

# REPORTER

## WORKERS' COMPENSATION REPORTER

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- *Creation of workplaces that are safe and secure from injury and disease*
- *Successful rehabilitation and return to work of injured workers*
- *Fair compensation for workers suffering injury or illness on the job*
- *Sound financial management to ensure a viable W.C.B. system*
- *Protection of the public interest*

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- Blue — Decisions of the Panel of Administrators
- Green — Appeal Division Decisions
- Pink — Miscellaneous
- Purple — Review Board Findings
- Orange — Court Decisions



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## Decision of the Appeal Division

**Number: 33**

**Date: June 29, 2001**

**Subject: Appeal Division Practice and Procedure Decision**

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### INTRODUCTION

As of September 1, 2001, the practices and procedures of the Appeal Division will be those set out in this Decision. The Decision consists of this document and all the attached appendices.

This Decision consolidates and supersedes all previous practice and procedure decisions, directives and information sheets issued by the Appeal Division since 1991. The version of Decision No. 33 published in the *Workers' Compensation Reporter* is authoritative and supercedes all others.

The practices and procedures in this Decision are based on the legal requirements set out in the *Workers Compensation Act*<sup>1</sup> (as amended) and on relevant policy of the former Board of Governors and current Panel of Administrators.<sup>2</sup> Additional matters have been determined by the chief appeal commissioner in accordance with section 85.1 of the Act which provides:

**85.1** Subject to any policies of the governors and any bylaws enacted or resolutions passed under section 82, the chief appeal commissioner may determine the practice and procedure for the conduct of appeals by the appeal division under this Act.

The Decision in its entirety is issued by the chief appeal commissioner pursuant to his authority under section 85.1 of the Act.

In this Decision, the procedures which are specific to each type of appeal are set out in a separate Appendix for that type of appeal. This was done so as procedures change over time, the relevant Appendix could be amended with relative ease.

The main text of this Decision sets out processes which are, in general, common to all of the appeals. The main text is to be read as being in addition to the specific procedures in each Appendix.

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<sup>1</sup> Unless otherwise stated, all references in this Decision to the Act or the *Workers Compensation Act* should be taken to be reference to the *Workers Compensation Act*, R.S.B.C. 1996, c. 492, as amended.

<sup>2</sup> Reference in this Decision to the governors should be taken to be reference, where appropriate, to the Panel of Administrators which, since 1995 and pursuant to section 83.1 of the Act, has discharged the powers, duties, and functions of the governors.

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## 1.0 COMPOSITION OF THE APPEAL DIVISION

The Appeal Division consists of:

- chief appeal commissioner
- deputy chief appeal commissioner
- assistant chief appeal commissioner
- appeal commissioners

### 1.1 Chief Appeal Commissioner

The chief appeal commissioner is appointed by the governors. As set out in section 85(7) of the *Workers Compensation Act*, the chief appeal commissioner is responsible to the governors for the general operation of the Appeal Division. Under this provision, the chief appeal commissioner must:

- (a) attend and participate as a non-voting member at meetings of the governors,
- (b) implement the policies of the governors with respect to the administration of the Appeal Division, and
- (c) preside at hearings or meetings of the Appeal Division.

Under section 85(8), the chief appeal commissioner may delegate in writing any of his or her powers and duties to an appeal commissioner subject to any terms and conditions set out in the delegation.

### 1.2 Deputy Chief Appeal Commissioner and Assistant Chief Appeal Commissioner

One non-representational appeal commissioner will be appointed by the chief appeal commissioner to serve as the deputy chief appeal commissioner, and another will be appointed assistant chief appeal commissioner.

These two appeal commissioners will from time to time have certain powers and duties of the chief appeal commissioner delegated to them under section 85(8).<sup>3</sup> Those duties may include:

- (a) the powers of the chief appeal commissioner under sections 85(7)(b), 85(7)(c), 85.2, 91(1), 91(3), 96(6), 96(6.1), and 96.1(3) of the *Workers Compensation Act* and sections 22(5) and 23(3) of the *Criminal Injury Compensation Act*;

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<sup>3</sup> In this Decision, any reference to a power of the chief appeal commissioner should be read as including reference to an appeal commissioner exercising that power under authority delegated from the chief appeal commissioner.

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- (b) chairing meetings of the Appeal Division, in the absence of the chief appeal commissioner; and
  - (c) acting in matters in which the chief appeal commissioner has declined to act due to a possible or actual conflict of interest or appearance of bias.

Notice of the appointment of and the general delegation of duties to the deputy and assistant chief appeal commissioner is published by the Appeal Division in the *Workers' Compensation Reporter*, and as **Appendix "O"** to this Decision.

### **1.3 Appeal Commissioners**

#### **(a) Types of Commissioners**

There are two types of appeal commissioners. Both types are neutral decision-makers who are appointed by the chief appeal commissioner in accordance with the policies established by the governors.

1. **Non-representational appeal commissioners** – These appeal commissioners have no particular perspective although they may have had either an employer or a worker perspective in their background. These appeal commissioners include the chief appeal commissioner, the deputy chief appeal commissioner and the assistant chief appeal commissioner. A non-representational appeal commissioner may sit as a panel of one person or on panels of three on appeals and may have certain powers and duties delegated to them by the chief appeal commissioner.
2. **Representational appeal commissioners** – These appeal commissioners are appointed to bring a worker interest perspective or an employer interest perspective to the Appeal Division. These representational appeal commissioners hear appeals as members of three-member panels. They do not have powers and duties delegated to them by the chief appeal commissioner.

#### **(b) Qualifications**

A list of qualifications that a candidate for the position of appeal commissioner might possess is contained in Decision of the Governors #2 (1991), 7 *Workers' Compensation Reporter* 13 [<http://www.worksafebc.com/policy/appeals/gov2.pdf>]. It is not expected that any one candidate would possess all of these qualifications.

#### **(c) When an Appointment Ceases**

Section 85(6) of the *Workers Compensation Act* states that where an appeal commissioner resigns or their appointment terminates, they may carry out and complete their duties and responsibilities and continue to exercise their powers as an appeal commissioner in relation to

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a proceeding in which they participated, until the proceeding is completed. The extent to which an appeal commissioner will remain so involved in a proceeding will be a matter for the discretion of the chief appeal commissioner.

Appeal commissioners who cease to hold office continue to be bound by the obligations of confidentiality in respect of any matter arising while they were an appeal commissioner.

Appeal commissioners are also prohibited from appearing or making written submissions in a proceeding or matter before the Appeal Division as counsel, advocate or representative on behalf of a party to the proceeding or matter until the later of six months after the appeal commissioner's appointment ends, or six months after the final written decision for which the appeal commissioner was a member of a panel is issued.

#### **1.4 Panels of the Appeal Division [section 85.2]**

The chief appeal commissioner may establish one or more panels of the Appeal Division. A panel has the power and authority of the Appeal Division. The chief appeal commissioner may refer a matter that is before the Appeal Division to a panel or a matter that is before a panel to another panel.

A panel of the Appeal Division will consist of:

- (a) a panel of one person (either the chief appeal commissioner or a non-representational appeal commissioner), or
- (b) a three-member panel (consisting of either the chief appeal commissioner or a non-representational appeal commissioner, together with one appeal commissioner chosen from the worker representatives and one appeal commissioner chosen from the employer representatives, or three non-representational appeal commissioners, which may include the chief appeal commissioner).

The assignment of one or more appeal commissioners to a panel in a particular case will be made by the chief appeal commissioner, deputy chief appeal commissioner or assistant chief appeal commissioner.

Two or more panels may proceed with separate matters at the same time. The chief appeal commissioner may terminate a designation to a panel and may fill any vacancy on a panel. A decision of the Appeal Division or of a panel is deemed to be a decision of the Board.

The appellant's preference for a one-member panel or a three-member panel will be a factor considered when the panel is assigned.

In matters where the chief appeal commissioner considers that the issues warrant it, the chief appeal commissioner has the authority to constitute a three-member panel of non-representational appeal commissioners.

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## 2.0 JURISDICTION OF THE APPEAL DIVISION

The Appeal Division has authority to determine the matters set out below. The statutory authority for the Appeal Division's jurisdiction in each matter is identified in italics.

This jurisdiction and the statutory source of the appealed decisions are summarized in chart form in **Appendix "A"** on Standing and Jurisdiction.

The types of appeals are referred to in this Decision by the term in bold.

- (1) **Claims Appeals** – A worker, the worker's dependants, the employer or a representative may appeal any finding by the Review Board (section 90) about the worker's compensation claim. *[section 91]*
- (2) **Referrals by the President** – The President may also refer a finding of the Review Board to the Appeal Division. *[section 96(4)]*
- (3) **Assessment Appeals** – An employer may appeal decisions made by the Assessment Department and by the Revenue Services Department, including those decisions made under sections 40 and 42 to the Appeal Division. *[section 96(6) & 96(6.1)]*
- (4) **Relief of Costs Appeals** – Under section 39(1)(e), an employer may seek relief from a claim cost due to a worker's pre-existing disease, disability or condition, and the Board's decision on this matter can be appealed to the Appeal Division. *[section 96(6)]*
- (5) **Other Employer Appeals**
  - **Section 73 Appeals** – An employer may appeal a levy imposed by the Board under section 73. *[section 96(6)(c)]*

In addition, the governors have designated certain matters, as being appealable to the Appeal Division under *section 96(6.1)*:

- **Allocation of Claim Costs Appeals** – Under section 10(8) of the Act, a Board officer can determine whether the costs of a claim should be attributed, in whole or in part, to another employer, and this decision can be appealed to the Appeal Division.
- **Charging of Claims Appeals** – Under section 47(2), the Board can impose a penalty on an employer for default in a payment, and this decision can be appealed to the Appeal Division.
- **Other Matters** – Any notice relating to an assessment, classification, monetary penalty or apportionment or shifting of costs between classes for which no appeal to the Appeal Division is specifically provided in section 96(6).

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- (6) **Prevention Appeals** [section 207] – Under Part 3, Division 14 of the *Workers Compensation Act*, the employer or a worker or union of the employer, or any other person aggrieved by a decision, can appeal decisions of the Prevention Division on the following matters:
- Appeals from reviewing officer decisions on discriminatory actions (sections 150 and 151) and unpaid wage claims (section 152). This includes orders, the refusal to make an order, or the cancellation of an order under section 153.
  - Appeals in relation to administrative penalties under section 196. This includes the imposition of a penalty order, the cancellation of an order and a decision not to impose an administrative penalty made after a penalty notice is issued under section 196(2).
  - Appeals in relation to an order under section 195 cancelling or suspending a certificate issued under Part 3, or placing a condition on the use of the certificate.
- (7) **Criminal Injury Compensation Act Reviews** [section 22, *Criminal Injury Compensation Act*] – Under section 22 of the *Criminal Injury Compensation Act*, the Workers’ Compensation Board and the Appeal Committee make decisions regarding compensation to victims of crime. The Appeal Division can grant leave to applicants for it to review decisions or findings made under section 22.
- (8) **Section 11 Certificates to Court** – The governors have also assigned to the Appeal Division the Board’s obligation to issue Certificates to the Court under section 11 of the Act.
- (9) **Reconsiderations** – The Appeal Division also has certain powers to reconsider Appeal Division decisions and decisions of former commissioners of the Board. The Appeal Division’s jurisdiction on reconsideration is set out in section 12.0 of this Decision.

## 3.0 INITIATING AN APPEAL

### 3.1 Time Limits

Section 91(1) of the Act deals with appeals from Review Board findings and requires that an appeal be initiated:

“ . . . not more than 30 days after the finding is sent out, or within a longer period the chief appeal commissioner may allow. . . ”

A similar time limit is established for appeals under sections 96(6) and 96(6.1) with the same power provided the chief appeal commissioner to grant an extension of time to appeal. Regarding extension of time applications for section 39 appeals, see **Appendix “F”** of this Decision.

The Act does not give the Appeal Division the authority to extend the 30-day time limit on prevention appeals.

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For the purpose of meeting these time limits, it is sufficient that the Appeal Division receives a notice of intent to appeal within 30 days after the impugned decision is deemed to have been received. For this purpose the Appeal Division allows for 10 days for the mailing of decisions, pursuant to section 101 of the Act, except for Prevention decisions. As set out in s. 221(2) of the Act, Prevention decisions are sent by registered mail, and are deemed to have been served after eight days.

### **3.2 Appeal Forms**

Most appeals involve use of special forms to file an appeal with the Appeal Division. These forms can be found on the Board's internet web site at the following address:

<http://www.worksafebc.com/pubs/forms/default.asp>

Appeal Officers in the Appeal Division can provide information about the appeal forms and the appeal process, including how to initiate an appeal where no form is specified. (Call 604 276-3067 or 1 800 661-2112 (local 3067).)

### **3.3 Notice of Intent to Appeal**

To initiate an appeal, an appellant must notify the Appeal Division of his/her intent to appeal a specific decision.

For the notification to be complete, the appellant is required to identify why he/she believes that the impugned decision was wrong and, in some types of appeals, the grounds on which the appeal is based, whether error or law, fact, or policy. Generally, the completion of a "Notice of Appeal" form, with reasons, will satisfy this requirement.

For some types of appeals, the appellant can notify the Appeal Division orally or in writing. In prevention appeals, notification can only be made in writing.

Where the appellant provides oral notification, the Appeal Division will acknowledge this notice in writing and ask the appellant to complete a "Notice of Appeal" form with reasons. If this information is not provided to the Appeal Division within 21 days following this request, the appellant shall be considered to have abandoned his/her notice of intent to appeal.

Written notification can be delivered:

- by mail or by hand at any office of the Board; or
- by fax [604 276-3349]

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Oral notification can be provided to intake officers of the Appeal Division at one of the following numbers:

- 604 276-3067
- 1 800 661-2112 (local 3067)

### **3.4 Extension of Time to Appeal**

The chief appeal commissioner will determine whether an extension of time to appeal should be granted. The following factors will be considered in determining whether to grant an extension:

- (a) substantial and material new evidence has arisen or has been discovered subsequent to the decision being appealed; or
- (b) 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 (a), or after the exceptional circumstances referred to in (b) 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 a Review Board finding was sent out and the appellant acted expeditiously in initiating an appeal when they received the finding.

The Appeal Division does not normally obtain comments from a respondent on the issue of whether an extension of time should be granted. If 60 days or less have elapsed between the date of the decision being appealed and the appeal being made to the Appeal Division, the Appeal Division will not normally invite comments from the respondent on the extension of time issue.

However, respondents are informed of the application and their comments are sought when more than 60 days have elapsed. This practice strikes a reasonable balance between administrative efficiency and recognizing the significance to the respondent of this preliminary decision.

## **4.0 THE INQUIRY MODEL**

The role of the Appeal Division is to inquire into the merits of matters properly before it. Governors' policy provides that the Appeal Division has the discretion to initiate and to conduct a full inquiry into all of the issues arising out of an appeal. This authority is not limited to appeals under section 91(1) (see Decision of the Governors #75 (1994), 10 *Workers' Compensation Reporter* 753).

Given this role, the Appeal Division will use the following procedures in the conduct of its inquiries.

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## 4.1 Issues on Appeal

In selecting the issues on which it will focus, the Appeal Division's ultimate concern must be a determination of the issues essential to findings consistent with the merits and justice of the case. In this regard, there must be proper regard to all competing interests.

As stated in Decision of the Governors #75 (1994), 10 *Workers' Compensation Reporter* 753, the Appeal Division will adopt a procedure that ensures the issues in an appeal are identified during the course of the appeal so that all parties may understand and have an opportunity to respond.

Normally the issues in an appeal will be those raised by the Notice of Appeal or other initiating document from the appellant. All parties will be provided with a copy of that Notice or document.

When an Appeal Division panel concludes its decision will turn upon a consequential question of which the parties have not expressly been made aware, the panel will consider whether that question raises an issue of a fundamentally different character than the issue(s) raised by the Notice of Appeal or other initiating document. If the question is of a fundamentally different character, then parties will be advised that the question is open for determination by the Appeal Division panel. (See Appeal Division Decision #97-0835/0841, 14 *Workers' Compensation Reporter* 83.) Additional submissions on the question will then be requested of the parties.

## 4.2 Scope of the Evidence

The Appeal Division has the discretion to determine what evidence it will accept in the course of conducting its proceedings. The Appeal Division may seek medical opinions independent of those offered by the parties, either from the Board's Medical Services Division or from practitioners outside the Board. The decision as to whether further evidence should be obtained, and as to the source of such evidence, rests with the panel hearing the matter.

Where the Appeal Division independently obtains information in connection with an appeal, copies will be provided to the parties who are participating and they will be given an opportunity to respond.

## 4.3 Powers of the Appeal Division

Section 87 of the *Workers Compensation Act* provides that the Appeal Division has the like powers as the Supreme Court to compel the attendance of witnesses and examine them under oath, and to compel the production and inspection of books, papers, documents and things. The Appeal Division may cause depositions of witnesses residing in or out of the Province to be taken before a person appointed by the Appeal Division in a similar manner to that prescribed by the Rules of the Supreme Court for the taking of like depositions in that Court before a Commissioner. A request that the Appeal Division exercise its powers under section 87 will be dealt with by the panel considering the appeal or other matter. The procedures set out in paragraph 5.5(e) of **Appendix "D"** will generally apply to all subpoena requests.

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## **4.4 Appeal Division Decisions**

A decision of the Appeal Division or of a panel is deemed to be a decision of the Board (see section 85.2(6) of the Act).

Subject to a reconsideration by the Appeal Division, or to a Medical Review Panel Certificate, a decision of the Appeal Division is final and conclusive (see section 96.1 of the Act and section 12.0 of this Decision).

## **5.0 STANDING**

For each type of appeal, the Act specifies the parties who have standing to initiate and participate in the appeal. These parties are identified in **Appendix "A"** on Standing and Jurisdiction.

Special issues of standing arise in the following situations.

### **5.1 Worker Is Deceased — Standing of an Estate to Appeal**

In Decision #95-0991, *Status of Deceased Worker's Estate* (1995), 11 *Workers' Compensation Reporter* 507, an Appeal Division panel concluded:

- The estate of a deceased worker has standing to continue an appeal initiated by the worker to the Review Board concerning a claim for arrears of compensation;
- The estate of a deceased worker has standing to initiate an appeal to the Appeal Division of Review Board findings concerning a claim for arrears of compensation.

### **5.2 Employer Is De-registered**

The Assessment Department's records identify when an employer's account with the Board is cancelled and the employer is de-registered.

When the appeal officer receives an appeal where the employer is de-registered, the Appeal Division will confirm with the Assessment Department if there is a successor employer under the Act. Where a successor employer can be identified, the Appeal Division will provide notice and the disclosure request form to the successor employer, and process the appeal with the successor employer as the "employer."

Where there is no successor employer, the Appeal Division will process the appeal in accordance with the provisions for de-registered employers in each type of appeal.

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### **5.3 Individuals With Personal Optional Protection Coverage**

Individuals who have Personal Optional Protection or “P.O.P.” but who do not employ workers are also not “employers” under the Act and therefore, do not have standing under the Act to initiate appeals under section 96.6 or 96(6.1). See Appeal Division 2000 Annual Report (pages 42 and 43) and Appeal Division Decisions #96-1875 and #97-0759.

## **6.0 REPRESENTATION ISSUES**

As the Appeal Division conducts its hearings on an inquiry basis, it may seek to obtain information from sources other than those offered by a party to the proceedings. Where the participation of other persons or groups will assist an inquiry into the merits of the issues, these persons or groups will be given notice and invited to participate in the matter.

### **6.1 Notice and Notice Inviting Participation**

The decision to give notice and to invite the participation of other persons or groups will generally be made:

- (a) by the deputy chief appeal commissioner prior to the matter being assigned to a panel; or
- (b) by the deputy chief appeal commissioner in response to a panel’s request for such notice and participation.

The decision to notify certain persons or groups, and/or to invite their participation is at the discretion of the Appeal Division and depends, to some extent, on the type of appeal involved, as set out in each appeal appendix. For example, the Appeal Division may exercise this discretion by providing notice:

- (a) in a claims appeal
  - (i) to an organized group of employers which participated in the Review Board appeal under section 90(2); or
  - (ii) where an employer is no longer registered with the Board, to the relevant industry association and/or the employers’ advisors; or
- (b) in an assessment appeal, and provide notice to other employers or to the workers or trade union representative of the workers employed by the employer, who may have an interest in the appeal.

(see Decision of the Governors #75 (1994), 10 *Workers’ Compensation Reporter* 753)

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In addition, certain cases may raise issues of major significance with an impact beyond the confines of the particular matter and/or of special interest to the broader workers' compensation community. In such cases, the Appeal Division may identify whether the participation of intervenors would be useful to the proceedings or otherwise beneficial. In such cases, the Appeal Division may exercise its discretion to invite certain workers or employers, or issue an open invitation to the workers' compensation community or a segment of that community, to participate in a particular appeal case. Examples of such past instances are:

- Decision #91-0850, *Retroactive Adjudication* (1991), 7 *Workers' Compensation Reporter* 173
- Decision #92-0743, *Government Employees Compensation Act* (1992), 8 *Workers' Compensation Reporter* 165
- Decision #92-1210, *Transfer of Experience Rated Assessment* (1992), 8 *Workers' Compensation Reporter* 319
- Decision #96-0333, *Restructuring Subclass 0621* (1996), 12 *Workers' Compensation Reporter* 29

In all cases, the criterion for the Appeal Division's exercise of its discretion in inviting the participation of persons or groups other than the parties to the appeal shall be whether their participation will assist the inquiry into the merits of the issues under appeal.

## **6.2 Authorizations**

A representative is not a worker or an employer and therefore cannot speak for a worker or an employer except with a valid authorization.

While the authorization of representatives is not often an issue, it can arise where a party authorizes more than one representative, or where authorizations are worded so generally as to make the scope of the authorization unclear.

The Appeal Division's practices to ensure clear and valid authorizations are set out in **Appendix "J"** of this Decision.

## **7.0 WRITTEN SUBMISSIONS OR ORAL HEARING**

Appeals often proceed by written submissions but may involve an oral hearing. A party has the right to request an oral hearing, but an oral hearing is not required in every case: *Prevost v. WCB* (B.C.) (1988), 29 B.C.L.R. (2d) 131, (B.C.S.C.) aff'd (1989), 37 B.C.L.R. (2d) 27 (B.C.C.A.); *Van Unen v. Workers' Compensation Board*, 2001 BCCA 0262, [2001] B.C.J. No. 672 (Q.L.) (B.C.C.A.).

A request for an oral hearing must include reasons why an oral hearing should take place. The request should be made in the Notice of Appeal or Notice of Participation.

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## **7.1 Written Submissions**

The process for making written submissions is set out in detail for claims appeals (section 3.1 of **Appendix "C"**), among others. For those types of appeals where the process for written submissions is not specified, the process will be similar to the one set out for claims appeals.

## **7.2 Request for an Oral Hearing**

A request for an oral hearing will be considered as a preliminary matter. A preliminary decision in respect of an oral hearing will normally be made by the chief appeal commissioner or deputy chief appeal commissioner, prior to the commencement of the appeal by the Appeal Division.

The Appeal Division has the discretion to decide whether an oral hearing will be granted in any case. The Appeal Division will give liberal consideration to the following factors in deciding whether to grant a request for an oral hearing:

- (a) there is significant new evidence to be presented which requires an oral hearing;
- (b) the appeal raises a significant policy issue;
- (c) there appears to be an error or confusion in the finding or decision under appeal;
- (d) there is evidence to suggest there is an error of fact in the finding or decision under appeal;
- (e) there is a significant issue of credibility involved.

Some of the factors which would weigh against the granting of an oral hearing are that:

- (a) there are no reasons given as to how the finding or decision under appeal is in error;
- (b) there are no reasons given for the request for an oral hearing;
- (c) there was no request for an oral hearing before the Review Board;
- (d) the issue is purely medical and the appeal can be determined on the basis of written expert medical opinions alone.

This list is not exhaustive and other factors may be taken into account. None will be considered determinative. If there are grounds that warrant holding an oral hearing, for example, it may be granted notwithstanding the fact that no oral hearing was requested at the Review Board. On the other hand, if an oral hearing was held by the Review Board, this may weigh against granting an oral hearing at the Appeal Division.

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The Appeal Division does not normally provide reasons for denying an oral hearing. The Appeal Division has finite resources which are better devoted to the consideration of the actual merits of appeals rather than providing detailed letters of explanation as to why an oral hearing request was denied.

If an oral hearing is not granted on the basis of the preliminary review, the parties will then be given an opportunity to provide written submissions. Once submissions are completed, the matter will be assigned to a panel. The panel will have the discretion to consider the oral hearing request afresh at the time of assignment, and hold an oral hearing if it concludes, after considering the written submissions, that an oral hearing is necessary.

### **7.3 If an Oral Hearing is Granted**

If an oral hearing is granted, it will be scheduled according to the procedures set out in **Appendix "B."**

The chief appeal commissioner will determine the extent to which oral hearings are conducted throughout the province based on the objective that as far as is practicable and reasonable all parties should have access to appear before the Appeal Division where a request for an oral hearing has been granted.

If an oral hearing is to be held outside the area in which a party resides, the Appeal Division may on request make provision for travel costs in advance of the oral hearing. This would include transportation and accommodation in the Board's Richmond Residence for the appellant and respondent, and would be provided without regard to the outcome of the appeal. Other costs in connection with attending the hearing will be determined in the normal fashion at the discretion of the panel (see #100.00 of the *Rehabilitation Services and Claims Manual*).

A qualified translator will be provided if required for an oral hearing. A request from a party for a translator must be made sufficiently in advance of an oral hearing, normally in the Notice of Appeal or Notice of Participation at the outset of the matter. Normally a family member or friend of the party will not be permitted to provide any necessary translation.

The Appeal Division does not tape record oral hearings and does not allow parties or witnesses to use tape recording devices at its oral hearings.

Members of the public, including members of the media, will be permitted to attend oral hearings of the Appeal Division if all participating parties consent. This type of condition on public access to hearings is necessary in light of section 95 of the *Workers Compensation Act* and the privacy provisions of the *Freedom of Information and Protection of Privacy Act*.

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## **8.0 EXPERT EVIDENCE**

### **8.1 Introduction to the Rules**

The rules for admitting expert evidence in court proceedings, quasi-judicial or administrative hearings do not apply where the tribunal makes its own rules. While section 10 and 11 of the *Evidence Act*, R.S.B.C. 1996, c. 124, set out the court rules, section 10(2) states:

This section and section 11 do not apply where a tribunal, commission, board or other similar body enacts or makes its own rules for the introduction of expert evidence and the testimony of experts, and where there is a conflict between any such rules and this section or section 11, those rules apply.

Pursuant to this provision, the Appeal Division has made its own rules for the introduction of expert evidence and the testimony of experts.

These rules are intended to ensure that no party is taken by surprise by expert evidence submitted at a hearing. They are also intended to ensure that the procedures followed by the Appeal Division are informal in nature to facilitate workers and employers acting on their own behalf.

### **8.2 Who Is an Expert?**

These rules concern the provision of opinion evidence by any person whom the panel finds to be an expert. For example, this could include a physician, rehabilitation consultant, occupational therapist, engineer, accountant, physiotherapist, or occupational hygienist.

These rules do not apply to the provision of evidence by witnesses, who simply report what they saw or heard without giving an “expert” opinion.

### **8.3 Oral Hearings and Written Submissions**

These rules set out below govern the provision of expert evidence where an oral hearing will be held by the Appeal Division.

The principles upon which these rules are based are also generally applicable to the provision of expert opinion evidence where no oral hearing is being held. In particular, Rules 1 to 4 are applicable to a matter being considered on the basis of written evidence and submissions. In such cases, however, the existing procedures of the Appeal Division which govern the time frames for the provision of written evidence and submissions, and for notice to other parties, continue to apply.

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## **8.4 Costs Related to Expert Witnesses**

Regarding reimbursement for the costs of medical expert reports, item #100.50 of the Board's *Rehabilitation Services and Claims Manual* indicates that:

The cost of medical reports obtained by a claimant or employer will also be paid by the Board where, following the inquiry or appeal, it appears reasonable for them or their representative to have assumed, prior to the inquiry or appeal, that the provision of the report was necessary. These costs may be paid even if, after the matter is concluded, it is determined that they had not specifically served to assist in the enquiry.

Item #100.60 of the *Claims Manual* indicates the Appeal Division has the authority to consider requests for such reimbursement for matters before the Appeal Division. Any such requests should be made in the party's submissions to the Appeal Division on the appeal.

## **8.5 Rules for Expert Evidence**

1. Opinion evidence will generally only be accepted from a person the panel recognizes as being qualified by education, training or experience as an expert.
2. Objections to a person's qualifications as an expert will not generally cause a panel to exclude evidence. Such argument will be considered by the panel relative to the weight to be given to the evidence received.
3. The evidence of an expert is admissible in the form of a written report by the expert, without the necessity of the expert attending an oral hearing before the Appeal Division. The correspondence requesting the written report of the expert should also be submitted. An expert's oral evidence will be admissible in a hearing, however, even if a written report has not been provided by them. It is expected that advance notice will be given to the Appeal Division of any expert who will be attending the oral hearing.
4. The qualifications of the expert should be stated in or with their report. The assertion of qualifications in that manner will generally be considered as sufficient evidence of such qualifications. A job title will generally be accepted as evidence of the person's qualifications to hold the position.
5. Where an oral hearing is granted, it is expected that written reports will be provided to the Appeal Division as soon as practicable after receipt by the party obtaining them. This is for the purpose of the panel disclosing same to any other parties who have given notice of their intention to participate in the appeal process. The object is to provide notice to other parties in sufficient time for any response to be presented at the hearing.

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6. Evidence tendered at an oral hearing will not be excluded from consideration due to lack of notice. Where the panel considers that a party would otherwise be prejudiced as not having had sufficient opportunity to respond to significant new expert evidence, the panel may:
    - (a) allow an extension of time after the oral hearing for submission of a response;
    - (b) postpone the oral hearing; or
    - (c) provide such other relief as the panel considers appropriate.
  7. The Appeal Division will not require an expert to attend an oral hearing unless, in the panel's assessment, the attendance is necessary to a fair hearing of the issues or a failure to do so would prejudice a party to the proceeding.
  8. The application of these rules may in any case be varied at the discretion of the Appeal Division and will generally be considered by the panel hearing the matter.

## **9.0 CONTACT WITH APPEAL COMMISSIONERS BY PARTIES**

The Appeal Division is a quasi-judicial tribunal serving as the last level of appeal on non-medical issues in the workers' compensation system in British Columbia. The Appeal Division has a responsibility to ensure compliance with the requirements of natural justice and procedural fairness, and to maintain the integrity of the decision-making process.

Attached as **Appendix "K"** to this Decision are guidelines for the workers' compensation community concerning the Appeal Division's practices and procedures regarding contact between appeal commissioners and parties to Appeal Division proceedings. The guidelines provided concerning the conduct of parties also apply to their representatives, witnesses and Board officers.

## **10.0 BOARD POLICY**

Section 99 of the Act provides that the Appeal Division is not bound to follow legal precedent and will make its decisions according to the merits and justice of each case. In claims matters, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue will be resolved in accordance with that possibility which is favourable to the worker as directed in section 99.

The Appeal Division also applies and interprets the Act, Regulations and existing Board policy. The Appeal Division does not have the authority to create new policy (see Decision of the Governors #75 (1994), 10 *Workers' Compensation Reporter* 753).

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In certain cases, there are issues as to whether there are conflicts between the Act, Regulations and existing Board policy. In the event of a conflict between the Act or Regulations and the published policy of the governors, the Act and Regulations are paramount. In the event of a conflict between published policy in a Manual identified in paragraph 1.1 of Decision of the Governors #86 (1994), 10 *Workers' Compensation Reporter* 781 [<http://www.worksafebc.com/policy/appeals/gov86.pdf>] and published policy in *Workers' Compensation Reporter* Decisions Nos. 1-423, published policy in a Manual is paramount.

In the event of any other conflict between published policies of the governors, if the policies were approved by the governors on the same date, the policy most consistent with the Act or Regulations is paramount. If the policies were approved by the governors on different dates, the most recently approved policy is paramount.

In most cases where conflict is alleged to exist between the Act and policy, or where policy gaps or ambiguity is alleged, Appeal Division panels will proceed to make decisions on these issues in individual cases, filling the gaps by interpretation of the statute, or choosing the interpretation of ambiguous policy most consistent with the Act and other policy. The chief appeal commissioner will determine whether a policy issue should be referred to the Panel of Administrators before the Appeal Division decision is made, pursuant to Item 5.0 of Decision of the Governors #75 (1994), 10 *Workers' Compensation Reporter* 753.

The chief appeal commissioner will forward copies of significant decisions of the Appeal Division to the chair of the Panel of Administrators and the president and will report on significant decisions to the Panel of Administrators.

## **11.0 PUBLICATION OF APPEAL DIVISION DECISIONS**

A decision of the Appeal Division concerning an appeal will be provided in writing, explaining the conclusion reached and providing reasons for that conclusion and for any dissent. The decision will be signed by all members of the panel that made the decision. A dissent will also be signed.

Appeal Division decisions from January 1, 2000 are posted on the Board's internet web site [[www.worksafebc.com](http://www.worksafebc.com)]. All published decisions, except section 11 decisions, have been written without reference to identifiers so as to respect privacy rights. See **Appendix "M"** of this Decision entitled *Public Access to Appeal Division Decisions – Writing Decisions Without Reference to Identifiers* which sets out the guidelines used by appeal commissioners in writing decisions without identifiers.

In addition, selected decisions of the Appeal Division are published under the direction of the chief appeal commissioner in the *Workers' Compensation Reporter* series.

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## **12.0 RECONSIDERATION OF APPEAL DIVISION DECISIONS**

The chief appeal commissioner has the jurisdiction to reconsider a decision of the Appeal Division on two grounds:

1. statutory ground of new evidence (as set out in section 96.1 of the Act); and
2. common law grounds such as a breach of natural justice.

Unless the requirements of these reconsideration grounds are met, the chief appeal commissioner has no jurisdiction to reconsider the Appeal Division decision. This is a very limited authority and should not be considered or treated as a further avenue of appeal.

### **12.1 Reconsideration on the Statutory Ground of New Evidence**

Section 96.1 of the Act sets out the jurisdiction of the chief appeal commissioner to reconsider Appeal Division decisions on the basis of “new evidence.”

- 96.1** (1) Subject to this section and sections 58 to 66, a decision of the appeal division is final and conclusive.
- (2) A worker, the worker’s dependants, the worker’s employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the appeal division on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the matter decided by the appeal division.
  - (3) Where the chief appeal commissioner considers that the evidence referred to in subsection (2)
    - (a) is substantial and material to the decision, and
    - (b) did not exist at the time of the hearing or did exist at that time but was not discovered and could not through the exercise of due diligence have been discovered,he or she may direct that
    - (c) the appeal division reconsider the matter, or
    - (d) the applicant may make a new claim to the board with respect to the matter.

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### **(a) Who May Apply?**

As set out section 96.1, a worker, the worker's dependants, the worker's employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision of the Appeal Division on the grounds of new evidence.

### **(b) Scope of Section 96.1 Reconsiderations**

In Appeal Division Decision #93-0166/0182, *Section 96.1 (1993)*, 9 *Workers' Compensation Reporter* 351, the chief appeal commissioner found that section 96.1 and the ground of "new evidence" would apply as long as the decision to be reconsidered involved a claim (directly or indirectly). It would also apply to applications by employers so long as the employer requesting a reconsideration could be characterized as a "worker's employer."

Following this interpretation, the following matters fall within the scope of section 96.1(2) and may be reconsidered on the basis of new evidence:

- all claims appeals
- relief of costs appeals involving section 39(1)(d) and (e)
- transfer of costs appeals re: section 10(8)

Under section 211(4) of the Act, the reconsideration provisions of section 96.1 do not apply to Appeal Division decisions in prevention appeals. The effect of this provision, together with the chief appeal commissioner's decision cited above, is that reconsideration on the ground of new evidence is not available for assessment appeals or prevention appeals.

Decisions by the Appeal Division under s. 22 of the *Criminal Injury Compensation Act* may be reconsidered by the Appeal Division on the grounds of new evidence, as set out in section 23 of the *Criminal Injury Compensation Act*.

### **(c) Reconsideration of Section 11 Determinations**

In their assignment of section 11 determinations to the Appeal Division, the Board of Governors were silent on whether these determinations can be reconsidered by the chief appeal commissioner on the basis of new evidence under section 96.1(2). This matter was considered in several Appeal Division decisions (see Decision #93-0781, *Section 11 Reconsideration*, 11 *Workers' Compensation Reporter* 269, and Decision #00-0412 (24 March 2000)). In summary, these decisions assume that, until there is further clarification from the Panel of Administrators, there is some limited reconsideration power under section 96.1 in relation to section 11 determinations.

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#### **(d) “Substantial and Material” Test for New Evidence**

Section 96.1(3) sets out the requirements that the new evidence must be “substantial and material” to the decision.

In reconsideration Decision #00-0796, the chief appeal commissioner set out some tests for the type of new evidence which is required to give the Appeal Division the authority to reconsider its decisions. The new evidence must be “material” and “substantial” which means:

- (i) it is not sufficient that the evidence is merely new and/or relevant;
- (ii) the new evidence must be important, pertain to the substance of the matter and have sufficient substance or weight to support a particular conclusion; however
- (iii) the new evidence need not provide proof on a balance of probabilities or be of such weight as to decide an issue one way or the other on its own.

It is not desirable or possible to be more specific as the circumstances of each application for reconsideration have to be considered in light of section 96.1 of the Act.

#### **(e) The “Due Diligence” Test**

If the new evidence existed prior to the Appeal Division decision, the applicant must explain how the exercise of “due diligence” by the applicant could not have discovered the evidence earlier.

In reconsideration Decision #91-0724, 7 *Workers’ Compensation Reporter* 145, the chief appeal commissioner stated that the most reasonable interpretation of section 96.1 is that it constitutes a bar to reconsideration to an applicant where the basis for their request is that the Appeal Division did not consider evidence which the applicant could, through the exercise of due diligence, have obtained and submitted prior to the making of the impugned decision. Also:

- (i) the “due diligence” test applies to the person requesting the reconsideration rather than to the decision-maker;
- (ii) there is some onus on an appellant for ensuring that the Appeal Division is in possession of the information necessary to the proper consideration of their appeal in the first instance. The appellant should be aware of this provision and take reasonable steps to ensure that the evidence on their appeal file is complete; and
- (iii) the requirement of “due diligence” is the degree of care which a prudent and reasonable appellant would have exercised in ensuring that the Appeal Division had all relevant information necessary to the proper consideration of their appeal.

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Regarding the “new evidence” ground for reconsideration under section 96.1 of the Act, reference may be made to the *Index of Appeal Division Decisions Published in the Workers’ Compensation Reporter*, which was published as part of the *Workers’ Compensation Reporter* series. Under the heading “Reconsideration, Appeal Division (New Evidence),” reference is made to the following published decisions of the Appeal Division that may assist in addressing the requirements of section 96.1 in relation to “new evidence”:

- Decision #91-0272, 7 *Workers’ Compensation Reporter* 103
- Decision #91-0724, 7 *Workers’ Compensation Reporter* 145
- Decision #92-0930, 8 *Workers’ Compensation Reporter* 251
- Decision #92-1017/1018, 8 *Workers’ Compensation Reporter* 355
- Decision #92-0924, 8 *Workers’ Compensation Reporter* 371
- Decision #92-1423, 8 *Workers’ Compensation Reporter* 499
- Decision #92-1376, 8 *Workers’ Compensation Reporter* 589
- Decision #93-0030/0031, 9 *Workers’ Compensation Reporter* 107
- Decision #92-1462, 9 *Workers’ Compensation Reporter* 231

Another research source is Appeal Division decisions on the internet. All decisions of the Appeal Division since January 1, 2000 are available on the internet at: <http://www.worksafebc.com>. The Appeal Division decisions can be searched using a text-based search on the search engine available at the Appeal Division Decisions site.

## **12.2 Reconsideration on Common Law Grounds**

### **(a) Scope of Reconsideration on Common Law Grounds**

The chief appeal commissioner has 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. This authority is based upon general common law principles (please see Decision #93-0740, *Right to Reconsider Appeal Division Decisions*, 10 *Workers’ Compensation Reporter* 127).

Several published Appeal Division decisions consider how this ground is applicable to the reconsideration of Appeal Division decisions. Comments include:

- the weighing of evidence is generally not a reviewable matter in the reconsideration process. (Decision #96-1627, 14 *Workers’ Compensation Reporter* 5 at p. 7)

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- a patently unreasonable finding of fact can amount to an error of law going to jurisdiction, and that patently unreasonable finding of fact includes a finding of fact that is not supported by *any* evidence. (Decision #96-1627, 14 *Workers' Compensation Reporter* 5 at p. 6)
  - the grounds for reconsideration are strict and the reconsideration process cannot be used simply to continue arguments or strengthen an unsuccessful case. (Decision #96-1628, 14 *Workers' Compensation Reporter* 9 at p. 9)

All Appeal Division decisions may be reconsidered on the common law grounds of mistake, fraud or error of law “going to jurisdiction,” including a breach of natural justice.

### **(b) Who May Apply?**

A party, or a representative on the party’s behalf, who had standing in the original decision may apply for reconsideration on common law grounds. In addition, any person or group who would have standing on a judicial review petition before the court may also have standing to bring a reconsideration application to the chief appeal commissioner.

## **12.3 Procedures for Reconsiderations**

### **(a) How to Apply for Reconsideration**

The party, a representative on the party’s behalf, or an individual or group who may have standing may make an application in writing to the chief appeal commissioner requesting reconsideration. The request should address the limited grounds for reconsideration of an Appeal Division decision.

### **(b) Notice to Respondents**

Parties in the original decision, besides the applicant, are respondents for reconsiderations. A respondent will be given the opportunity to provide submissions prior to the chief appeal commissioner’s consideration as to whether the applicant’s request meets the reconsideration grounds.

In cases where the employer is de-registered, and the Employers’ Advisors and/or an Industry Association have been invited to participate and have participated in the impugned appeal decision, these participants shall also be given notice of the reconsideration application, and an opportunity to respond.

## **12.4 Reconsideration of Decisions of the Former Commissioners**

Regarding requests for reconsideration of decisions of the former commissioners, the following information may be helpful.

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The *Workers Compensation Act* was amended on June 3, 1991 when Bill 27 (the *Workers Compensation Amendment Act, 1989*) came into force. Under the former legislation, the commissioners were the “board,” and had responsibility for the administration of the Board, policy-making, and appellate decision-making on claims. Under the amendments contained in Bill 27, these functions were divided among the administration, the governors, and the Appeal Division, respectively. Section 17(5) of Bill 27 granted to the Appeal Division the authority to reconsider decisions of the former commissioners made under section 91 or section 96 of the former Act, on the following basis:

A worker, the worker’s dependants, the worker’s employer or the representative of any of them may apply to the chief appeal commissioner for reconsideration of a decision made under section 91 or 96 of the former *Workers Compensation Act* on the same grounds and in the same manner as that set out in section 96.1 of the new *Workers Compensation Act*.

In addition to section 96.1, section 96(2) of the *Workers Compensation Act* provides:

... 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.

On January 6, 1992, the Board of Governors approved the following (Decision of the Governors #8, *Reopening and Reconsideration of Past Commissioners’ Decisions (An Amendment to Decision of the Governors No. 1)*, 7 *Workers’ Compensation Reporter* 171 [Replaced but continued in the same terms by Decision of the Governors #75 (1994), 10 *Workers’ Compensation Reporter* 753]):

RESOLVED THAT the Appeal Division of the Workers’ Compensation Board of British Columbia shall exercise the authority of the Workers’ Compensation Board of British Columbia under Section 96(2) of the *Workers Compensation Act* to reopen, rehear and redetermine any decision made by the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds that the decision was based upon an error of law or involved or involves an issue under the *Canadian Charter of Rights and Freedoms*; . . .

In Appeal Division Decision #92-0818, 8 *Workers’ Compensation Reporter* 211, the former chief appeal commissioner articulated a standard for review of decisions of the former commissioners when an error of law has been alleged:

In light of the fact that the former commissioners’ decisions were protected by a privative clause, I find that, in general, the test must be whether their decision was so patently unreasonable that it cannot be rationally supported by the relevant legislation. However, in the case of decisions pertaining to natural justice issues, it is my view that the Appeal Division’s scope of review is broader. In such cases, the Appeal Division must have the power to redetermine decisions of the former commissioners on the grounds that they

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misinterpreted the law, irrespective of whether the misinterpretation can be characterized as “patently unreasonable.” This is consistent with various judicial pronouncements on the standard of review applicable to decisions involving natural justice issues.

Regarding requests for reconsideration on the basis of new evidence, section 96.1(3) sets out requirements which must be addressed in any application based on section 96.1. See comments earlier in this Decision at section 12.1 regarding how these requirements have been applied in past reconsideration decisions.

### **13.0 IMPLEMENTATION OF APPEAL DIVISION DECISIONS**

Section 96.1(1) of the *Workers Compensation Act* states, in part, that Appeal Division decisions are “final and conclusive.” The Board carries responsibility for implementation of Appeal Division decisions.

In the absence of a properly established reconsideration request, it is not generally open to the Appeal Division to revisit its decision.

It is also not open to the Appeal Division to consider, at first instance, objections to decisions by Board officers in implementing a decision of the Appeal Division. Such decisions by Board officers are appealable to the Review Board, and Review Board findings may be appealed to the Appeal Division. It would, therefore, not be appropriate for the Appeal Division to comment on the manner in which a decision of the Appeal Division has been interpreted or implemented by a Board officer except in the context of an appeal from a Review Board finding.

There is, however, judicial authority for a panel to further consider the matter if its decision may be seen as incomplete. See *Chandler v. Alberta Assoc. of Architects*, [1989] 2 S.C.R. 848. In such limited circumstances it may be appropriate to refer a matter back to an Appeal Division panel to complete a decision. In addition, tribunals have the authority to correct inadvertent slips, such as typographical or clerical errors. In the event a request for reimbursement for a medical report or such matter has not been dealt with by the Appeal Division decision, that discrete matter may be referred back to the panel to issue a supplementary decision.

### **14.0 COMMISSIONERS' CODE OF CONDUCT**

The Appeal Division has adopted a Code of Conduct for appeal commissioners which sets out the principles which guide the Appeal Division as an internal but independent quasi-judicial appeal tribunal within the workers' compensation system.

The Code establishes reasonable, standard expectations governing the conduct of all appeal commissioners in the course of their duties as appeal commissioners, including the chief appeal commissioner and the deputy chief appeal commissioner. The Code can be found as **Appendix “L”** to this Decision.

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## **15.0 HALLMARKS OF QUALITY APPEAL DIVISION DECISIONS**

The Appeal Division's 1997 Annual Report reported on the Division's strategic planning initiatives. Among the initiatives was development of Hallmarks of Quality Decisions for the Appeal Division. The Appeal Division developed and adopted the following Hallmarks which are intended to guide appeal commissioners as they seek to maintain the highest quality of decisions.

The Hallmarks state as follows:

A good decision:

- clearly identifies the issues at the outset;
- identifies a clear set of relevant findings of fact fairly drawn from the evidence;
- where there is conflicting relevant evidence, explicitly identifies the findings of fact on which the conclusion is based and the reasons for the findings of fact;
- responds to the relevant submissions and arguments;
- identifies and applies appropriate law and policy;
- uses plain language where possible and uses technical and legal terminology in a manner consistent with other decisions;
- makes the panel's reasoning clear and understandable and leads to a logical conclusion that resolves the issues.

Though conflicts may occur during periods of development, over the long term a good decision supports established positions on law, medicine, science, and the interpretation of legislation, regulations, and policy.

A good decision is consistent with previous published Appeal Division decisions unless the conflict is identified and the reasons for the departure are articulated in a coherent manner.

The Hallmarks were established before the publication of all Appeal Division decisions since January 1, 2000 on the Board's internet web site. The reference to "previous published Appeal Division decisions" was intended to mean, and continues to mean, Appeal Division decisions published in the *Workers' Compensation Reporter* series.

## **16.0 DELEGATIONS BY THE CHIEF APPEAL COMMISSIONER**

Section 85(8) of the *Workers Compensation Act* provides:

The chief appeal commissioner may delegate in writing any of the chief appeal commissioner's powers and duties to an appeal commissioner subject to any terms and conditions set out in the delegation.

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Pursuant to this authority, the chief appeal commissioner, from time to time, issues general delegation decisions, providing ongoing authority to the deputy chief appeal commissioner, the assistant chief appeal commissioner and appeal commissioners generally. The current general delegation can be found as **Appendix "O"** to this Decision.

In addition, from time to time the chief appeal commissioner may also issue specific delegations to specific appeal commissioners in relation to a particular matter before the Appeal Division. Copies of such written delegations are placed on the relevant claim file, firm file, etc.

## **17.0 ANNUAL REPORTS OF THE APPEAL DIVISION**

Since the inception of the Appeal Division in 1991, the Division has published in the *Workers' Compensation Reporter* a comprehensive annual report of its activities. These reports will continue to be so published, as well as placed on the Board's internet web site. The past annual reports of the Appeal Division (to 1998) can be found in the following volumes of the *Workers' Compensation Reporter* series:

- 1991–92 – 8 *Workers' Compensation Reporter* 637
- 1992 – 11 *Workers' Compensation Reporter* 117
- 1993 – 11 *Workers' Compensation Reporter* 165
- 1994 – 11 *Workers' Compensation Reporter* 393
- 1995 – 12 *Workers' Compensation Reporter* 143
- 1996 – 13 *Workers' Compensation Reporter* 251
- 1997 – 14 *Workers' Compensation Reporter* 285
- 1998 – 15 *Workers' Compensation Reporter* 415

The 1999 and 2000 annual reports of the Appeal Division will also be published in the *Workers' Compensation Reporter* and are also available on the Board's internet web site at the following addresses:

2000 – <http://www.worksafefbc.com/appeal/appealdiv/appealar2000.pdf>

1999 – <http://www.worksafefbc.com/appeal/appealdiv/appealar99.pdf>

The 1998 and 1997 annual reports are also available on the internet at the following addresses:

1998 – <http://www.worksafefbc.com/appeal/appealdiv/appealar98.pdf>

1997 – <http://www.worksafefbc.com/appeal/appealdiv/appealar97.pdf>

John J. Steeves  
Chief Appeal Commissioner  
June 29, 2001



# REPORTER

## Appendix "A"

### Subject: Standing and Jurisdiction

Type of Appeal	Authority for Appeal	Authority for Standing
<p><b>Review Board Findings</b> (s.90)</p>	<p><b>91 (1)</b> Where the review board makes a finding under section 90, the worker, the worker's dependants, the worker's employer or the representative of any of them may, not more than 30 days after the finding is sent out, or within a longer period the chief appeal commissioner may allow, appeal the finding to the Appeal Division.</p>	<p><b>91 (1)</b> . . . the worker, the worker's dependants, the worker's employer or the representative of any of them . . .</p>
<p><b>Assessments and Other Employer Appeals</b> (a) general (ss.36-52) (b) relief of costs (s.39(1)(e)) (c) allocation of claim costs (s. 10(8)) (d) penalty for default in payment or return (s.47(2)) (e) levies under s. 73</p>	<p><b>96 (6)</b> An employer who has received notice of (a) an assessment under section 39 or 40, (b) a classification, special rate, differential or assessment under section 42, or (c) an additional assessment, levy or contribution under section 73 may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the Appeal Division on the grounds of error of law or fact or contravention of a published policy of the governors.</p>	<p><b>96 (6)</b> . . . an employer . . . <b>96 (6.1)</b> . . . an employer . . .</p>

Type of Appeal	Authority for Appeal	Authority for Standing
<p><b>Assessments (continued)</b></p>	<p><b>96 (6.1)</b> An employer who has received a notice relating to            (a) an assessment,            (b) a classification,            (c) a monetary penalty, or            (d) an apportionment or shifting of cost between classes under this Act not referred to in subsection (6) but designated in the policies of the governors, may, not more than 30 days after receiving the notice or within a longer period the chief appeal commissioner may allow, appeal the assessment, classification, monetary penalty or apportionment or shifting of cost between classes to the Appeal Division on the grounds of error of law or fact or contravention of a published policy of the governors.</p>	

Type of Appeal	Authority for Appeal	Authority for Standing
<p><b>Prevention (Part 3)</b>            (a) administrative penalties (s.196)            (b) other matters</p>	<p><b>207</b> The following are decisions that may be appealed to the appeal tribunal in accordance with this Division:</p> <p>(a) in relation to administrative penalties under section 196,            (i) an order imposing an administrative penalty,            (ii) the cancellation of an order imposing an administrative penalty, or            (iii) a decision not to impose an administrative penalty made after issuing a penalty notice under section 196(2);</p> <p>(b) a decision on a review under division 13 of this Part in relation to a determination or order under section 153, including a decision respecting the refusal to make or the cancellation of an order under that section;</p> <p>(c) a decision on a review under Division 13 of this Part in relation to an order under section 195;</p> <p>(d) any other decision under this Part or the regulations that is prescribed by regulation to be an appealable decision.</p>	<p><b>208</b> The following may bring an appeal of an appealable decision:</p> <p>(a) for an appeal in relation to an administrative penalty,            (i) the employer subject to the penalty, unless the employer accepted the penalty under section 196(4)(a)            (ii) a worker of the employer or a union representing workers of the employer, or            (iii) any other person aggrieved by the decision;</p> <p>(b) for an appeal in relation to a decision under section 153, the worker, employer or union affected by the decision;</p> <p>(c) for an appeal in relation to an order under s.195, the person subject to the order;</p> <p>(d) for an appeal in relation to a decision prescribed to be appealable, the persons permitted by regulation to appeal.</p>



# REPORTER

## Appendix "B"

**Subject: Oral Hearings Before the Appeal Division**

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The following procedures apply regarding scheduling of oral hearings:

## **1.0 REQUESTING AN ORAL HEARING**

- 1.1 An appellant can request an oral hearing when completing the Notice of Appeal form. The Notice states that if the request for an oral hearing is granted, the appellant should be prepared to attend a hearing within 30–60 days. The Notice further states that if a party intends to obtain additional evidence or seek assistance from a representative, they should do this immediately to avoid delay. The respondent may also request an oral hearing in writing.
- 1.2 Upon receiving a request for an oral hearing, the appeal officer will refer the file to the deputy chief appeal commissioner. The deputy chief appeal commissioner will determine whether or not a request for an oral hearing will be allowed, based on the factors set out in section 7.2 of this Decision.
- 1.3 If the request for an oral hearing is not granted by the deputy chief appeal commissioner on the basis of the preliminary review:
  - (a) the party who made the request will be advised in writing of this decision; and
  - (b) the file will be returned to an appeal officer for written submissions. A party can expand on the initial request for a hearing as part of their written submission.

Whether requested to or not, it is always open to the panel deciding the appeal to decide an oral hearing is necessary after reviewing the file and submissions. (See section 7.2 of this Decision.)

## **2.0 SCHEDULING AN ORAL HEARING**

- 2.1 If a request for an oral hearing is granted by the deputy chief appeal commissioner the file will be returned to the appeal officer who will send a letter to the parties that communicates the following:
  - the appeal has been commenced for the purposes of the 90-day decision period;
  - the request for an oral hearing has been granted;
  - disclosure of the file is included; and
  - information about representation.

The letter will also emphasize that the parties need to be prepared to schedule a hearing when contacted by the hearing coordinator. The objective is to hold an oral hearing within 30–45 days from the date of the scheduling call.

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- 2.2 After this letter is sent to the parties commencing the appeal, the file is sent to the chair of the panel hearing the appeal. The chair will review the file and appeal documents, and then provide the hearing coordinator with information about the length of the hearing and some proposed hearing dates.
  - 2.3 The hearing coordinator will contact the appellant to propose 2–3 specific dates for a hearing. In general, the appellant will have to provide very good reasons for not being available for one of those dates. If there are good reasons then alternate dates will be obtained.
  - 2.4 Once a date or dates have been obtained from the appellant, the respondent will be contacted by telephone to confirm a date. The respondent will be expected to agree to the date, unless compelling reasons exist.
  - 2.5 Once a date is set, the coordinator will send a letter to the parties confirming the date, time and place of the oral hearing. The coordinator will make the necessary travel arrangements for both the appellant and the respondent.

### **3.0 COSTS**

Costs for attending an oral hearing for appellants and respondents will be as set out in section 7.3 of this Decision. Other costs issues will be considered under Item #100.00 of the *Rehabilitation Services and Claims Manual*.

### **4.0 ADJOURNMENTS**

- 4.1 Adjournments should be unusual events. The party requesting the adjournment must send written and adequate reasons preferably by fax, to the appeal officer who will refer the matter to the Appeal Division panel. The written application for an adjournment should include:
  - the reasons for the request;
  - the length of the adjournment requested;
  - the next available date; and
  - whether the other parties consent to the postponement. If consent has not been obtained, the party requesting the adjournment must make every effort to advise the other parties to the hearing of the request and provide the Appeal Division with the details of their efforts (who was contacted, when the contact was made and how it was made).

The Appeal Division will expedite a decision on adjournment requests.

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- 4.2 If a request for an adjournment is to be made within 72 hours of the hearing, the party making the request must make every effort to contact the appeal officer on an urgent basis. The Appeal Division may direct that the request be made before the panel at the scheduled hearing by either the party wishing the adjournment or an agent representing the party (with appropriate authorization).
- 4.3 In deciding whether to grant a request, the Appeal Division may consider a variety of factors including:
- whether the request is made far enough in advance (i.e., at least three weeks in advance of the hearing date) that the scheduled hearing can be re-scheduled with a minimum of cost and disruption of schedules;
  - whether a prior adjournment was granted (this would make it more difficult to allow a further adjournment);
  - the length of time sought in the adjournment request;
  - whether the adjournment would require additional time for the 90-day decision period and, if so, whether the circumstances would likely meet the statutory basis for the chief appeal commissioner to grant additional time under section 91(3) of the Act;
  - any prejudice to the other parties balanced against the prejudice to the appellant if the postponement is not granted; and
  - any other factors which may be relevant.

For example, personal emergencies such as medical problems, family crisis, and motor vehicle accidents would be reasons for an adjournment. The Appeal Division would also attempt to accommodate situations such as an unemployed worker who has just obtained work and does not want to jeopardize it by taking time off or the unforeseeable unavailability of an essential witness. Appropriate documentation will usually be necessary.

- 4.4 If a request for an adjournment is not granted, the appellant may be given the opportunity to proceed by way of written submissions only.
- 4.5 If an adjournment is granted, the Appeal Division will advise the parties to an appeal by fax, letter or, in some circumstances, by telephone. An alternate date will be given to the parties.
- 4.6 An adjournment may require additional time for the 90-day decision period for claims appeals and appeals under section 96(6) and section 96(6.1) of the Act. This decision would be made by the chief appeal commissioner and it would be on the basis of an act or omission by the appellant under section 91(3) of the Act. Where a longer period for a decision is designated by the chief appeal commissioner, the parties would be notified of the new date as set out in **Appendix "C."**

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## **5.0 NON-APPEARANCE BY AN APPELLANT**

- 5.1 If the appellant does not appear at an oral hearing (and there has been no adjournment approved by the Appeal Division) the panel will remain in the hearing room for 15 minutes after the scheduled start of the hearing.
- 5.2 If the appellant does not appear within this 15-minute period the hearing will be adjourned.
- 5.3 Limited inquiries (usually one telephone call to the appellant and/or the appellant's representative) will be made by the Appeal Division to determine the reasons for the appellant's absence.
- 5.4 A lack of appearance would normally only be justified by a personal emergency and re-scheduling of a hearing may be considered in those circumstances.
- 5.5 If no explanation is available or the explanation is insufficient the appeal will be decided on the basis of a file review and without a hearing after giving the parties an opportunity to provide written submissions.
- 5.6 In cases where a hearing is considered by the panel to be vital to the determination of the appeal there may be consideration of scheduling a further hearing.
- 5.7 If there are successive failures to appear the appeal may be deemed abandoned by the panel after providing adequate notice to the parties.

## **6.0 TELEPHONE AND VIDEO CONFERENCING**

- 6.1 In the past the Appeal Division has used telephone conferences. These have been for specific and limited purposes such as discussing one particular aspect of the evidence but they are not generally appropriate for a full hearing of an appeal. This practice will continue.
- 6.2 Video conferencing may be available for some limited purposes and on the basis of a specific request from the parties or direction from the panel. The Board has this technology in some regional offices but not all offices. At a minimum it may provide a means for a party who is working in another part of the province to participate in a limited way in an oral hearing in Richmond. This would be most useful to a respondent (often an employer) who simply wants to monitor a hearing.

It may also have some use for obtaining additional information or clarification as long as the requirements of natural justice are met. Video conferencing should be considered experimental at this time.



# REPORTER

## Appendix “C”

### Subject: Claims Appeals

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## **1.0 JURISDICTION OF THE APPEAL DIVISION IN CLAIMS APPEALS**

### **1.1 Appeals From a Review Board Finding**

The Appeal Division has authority under section 91(1) of the Act to hear appeals from Review Board findings on workers' claims for compensation.

Section 91(1) of the Act provides that:

Where the review board makes a finding under section 90, the worker, the worker's dependants, the worker's employer or the representative of any of them may, not more than 30 days after the finding is sent out, or within a longer period the chief appeal commissioner may allow, appeal the finding to the appeal division.

There is no right of appeal to the Appeal Division under section 91(1) against a decision of a Board officer.

### **1.2 Appeals From Preliminary Decisions by the Review Board**

The word "finding" in section 91 normally means a finding made by the Review Board after it has considered an appeal on the merits.

An appeal cannot be made to the Appeal Division solely from a procedural or preliminary determination by the Review Board. The Review Board's own procedures are not therefore matters for the Appeal Division to review.

Complaints regarding Review Board procedures should be addressed to the Review Board. In an appeal from a Review Board finding, any objections to the Review Board's procedural or preliminary determinations may be taken into account by the panel.

However, the Appeal Division will consider appeals from Review Board findings on "preliminary matters" where the finding would constitute a final determination of the appeal. This includes a refusal to grant an extension of time to appeal to the Review Board. The Review Board generally will reconsider a refusal to grant an extension of time to appeal on the basis of new reasons for the delay. However, once a final determination has been made by the Review Board to deny an extension of time, the Appeal Division will consider the appeal and generally apply the Review Board policy for considering extension of time applications contained in the Review Board's *Policies and Procedures Manual* (see Appeal Division Decision #93-1186, 10 *Workers' Compensation Reporter* 43).

Where the Appeal Division allows an appeal on the issue of an extension of time, the Appeal Division will generally consider the appeal on its merits, unless the appellant requests that the matter be returned to the Review Board for consideration, pursuant to section 91(2) of the Act.

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### **1.3 President's Referral of Review Board Findings**

The president may, not more than 30 days after a finding of the Review Board is sent out, refer the finding to the Appeal Division for redetermination on grounds of error of law or contravention of a published policy of the governors (section 96(4)).

Upon receipt of this referral, the Appeal Division will disclose the referral documentation from the president to the parties. The chief appeal commissioner may also consider whether any persons or groups who are not parties should be notified of the referral and given standing to participate (as set out in section 6.1 of this Decision).

### **1.4 Scope of Appeal**

On an appeal under section 91(1), the Appeal Division may reopen, rehear and redetermine any matter that has been dealt with by the Review Board (see section 96(3) of the Act).

The discretion to inquire into “all of the issues arising out of an appeal” entails a broad jurisdiction to fashion appropriate remedies. The Appeal Division has the power to consider the set of issues that were explicitly or implicitly “present” at the root of the claims adjudicator’s decision. See Appeal Division Decision #92-0634, *Section 91(1) – Remedial Jurisdiction* (1992), 8 *Workers’ Compensation Reporter* 151.

As set out in section 4.1 of this Decision, the Appeal Division will adopt a procedure that ensures the issues in an appeal are identified during the course of the appeal so that all parties may understand and have an opportunity to respond. See Decision of the Governors #75 (1994), 10 *Workers’ Compensation Reporter* 753.

Normally the issues in an appeal will be those raised by the Notice of Appeal or other initiating document from the appellant. All parties will be provided with a copy of that Notice or document.

When an Appeal Division panel concludes its decision will turn upon a consequential question of which the parties have not expressly been made aware, the panel will consider whether that question raises an issue of a fundamentally different character than the issue(s) raised by the Notice of Appeal or other initiating document. If the question is of a fundamentally different character, then parties will be advised that the question is open for determination by the Appeal Division panel. (See Appeal Division Decision #97-0835/0841, 14 *Workers’ Compensation Reporter* 83.) Additional submissions on the question will then be requested of the parties.

### **1.5 Discretionary Authority**

The Appeal Division may exercise the Board’s authority to refer a worker for examination by a Medical Review Panel pursuant to section 58(5), with or without the worker’s consent, in the course of dealing with an appeal or reconsideration application (see Decision of the Governors

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#75 (1994), 10 *Workers' Compensation Reporter* 753). The Appeal Division will take into account a request from a worker or employer that it exercise this discretion although such a request is not necessary to, nor determinative of, the exercise of this discretion.

On an appeal from a Review Board finding, the Appeal Division may under section 91(2) direct the Review Board to reconsider the matter either generally or on a particular issue, and the Appeal Division may withhold its decision pending the finding of the Review Board. This power may be used, for example, where the Review Board has failed to exercise its jurisdiction to consider a matter properly before it.

The Appeal Division does not have the authority to exercise the Board's plenary independent power to reopen, rehear, and redetermine matters under section 96(2) of the Act.

## **2.0 APPLYING FOR AN APPEAL**

### **2.1 Initiating an Appeal**

General requirements for initiating an appeal including oral and written notification, are set out in section 3.0 of this Decision.

A policy of the Board of Governors (Decision of the Governors #75 (1994), 10 *Workers' Compensation Reporter* 753) requires an appellant to outline in writing the reasons for the appeal, explaining how the Review Board finding is in error. As set out in section 3.3 of this Decision, the completion of a "Notice of Appeal from a Review Board Finding" form, with reasons, will generally satisfy this requirement. However, where the appellant provides the necessary information required to commence an appeal in a letter to the Appeal Division containing detailed reasons, the requirement to complete a Notice of Appeal form will be waived by the appeal officer.

Appeals will be initiated by an intake officer who will register the appeal on the Appeal Division appeal tracking system and will request from the Board that the claim file be provided to the Appeal Division. Until the claim file is received by the Appeal Division the appeal cannot proceed.

### **2.2 Time Limits for Filing an Appeal**

Section 91(1) of the Act states that an appeal must be initiated :

“ . . . not more than 30 days after the finding is sent out, or within a longer period the chief appeal commissioner may allow. . . . ”

Section 3.3 of this Decision sets out what constitutes a notice of an intent to appeal for the purpose of meeting these time limits.

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Section 3.4 of this Decision sets out the basis on which the chief appeal commissioner will determine a request for an extension of time to file an appeal.

### **2.3 Standing and Notice to the Parties**

The parties with standing to bring to a claims appeal are set out in section 91(1) as “. . . the worker, the worker’s dependants, the worker’s employer or the representative of any of them.” Parties to the appeal shall receive notice of the appeal.

### **2.4 Notice of an Appeal When Employer Is De-registered**

As set out in section 6.1 of this Decision, the Appeal Division has been given the discretion in Decision of the Governors #75 (1994), 10 *Workers’ Compensation Reporter* 753, to invite the Employers’ Advisors and/or Industry Associations to participate in claims appeals when the employer is de-registered, where the participation of these persons or groups will assist the inquiry into the merits of the issues.

The Appeal Division shall exercise this discretion according to the following criteria where there is no successor employer:

#### **(a) To Employers’ Advisors**

In the normal course of events, the deputy chief appeal commissioner, as part of his/her preliminary identification of the issues in the matter, will determine whether the Employers’ Advisors will be given notice of a particular appeal and invited to participate. The deputy chief appeal commissioner may invite the Employers’ Advisors to participate where:

- (i) there are issues which could be best resolved with the addition of an employer submission;
- (ii) there is evidence which is best tested with the participation of a representative of the employer;
- (iii) an employer representative could provide helpful factual information about circumstances affecting the issue in a case; or
- (iv) any other case involving an issue with a significant financial value or an important policy issue.

The panel assigned to consider an appeal may also request that the deputy chief appeal commissioner invite the Employers’ and/or Workers’ Advisors to participate, after reviewing submissions and evidence, if the panel considers that such participation would assist an inquiry into the merits of the appeal.

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From time to time, the chief appeal commissioner will consult with representatives of the Employers' Advisors and the Workers' Advisors to review what issues in claims matters are of interest and importance to the community generally.

In any case where the Appeal Division has invited participation by the Employers' Advisors and the appellant is unrepresented, the Appeal Division will advise the appellant of the services of the Workers' Advisors and notify the Workers' Advisors of the appeal.

**(b) To Industry Associations**

Most claim files involve sensitive personal information. Therefore, the Appeal Division has adopted a cautious approach to giving notice to Industry Associations which, by their nature, encompass a large domain. The Appeal Division's practices in this area are intended to preserve the integrity of an inquiry process without unnecessarily expanding the circle of disclosure of a worker's personal claim file.

Industry Associations which wish to be placed on the Appeal Division's list of associations in order to receive notice and/or participate in claims appeals where the employer is de-registered should apply to the Appeal Division, in writing, and identify:

- (i) the employer classifications or sectors which are involved with their Industry Association and for which the Industry Association would like to participate;
- (ii) the individual authorized to represent the Industry Association in appeal matters and who will be the regular contact with the Appeal Division;
- (iii) the systems that will be in place to protect the privacy of information on claim files; and
- (iv) whether the Industry Association has in the past participated before the Review Board on appeals, pursuant to section 90(2). This factor is not determinative.

The chief appeal commissioner will consider each application on its merits, based on the above criteria, and make a decision whether the association should be recognized by the Appeal Division. The association will be advised of the decision on their application. A list of recognized associations will be kept by the Appeal Division, it will be available publicly and published in the Appeal Division's annual report and it will be updated on a regular basis.

In claims appeals where the employer is de-registered, the Industry Association may be given notice and invited to participate:

- (a) by the deputy chief appeal commissioner where on the face of the appeal the issue under appeal would be of interest and/or importance to the employer community in that industry because it involves an important issue of policy or a significant financial value; and the input of the Industry Association would be of assistance in an inquiry into the merits of the issues; or

- 
- (b) by the deputy chief appeal commissioner in response to a request from the panel where the panel considers that such participation would assist an inquiry into the merits of the appeal.

In addition, the Appeal Division will take into account whether the Industry Association has participated before the Review Board on the appeal in question, pursuant to section 90(2) of the Act. This factor is not determinative.

Disclosure of the claim file to the Employers' Advisors Office or an Industry Association is governed by section 95 of the Act which relates to the confidentiality of claim file materials.

## **2.5 Disclosure**

After:

- (a) notification of intent to appeal is received; and
- (b) the Appeal Division has been provided the relevant claim file(s)

the worker and employer will automatically be sent updated disclosure of the claim file where they have received disclosure in the past in connection with an earlier decision or appeal on the same issue.

If they have not previously obtained disclosure, they will be contacted and advised of the requirements for obtaining disclosure of the file.

In the event the Review Board held an oral hearing, parties participating in the appeal will be provided a copy of the tape containing the voice recording of the Review Board oral hearing as part of the appeal disclosure process.

The information in a claims file must not be disclosed outside the appeal proceedings except as set out in section 95 of the Act which relates to the confidentiality of claims file materials.

Parties will generally be considered to have notice of all information disclosed from the WCB file.

## **Priority of Claims Files**

There are occasions when a file is sought at the same time by the Appeal Division, the Review Board, and the Board's Compensation Services Division. An appeal cannot proceed until the Appeal Division receives the claim file.

New claims matters are recorded electronically on the Board's e-file system, and are available to multiple users at one time.

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However, earlier paper claims files are typically not part of the e-file system. In Appeal Division Decision #12, 10 *Workers' Compensation Reporter* 365, it was noted that only the Appeal Division is subject to a statutory time limit for making a decision and therefore, the Appeal Division should have priority in obtaining claim files where practicable and where it makes common sense to do so. As set out in the decision, in 1994, the Senior Executive Committee adopted a system whereby any request for a file by the Appeal Division will be acted upon within 72 hours. Within three days of a file request from the Appeal Division, the file will be:

- (a) forwarded to the Appeal Division; or
- (b) the appropriate manager in the Compensation Services or other Division will contact designated Appeal Division staff to reach an agreement concerning an alternative arrangement in the particular case.

This procedure was confirmed by the Board's director of Central Services in 2000.

## **2.6 Commencement of Appeal**

The appeal will be considered to be "commenced" for purposes of section 91(3) when:

- (a) Reasons for the appeal have been provided;
- (b) The file has been reviewed by the appeal officer to identify the appealable decision;
- (c) Disclosure, or an update to disclosure, has been provided to the appellant (note: initial disclosure of a worker's claim file to an employer requires that there have been a written request for same); and
- (d) The respondent has been notified of the appeal and has been invited to file a Notice of Participation.

When an appeal is "commenced," this begins the 90-day time-frame for appeal decision-making contemplated in section 91(3) of the Act.

## **3.0 THE APPEAL PROCESS**

Appeals may proceed by written submission or oral hearing. A party has the right to request an oral hearing, but an oral hearing is not required in every case. If an oral hearing is not requested and/or granted, the appeal will be heard by way of written submissions.

### **3.1 Written Submissions**

To enable a decision to be reached within 90 days of the date on which the appeal is commenced, written submissions must be provided in a timely manner.

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The Appeal Division will apply the following procedures with respect to the provision of submissions:

- (a) An appeal officer will request the appellant to provide their submissions within 14 calendar days following the commencement of the appeal;
- (b) The appeal officer or Appeal Division manager may grant an appellant up to an additional 30 days to provide submissions, upon request, unless to do so unduly compromises the respondent's interests;
- (c) The appeal officer or Appeal Division manager may grant an appellant a further 30 days (to a total of 60 additional days) to provide submissions if the request is accompanied by written reasons, and provided that to grant the request will not unduly compromise the respondent's interests;
- (d) A request by an appellant, with written reasons, for more than 60 additional days for submissions will be considered by the deputy chief appeal commissioner;
- (e) On appellant requests for additional time for submissions, consideration will be given to whether the granting of additional time for submissions will prejudice the respondent. In particular, where payment of compensation with respect to the period prior to the Review Board finding has been deferred under section 92 pending the outcome of the Appeal Division decision, the appellant will normally not be granted more than a maximum of an additional 30 days for submissions (and a corresponding period for the respondent);
- (f) Any additional time for submissions over the initial 14 days will normally result in the extension of the due date for the decision to 90 days from completion of submissions;
- (g) Neither the appeal officer nor the manager may grant additional time to a respondent where the appellant has not been granted additional time. In such circumstances the matter will be referred to the deputy chief appeal commissioner for consideration. Under section 91(3)(c), the chief appeal commissioner does not have the power to designate a longer period where the respondent requests a delay, unless the chief appeal commissioner is satisfied that the delay is required because of the complexity of the matter under appeal or because of an act or omission of the appellant. However, a request by an appellant for additional time will be deemed to include a provision for a corresponding extension of time to the respondent, if requested, and may be granted by the appeal officer or manager, up to a maximum of 60 days of additional time, upon request by the respondent;
- (h) Any written objections by the appellant or respondent to a determination by the appeal officer or manager on a request for additional time for submissions will be considered by the chief appeal commissioner;
- (i) Any written request by a respondent for additional time based upon any other "act or omission of the appellant or because of the complexity of the matter under appeal" will be considered by the chief appeal commissioner;

- 
- (j) An appeal will proceed whether or not the appellant provides a submission, so long as reasons have been provided for the appeal. In the absence of a further submission, the reasons provided by the appellant for appealing will be treated as their “submission.” This is subject to the appellant advising they wish to withdraw the appeal;
  - (k) If the time set for the provision of the appellant’s initial submission expires, without additional time for submissions being granted, the appeal officer will proceed to invite submissions from the respondent (if they are participating);
  - (l) If the respondent provides a submission, the appellant will be given an opportunity to reply;
  - (m) The parties will be informed that submissions are considered complete, and that the appeal has been forwarded to the chief appeal commissioner to be assigned to a panel of the Appeal Division for a decision;
  - (n) Consideration of any comments or submissions subsequently received will be at the discretion of the panel.

Where an extension of time is granted for an appeal, the time frames set out above will be applied from the date the extension of time to appeal is granted. Any further written submissions should be provided within 14 days of the decision granting an extension of time to appeal, and so forth.

### **3.2 Oral Hearings**

The procedures regarding requests for oral hearings are set out in section 7.0 of this Decision. Where an oral hearing is granted, the hearing will be scheduled in accordance with the procedures set out in **Appendix “B”**.

The following are additional issues which may arise in the course of claims appeals.

If the parties have any procedural concerns about the Review Board hearing, these may be included in the request for an oral hearing before the Appeal Division.

An oral hearing will be held and a decision made within the time frames specified in section 91(3)(a), (b) or (c). Under these provisions, the chief appeal commissioner may grant an extension of time where the appellant requires additional time to provide information, evidence, or argument in support of an appeal. However, a request by the appellant for such further time will delay the 90-day period for rendering a decision.

The parties are strongly urged to provide copies of any new documentary evidence they intend to submit to the Appeal Division two weeks in advance of an oral hearing. Late disclosure may result in delays in the hearing process and/or the decision.

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### **3.3 Irrelevant Sensitive Personal Information**

Item #99.30 of the *Rehabilitation Services and Claims Manual* provides that sensitive personal information that is received by the Board which has not been specifically requested and is not relevant to the claim should be returned to the sender and not become part of the claim file. In administering this practice, Appeal Division panels will review information the panels have requested before placing it on the claim file to ensure compliance with Item #99.30. In some circumstances, a panel may wish to have the sensitive personal information that is not relevant to the claim severed from the information that was requested. In that event, the original document would be returned to the sender, together with a copy of the severed document that will be retained on the claim file.

### **3.4 Submissions Containing Personal Identifiers of Third Party Worker Claims**

In order to protect workers' privacy, it is the practice of the Appeal Division to require that parties not use the names and claim number of others unless authorized to do so. Claim numbers alone can provide unauthorized access to workers' claim files contrary to section 95(1.1) of the Act. In addition, Schedule 1 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 includes within the definition of "personal information" an identifying number assigned to the individual. This would include a claim number.

Reference to the names and claim numbers of others can occur in cases where the submission is accompanied by a signed consent form by the affected worker or dependant. The consent form must be sufficiently worded to allow for disclosure of the name and claim number in the current proceeding, as well as any other future proceeding where disclosure of the current claim file may be provided. A sample consent form is attached as **Appendix "N"** to this Decision.

On occasion, the Appeal Division receives submissions which make reference to the names or claim numbers of other workers without their authorization. Upon receiving such submissions, the Appeal Division will return the submission without making a copy and notify the party or representative of the need for removing this information or obtaining an authorization.

The party will be provided with a brief period to make a new submission which complies with section 95(1.1) of the Act.

### **3.5 Adjournments/Suspensions/Withdrawals of Appeals**

In section 91(3)(c) of the Act, the legislature has provided a framework for the designation of a longer period of time for the Appeal Division to issue a decision for specified reasons. This statutory framework requires the chief appeal commissioner to designate a longer period of time: this does not contemplate matters being held in abeyance for an indefinite period. Requests that appeals be suspended will generally not be granted.

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In some cases, the appellant advises that an issue requires adjudication by the Compensation Services Division prior to consideration of the appeal, and that the further adjudication may eliminate the need for the appeal. In such circumstances, the Appeal Division may allow the appellant to withdraw the appeal pending the further adjudication. Where the further adjudication does not resolve the matter raised in the appeal, the appellant will, upon notification in writing to the Appeal Division no later than 30 days following the further adjudication decision, be granted an extension of time to appeal without the necessity of providing reasons. Where a request that the appeal be re-established is received beyond 30 days following the further adjudication decision, it will be considered as a request for an extension of time to appeal. In this latter event, reasons for the delay in appealing must be provided.

Consideration may also be given to a request that the “withdrawal pending further adjudication” remain in effect where the appellant wishes to appeal the new decision by the Board officer to the Review Board. This requires a specific request to the Appeal Division within 30 days of the new decision by the Board officer.

## **4.0 APPEAL DECISIONS**

### **4.1 Conduct of an Appeal**

Section 91(3) provides that a decision on an appeal commenced under section 91(1) must be made as soon as practicable and in any case within:

- (a) 90 days of the date on which the appeal is commenced,
- (b) 90 days of a reconsideration by the Review Board under subsection (2), or
- (c) a longer period the chief appeal commissioner may designate where the appellant requests a delay in the proceedings or where the chief appeal commissioner considers the longer period necessary because of an act or omission of the appellant or because of the complexity of the matter under appeal.

These time limits for the making of a decision are directory in nature. The Appeal Division has a legal duty to meet these time limits. If they are not met, however, the Appeal Division will not lose jurisdiction to render a decision. The primary purpose of these time limits is to ensure that the appellant is provided with a decision by the Appeal Division in a timely fashion. It would frustrate the intent of the legislation if appellants could be deprived of the right of appeal through events and conduct over which they have no control.

For the Appeal Division to meet these time limits for rendering a decision, the stages in the appeal process also have some time limits. Where these time limits are met, the decision will be rendered expeditiously and wherever possible within the designated 90-day period.

However, where the appellant has been granted further time to make submissions, the additional time will delay the 90-day period for rendering a decision.

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Section 91(3)(c) also provides that the chief appeal commissioner may designate a longer period for the making of the decision on the appeal where the appellant requests a delay in the proceedings. However, the chief appeal commissioner does not have the power under section 91(3) to designate a longer period where the respondent requests a delay in the proceedings.

Where the appellant complies with the time frame set by the Appeal Division for their participation, the respondent will be required to meet the time limit set for their participation.

Further time may be granted if the chief appeal commissioner is satisfied that delay is required because of the complexity of the matter under appeal or because of an act or omission of the appellant.

## **4.2 Designation of a Longer Period for a Panel Decision**

The Act clearly directs that most decisions of the Appeal Division shall be made within 90 days of the commencement of the appeal. However, the chief appeal commissioner may designate a longer period for the making of a decision where the chief appeal commissioner considers the longer period necessary because of an act or omission of the appellant or because of the complexity of the matter under appeal.

If an Appeal Division panel requires additional time for the making of its decision, the panel makes a written request for additional time, with reasons, to the chief appeal commissioner. The written request of the panel, and the signed decision of the chief appeal commissioner concerning the request, become part of the permanent file record.

The appellant and respondent are generally notified in each instance that a longer period is designated for the making of the Appeal Division decision at the request of the panel. The ground for this is stated, together with the amount of time by which the due date for decision has been extended. If the reason for the longer period is because an oral hearing has been scheduled, the parties will be informed of the new decision due date after the oral hearing.

The Appeal Division will generally not provide additional reasons for preliminary decisions such as this. The Appeal Division has finite resources, which are better devoted to the consideration of the actual merits of appeals rather than providing detailed letters of explanation as to why a longer period of time for decision-making has been designated.

## **5.0 CONCURRENT APPEALS TO THE APPEAL DIVISION AND MEDICAL REVIEW PANEL**

### **5.1 Medical Findings of the Review Board**

Medical findings of the Review Board are appealable to:

- 
- a Medical Review Panel under section 58 of the Act; and
  - the Appeal Division under section 91(1) of the Act.

If the appellant initiates concurrent appeals to both the Appeal Division and to a Medical Review Panel, the Appeal Division's practice is to continue with the appeal and inform the parties and the Medical Review Panel Department.

The Appeal Division will accept the appellant's request to withdraw the appeal before the Appeal Division while the Medical Review Panel process continues. But the Appeal Division will inform the parties that section 65 of the Act provides that a Medical Review Panel certificate is conclusive as to the matters certified and is binding on the Board, including the Appeal Division. The Appeal Division, therefore, may not have the ability or jurisdiction to re-establish the appeal to the Appeal Division.

## **5.2 Medical Findings of the Appeal Division**

Medical decisions of the Appeal Division are also appealable to a Medical Review Panel. Where a party seeks reconsideration by the chief appeal commissioner of an Appeal Division decision while concurrently seeking to appeal to a Medical Review Panel, the practice set out above is followed.

As contemplated in sections 58 to 66 of the Act, a medical decision of the Appeal Division may be appealed to a Medical Review Panel within 90 days of the date of the decision. The Appeal Division and the Medical Review Panel Department are separate and distinct. A request to the chief appeal commission for reconsideration does not stop the 90-day period from running.

## **5.3 Request for Withdrawal Pending M.R.P. Requirement Decision**

An appellant/applicant may also request that their appeal to the Appeal Division or their request for reconsideration be withdrawn pending a decision by the Medical Review Panel Department as to whether or not the requirements for initiating a Medical Review Panel appeal are met. These requirements relate to whether a bona fide medical dispute is identified by a physician's certificate.

Within 30 days of the Medical Review Department issuing its decision the appellant must advise the Appeal Division whether they wish to proceed to the Appeal Division on their appeal. In the absence of such advice, the Appeal Division will consider the appeal abandoned.



# REPORTER

## Appendix “D”

**Subject: Prevention Appeals**

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## **INTRODUCTION**

Bill 14, the *Workers Compensation (Occupational Health and Safety) Amendment Act* came into effect on October 1, 1999. The amendments created a new Part 3 of the *Workers Compensation Act* relating to occupational health and safety matters. Part 3 includes a separate purpose section and Board mandate as well as a definition section.

The amendments also included appeal provisions for occupational health and safety matters in Division 14 which differ in some respects from those in the rest of the Act.

Section 211 of the amendments provides that the chief appeal commissioner may, under section 85.1, and subject to any policies of the governors (Panel of Administrators) and any bylaws enacted or resolutions passed under section 82, determine the practice and procedure for the conduct of appeals by the Appeal Division (referred to as the Appeal Tribunal in the Act).

Set out below is the practice and procedure to be followed by the Appeal Division in deciding occupational health and safety matters on prevention appeals. These guidelines have been developed with input from both worker and employer stakeholders and are an attempt to balance the Appeal Division's need to provide timely and fair adjudication with the stakeholders' concerns.

### **1.0 JURISDICTION OF THE APPEAL DIVISION**

The Appeal Division has authority under section 207 of the Act to hear the following matters:

- (i) Appeals from reviewing officer decisions on discriminatory actions (see sections 150 and 151) and unpaid wage claims (see section 152). This includes orders, the refusal to make an order, or the cancellation of an order under section 153.
- (ii) Appeals in relation to administrative penalties under section 196. This includes the imposition of a penalty order, the cancellation of an order and a decision not to impose an administrative penalty.
- (iii) Appeals in relation to an order under section 195 cancelling or suspending a certificate issued under Part 3, or placing a condition on the use of the certificate.
- (iv) Any other decision prescribed by the lieutenant governor in council by regulation to be an appealable decision.

### **2.0 HEARING PANELS**

The chief appeal commissioner may establish panels which have the power and authority of the Appeal Division.

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A panel of the Appeal Division for occupational health and safety matters will consist of:

- (a) a panel of one person (either the chief appeal commissioner or a non-representational appeal commissioner), or
- (b) a three-member panel consisting of one non-representational appeal commissioner (or the chief appeal commissioner) together with one appeal commissioner chosen from worker representatives and one appeal commissioner chosen from employer representatives, or
- (c) a three-member panel of non-representational appeal commissioners.

The chief appeal commissioner or a delegate will assign members to a panel in a particular case. In cases where an oral hearing has been granted, the chief appeal commissioner or a delegate will consider any preference expressed by a party for a one-member panel or a three-member panel. The chief appeal commissioner may terminate a designation to a panel and may fill a vacancy on a panel. A decision of the Appeal Division or of the panel is deemed to be a decision of the Workers' Compensation Board.

### **3.0 APPLYING FOR AN APPEAL**

#### **3.1 Application for Appeal**

Section 209(1) requires that a person bringing an appeal must apply in writing to the Appeal Division within 30 calendar days of the decision being appealed.

An appeal is started by completing an Application for Appeal. An application form is available from the Appeal Division.

Applications can be made in writing by mail or by fax. A completed Application for Appeal form date-stamped as received at a Board office will be treated as having been received by the Appeal Division on that date.

An application for appeal must (section 209(2)):

- (a) identify the decision that is the subject of the application for appeal,
- (b) state the basis on which the application for an appeal is made and the outcome requested, and
- (c) include any other information required by the Appeal Division.

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### **3.2 When Does the 30-Day Period Commence?**

The Act does not give the Appeal Division the authority to extend the 30-day time limit. However, in determining when the 30-day period commences, the Appeal Division will consider when a decision is deemed to have been “served.”

Under section 221 of the Act, a notice, order or other document served personally on a particular day is deemed to have been served on that day. The 30-day time period will therefore commence on the following day.

A notice, order or other document not personally served must be sent by registered mail to the person’s last known address and is deemed to have been served on the 8th day after deposit with Canada Post. The day of deposit is not counted for this purpose. Therefore, the 30-day time period will start on the 9th day after deposit with Canada Post.

If the 30-day period ends on a statutory holiday or other day when the Appeal Division is not open during regular business hours, the 30-day time period will be deemed to have ended on the next day the Appeal Division is open for regular business hours.

### **3.3 Other Notice Requirements**

Section 211(2) adds an additional notice requirement for employers, workers and unions. Employers requesting an appeal must:

- (i) post a notice of the appeal at the workplace to which the decision under appeal applies,
- (ii) provide notice of the appeal to the joint committee or worker representative, as applicable, and
- (iii) send notice of the application to the union at that workplace, if workers of the employer at that workplace are represented by a union.

Unions or workers requesting an appeal must provide notice to the employer, who must then give notice as set out above in (i), (ii) or (iii).

In the case of an appeal by a person other than an employer, worker or union, the person must give notice in accordance with the directions of the Appeal Division.

The Appeal Division will require confirmation from the appellant that the requirements for giving notice as required by section 211(2) have been met.

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### **3.4 Cross Appeals**

Division 14 of the Act expands the parties to an appeal (see #4.1 of these guidelines). It may be the case, therefore, that two or more parties wish to appeal the same order or decision. If this occurs, all potential appellants must meet the statutory timeline for applying for an appeal, as set out in #3.1 and #3.2 of these guidelines.

### **3.5 Disclosure**

Once an application for appeal is received at the Appeal Division the Appeal Division will send all parties to the appeal copies of the application. All participating parties will, upon request, be provided with copies of the Prevention Division file.

If there is a claim file in the same or a related matter, disclosure of the claim file will not be given automatically. The Appeal Division will consider requests for a claim file on a case-by-case basis and will consider whether the claim file (or part of it) is relevant to the occupational health and safety matter under appeal in determining disclosure.

## **4.0 THE APPEAL PROCESS**

### **4.1 Who May Bring an Appeal?**

#### **(a) Administrative Penalties**

Section 208 states that the following may bring an appeal in relation to an administrative penalty:

- the employer subject to the penalty
- a worker of the employer,
- a union representing a worker of the employer, or
- any other person aggrieved by the decision.

The question of who is an aggrieved person will be decided on a case-by-case basis.

#### **(b) Discriminatory Action Matters and Unpaid Wage Claims**

Section 208 states that the following may bring an appeal:

- the worker,
- the employer, or
- the union

affected by the decision.

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### **(c) Certificate Matters**

Section 208 states that the following may bring an appeal:

- the person subject to the order.

## **4.2 What May Be Appealed?**

Section 207 sets out the decisions that are appealable to the Appeal Division as follows:

(a) in relation to administrative penalties under section 196:

- (i) an order imposing an administrative penalty,
- (ii) the cancellation of an order imposing an administrative penalty, or
- (iii) a decision not to impose an administrative penalty made after issuing a penalty notice under section 196(2).

(b) in relation to discriminatory action matters and unpaid wage claims under section 153:

- (i) a decision by a reviewing officer about a determination or order under section 153,
- (ii) a decision by a reviewing officer respecting the refusal to make an order under section 153,
- (iii) a decision by a reviewing officer respecting the cancellation of an order under section 153.

(c) in relation to certificate matters under section 195:

- (i) a decision by a reviewing officer in relation to an order. Section 195 states that an order can be made to cancel, suspend or impose a condition on a certificate.

## **4.3 An Appeal Does Not Operate as a Stay or Suspension of the Decision Appealed**

Section 210 states that an appeal does not operate as a stay or suspension of the decision being appealed unless the Appeal Division directs otherwise.

In the context of occupational health and safety, the most important factor to consider is whether the granting of a stay would endanger worker safety.

Other factors to be considered by the Appeal Division in determining whether to issue a stay or suspension pending the hearing of an appeal include:

- (1) an assessment of the merits of the appeal to ensure the appeal is not frivolous; that is, there is a serious question to be heard,

- (2) whether the appellant would suffer irreparable harm if the stay is not granted (for example, loss of a business), and
- (3) an assessment as to which party would suffer greater harm or prejudice from granting or denying a stay or suspension.

**Procedure:** An application for a stay or suspension will be dealt with as a preliminary matter on an expedited basis. A party who wishes a stay or suspension will normally be required to provide written submissions in support of the request to the Appeal Division within seven days of making the request. The Appeal Division will send the submissions to the other parties who will be given seven days to provide submissions in response to the request. The requesting party will then have five days to provide reply submissions. An Appeal Division panel will issue a written decision on the stay/suspension request on the basis of the parties’ submissions as soon as possible once submissions are complete.

## 5.0 CONDUCT OF AN APPEAL

### 5.1 Type of Appeal

Part 3 of the Act does not specify the type of hearing the Appeal Division must hold. An appeal may be conducted by way of written submissions, an oral hearing or a combination of both. A party can provide reasons for requesting a particular type of hearing in the “Application for Appeal.” A request for an oral hearing will be considered as a preliminary matter and a decision will normally be made by the chief appeal commissioner or a delegate (see Oral Hearing Procedure #5.5).

Set out below are factors the chief appeal commissioner may consider in determining when the Appeal Division will hold an oral hearing or receive written submissions. The factors are not exhaustive – the chief appeal commissioner may consider any other relevant factors in determining the fairest and most efficient method for resolving the appeal.

Oral Hearing	Written Submissions
<ul style="list-style-type: none"> <li>– the factual underpinnings of the order are in dispute or significant new evidence is available</li> <li>– there is a significant issue of credibility of witnesses involved</li> <li>– the case raises an issue of general significance or a significant policy issue</li> <li>– the complexity of the case</li> <li>– an oral hearing was not held by the Board</li> <li>– there are two parties (or more) to the appeal and one party requests a hearing</li> <li>– the amount of the penalty is significant</li> </ul>	<ul style="list-style-type: none"> <li>– no reasons are given for an oral hearing</li> <li>– there is only one party</li> <li>– the appeal turns simply on the interpretation or legal analysis of a word, phrase or provision in the Act or Regulations where witnesses would not be required to resolve the matter</li> <li>– the credibility of witnesses is not in issue</li> <li>– an oral hearing was held by the Board</li> </ul>

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## **5.2 Scope of Review**

An appeal involves an analysis of the correctness of the Board's decision; that is, whether there is a proper factual, legal and policy basis for the decision.

The actual nature of a hearing will vary in scope depending on the circumstances of a particular case. The hearing panel will have the information that was before the Board when it made its original decision and may hear any other evidence relevant to the issue before it.

## **5.3 The Authority of the Appeal Division**

In accordance with section 211 of Part 3, the Appeal Division has the same powers as the Supreme Court to compel the attendance of witnesses and examine them under oath, and to compel the production and inspection of books, papers, documents and things. The Appeal Division may require depositions of witnesses residing in or out of the province to be taken before a person appointed by the Appeal Division in a manner similar to that prescribed by the Rules of Court for the British Columbia Supreme Court for the taking of depositions. A request that the Appeal Division exercise these powers will be dealt with by the panel considering the appeal.

## **5.4 Written Hearing Procedure**

Section 212(1) states that the Appeal Division must make a decision "after considering" the appeal. If the chief appeal commissioner or a delegate determines that the appeal can be considered fairly by way of written submissions, the parties will be provided with a submission schedule. In making the schedule, the Appeal Division will ensure that each party to the appeal is given an opportunity to review the written submissions from the other parties and is given an opportunity to respond to those submissions from parties adverse in interest. The submissions will normally be scheduled to proceed in the following order:

- (1) appellants' submissions – within three weeks of the request by the Appeal Division
- (2) respondents' and third parties' submissions – within three weeks of the request by the Appeal Division
- (3) appellants' submissions in reply – within one week of the request of the Appeal Division.

A written response may be obtained from the Occupational Health and Safety Division where written submissions are provided by an appellant. Any such response will be disclosed to the parties who will have an opportunity to rebut the submission or comment further prior to the matter being considered by the Appeal Division.

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If a party is not able to deliver its submissions by the date specified by the Appeal Division, the party can request additional time to file its written submissions. The request should be made, in writing, prior to the specified deadline. The request should include the following information:

- (a) the reasons for seeking additional time; and
- (b) the length of time requested.

The other parties may be provided with an opportunity to make submissions on their positions with respect to the request. In deciding whether to grant additional time the Appeal Division will consider the adequacy of the reasons given, any prejudice to the other parties and any other relevant factors. If additional time is granted to one party, the Appeal Division will inform all parties of the revised schedule, in writing.

## **5.5 Oral Hearing Procedure**

A party in any case has the right to request an oral hearing but will be asked in the “Application for Appeal” to give reasons why an oral hearing is necessary. The Appeal Division has the discretion to decide whether an oral hearing is granted. A preliminary decision will normally be made by the chief appeal commissioner or a delegate within two weeks of the request being made. If an oral hearing is refused by the chief appeal commissioner or a delegate, the appellant will be required to provide written submissions within three weeks of the refusal and the matter will proceed as set out under #5.4. Even if an oral hearing is not granted by the chief appeal commissioner, the Appeal Division panel still has the discretion to hold an oral hearing if it concludes that an oral hearing is necessary.

Where the chief appeal commissioner or the hearing panel decides that an appeal will be conducted by way of an oral hearing, the Appeal Division will set the date, time and location of the hearing and notify the parties.

The parties’ availability will be taken into consideration in setting the date and place of hearing but the Appeal Division will make the final decision if the parties cannot agree or if a matter is being unduly delayed.

### **(a) Pre-hearing Processes**

The Appeal Division may, on its own initiative or at the request of any of the parties to the appeal, schedule a pre-hearing mediation session or a pre-hearing conference. The Appeal Division will consider the following factors in making its decision:

- whether there has been a prior mediation session at the Board;
- the complexity of the issues in the case;

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- the number of parties involved in the case;
  - whether there are preliminary procedural issues to be decided; and
  - any other factors that suggest a pre-hearing session would assist the parties and the Appeal Division to narrow the issues to be dealt with at the hearing, to clarify the hearing procedures, and to discuss any preliminary concerns.

A pre-hearing process is intended to facilitate a just, expeditious and inexpensive disposition of the matter. The hearing date will not be delayed by the pre-hearing process; any pre-hearing process will be scheduled prior to the time set for a hearing.

Mediation is a voluntary settlement negotiation facilitated by a neutral third party who has no decision-making power. Mediation is within the authority of the Appeal Division to set its own procedures, including pre-hearing procedures, under section 85.1 of the Act, as long as the process of mediation does not conflict with the Act and does not breach the principles of procedural fairness.

If the Appeal Division schedules a **mediation session**, each party (or their representative) should come with authorization to make decisions on the matters in dispute. The Appeal Division may ask the appropriate Board officer to attend. The mediation session will be conducted by an individual who will not preside at the hearing if the matter proceeds to a hearing. Any discussions between parties during mediation will not be part of the evidence at the hearing if the matter does not settle. It would be expected that a withdrawal of the appeal would be part of any settlement reached. If a withdrawal does not result, the Appeal Division panel assigned to consider the merits of the appeal will determine the disposition of the matter.

A **pre-hearing conference** may be initiated by the Appeal Division by conference call or by a meeting of the parties and their representatives. The conference will normally be conducted by the panel assigned to hear the appeal, at the panel's discretion. Parties should be prepared for a useful discussion of all items to be addressed.

A request for a pre-hearing conference should be made in writing at least 30 days before the hearing and should include a list of the items the party wants addressed at the conference.

Some matters that may be discussed at a pre-hearing conference include:

- defining and simplifying the issues to be determined at the hearing;
- identification of witnesses;
- arranging for the exchange of documents;
- submission of facts relevant to the hearing and consented to by the parties;

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- submission of any evidence relevant to the hearing and consented to by the parties;
  - resolution of the appeal.

These provisions do not preclude other voluntary meetings between the parties.

### **(b) Postponement of a Hearing**

All parties to an appeal are entitled to a hearing of their appeal in a timely fashion. Accordingly, the Appeal Division may grant a postponement of a hearing where all parties to the appeal consent to the postponement or when the party requesting the postponement can show that special circumstances exist which justify postponing the hearing to a later date.

A postponement request should be made in writing and should include the following information:

- the reasons for the request;
- the length of the postponement requested (and the next available date); and
- whether the other parties consent to the postponement.

In deciding whether to grant the request, the Appeal Division may consider a variety of factors including:

- any prior postponement that has already been granted in a particular matter;
- the length of time sought in the postponement request;
- any prejudice to the other parties, balanced against the prejudice to the appellant if the postponement is not granted;
- any other factors which may be relevant.

### **(c) Consolidation of Appeals**

The Appeal Division may consider combining two or more appeals and dealing with them in one proceeding where it considers that the appeals are related to each other or that the parties are the same. The goal of consolidation is to make the process more efficient.

The Appeal Division will notify all parties if it decides to consolidate the appeals. Objections to the consolidation may be made to the Appeal Division, in writing. An Appeal Division panel will issue a preliminary decision on the objection.

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#### **(d) Expedited Hearings**

The Appeal Division may consider requests for expedited hearings in certain cases. Requests should be made in writing and include reasons for the urgency.

The chief appeal commissioner or a delegate may consider the request having regard to the other parties' rights to proper notice of the appeal and the appeal hearing, and fairness to other appellants who are awaiting hearings.

#### **(e) Obtaining a Subpoena**

The parties to an appeal are responsible for arranging the attendance of witnesses and for the production of documents and other evidence at a hearing. If a proposed witness refuses to attend a hearing voluntarily or refuses to testify a party may ask the Appeal Division to issue a subpoena. Also, if a party refuses to produce, or does not have access to, certain relevant documents, a party may ask the Appeal Division to issue a subpoena.

The Appeal Division has authority under section 211 of Part 3 of the Act (which incorporates the provisions under section 87 of the Act) to issue a subpoena and require the production of documents and other items at a hearing.

A request for a subpoena should be in writing and include the following information:

- (i) the name and address of the witness, and
- (ii) the reasons why the person's attendance is required at the hearing.

If production of documents or other items is requested, the requesting party should provide:

- (i) a description of the document that would enable a reasonable person to know what document or information is being sought;
- (ii) the reasons why the document or information is relevant to the appeal.

If a subpoena is granted, the party requesting the subpoena will be responsible for serving it on the witness within a reasonable time before the witness is required to appear together with the appropriate conduct money as specified by the Rules of Court for the British Columbia Supreme Court.

#### **(f) Evidence at the Hearing**

The rules of evidence that apply to a hearing before the Appeal Division are less formal than those applied by a court. Relevance is the primary consideration for a hearing panel when deciding whether to admit evidence. This means, for example, that a hearing panel may admit

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hearsay and circumstantial evidence if it is considered relevant. Relevant evidence can be described as evidence (written or oral) that will shed some light on a disputed matter or tends to prove or disprove a fact in issue.

The hearing panel will generally have the Prevention Division's file material that was before the original decision-maker. Any evidence admitted during the hearing as relevant will be assessed by the hearing panel to determine what weight, if any, should be given to it before making a decision.

Section 8.0 of this Decision sets out the procedures to be followed to admit expert evidence at a hearing.

**(g) Interpreters**

A party may request a qualified interpreter for a hearing and, where required, the interpretation service will be arranged and paid for by the Appeal Division. The request should be made to the Appeal Division no later than 30 days prior to the scheduled date of hearing.

**(h) Procedures at the Hearing**

The degree of formality of a hearing may vary depending on the nature of the appeal, the number of parties to the appeal and whether or not the parties are represented. Generally, a hearing panel will follow the format set out below:

- (i) the parties may be asked if they wish to make opening statements
- (ii) the general order of presentation of evidence is:
  - 1. appellant
  - 2. respondent
  - 3. third party
  - 4. reply by appellant
- (iii) submissions (argument) by the parties, subsequent to the presentation of evidence, will generally follow the same order.

Where there is a "reverse onus" (for example in discriminatory action matters) the respondent will generally go first, followed by the appellant and third party. The respondent will also have a right of reply.

**(i) Expenses and Costs**

Section 100 of the Act and the published policies of the governors in the *Rehabilitation Services and Claims Manual* at item numbers 100.00 to 100.73 set out guidelines for deciding requests for expenses and costs.

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The Act requires that any expenses claimed be “incidental to” a contested matter. The general policy of the Board limits the claims to witness expenses and expenses incurred in producing evidence but does not include expenses of lawyers or other advocates. However, the Appeal Division has the discretion to award legal fees in unusual circumstances for deserving cases. In rare cases, an order may be made for the payment of costs by one party to another.

## **5.6 When a Prevention Officer Is Required to Attend an Oral Hearing**


An Appeal Division panel may ask a representative of the Prevention Division to attend an oral hearing in connection with a prevention appeal. In such cases, the following procedures and practices apply:

### **General**

1. The chief appeal commissioner has the authority under section 85.1 and section 211(1) of the Act to determine the practices and procedures of the Appeal Division.
2. Neither the Act nor policy provides the Prevention Division with legal standing to participate as a party in a hearing or an appeal
3. Where the panel decides to hold an oral hearing, the panel will determine whether to invite the participation of the Prevention Division and/or specific officers on the basis this participation will assist the panel’s inquiry into the merits of a particular case.
4. In general, the Prevention Division will not be asked to participate in an appeal where an oral hearing is not held unless the panel determines that further information from the Prevention Division is required to fully consider the appeal.

### **Scheduling**

1. The Appeal Division will attempt to accommodate the availability of Prevention Division staff when scheduling a hearing as long as there is no undue delay. The panel assigned to the appeal will identify which officer(s) is/are specifically needed.
2. Where the panel requests the participation of Prevention Division officers, the parties will be advised that the Prevention Division is participating by means of the Notice of Hearing. This will be copied to the Director of Investigations. The panel will consider any submissions from the parties about the participation of the Prevention Division.
3. Any party, including the employer, can request that the Prevention Division be invited to participate and the panel can determine the matter in their discretion.

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4. If the Prevention officer is attending the hearing, the Prevention Division will be provided with a copy of the employer's Notice of Appeal and/or submission(s) with the Notice of Hearing but they will be advised that this is for information purposes only. There will be no opportunity for the Prevention Division to provide a reply or other written submission.
  5. In some cases the panel hearing an appeal may hold a case management meeting with the parties in advance of the oral hearing in order to focus the issues and evidence and to facilitate the hearing process.

### **Conduct of the Hearing**

1. The panel will explain the role of the officer at the start of the hearing. In particular, the panel will advise the officer(s) that they are present as witnesses and are not a party to the appeal. For example, Prevention Division officers are present to give evidence, not argument, in order to assist the panel and their evidence should relate to the decision being appealed.
2. The panel will decide the order of evidence including whether the employer, the union, the aggrieved party or the officer should give evidence first.
3. The Appeal Division panel, or its counsel, may question the Prevention officer(s). The officer(s) will then answer questions from the parties. The Appeal Division panel, or its counsel, may also question the witnesses of the parties.
4. Some examples of the assistance that can be provided by the officer(s) include explaining the record, providing background information relevant to the decision under appeal, and responding to inquiries from the panel and the employer.
5. The officer(s) will not participate in the argument phase of the hearing although they may remain as observers unless there are specific reasons to exclude them, as determined by the panel.

## **6.0 DECISIONS**

### **6.1 Generally**

Section 212(1) provides that after considering an appeal the Appeal Division may:

- (a) confirm, vary or cancel the decision under appeal, or
- (b) refer the matter back to the Board for reconsideration.

A decision to refer a matter back to the Board will be made on a case-by-case basis by the hearing panel.

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Generally, the responsibility or “onus” for proving a fact is on the person who asserts it. However, section 153 of the Act provides that there is a “reverse onus” on an employer or union when a discriminatory action is alleged. The standard of proof on appeals at the Appeal Division is the civil standard of “balance of probabilities.”

In reaching its decision, the Appeal Division will apply and interpret the Act, regulations and published policy of the Panel of Administrators. The Appeal Division does not have authority to create new policy. If there is a conflict between the Act or regulations and a published policy of the Panel of Administrators of the Board, the Act or regulations are paramount and the interpretation of the policy most consistent with the intention of the Act or regulations will be applied.

A decision of the Appeal Division is deemed to be a decision of the Board.

## **6.2 Written Reasons for Decisions**

Section 212(2) states that the Appeal Division must make a written copy of its decision, with reasons, available to the parties. There is no specific time limit in the Act for issuing decisions; however, the Appeal Division will attempt to issue decisions within 90 days following an oral hearing or 90 days after final written submissions are received.

## **6.3 Reconsiderations**

Section 211(4) provides that section 96.1 (which deals with applications for reconsideration on the basis of substantial and material new evidence arising subsequent to the hearing) does not apply to an appeal in Part 3, Division 14.

Section 212(3) of the Act states that a decision of the Appeal Division, in which it has jurisdiction, is final and conclusive and not open to question or review in a court on any grounds.

However, an application for reconsideration of a decision may be brought on certain limited common law grounds including clerical mistakes or omissions, fraud, or an error of law going to jurisdiction including a breach of natural justice.

## **7.0 TRANSITION PROVISIONS**

The transition provisions with respect to appeals to the Appeal Division are contained in section 36 of Bill 14.

The rules with respect to the appeal of decisions made before Bill 14 came into force can be summarized as follows:

1. If the decision was *not* appealable to the Appeal Division under Part 1 of the *Workers Compensation Act* before Bill 14 came into force, it may not be appealed under Division 14.

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2. If the decision was appealable to the Appeal Division under Part 1, would be appealable under Division 14, and an application for appeal had been filed but not heard at the time Bill 14 came into force, then the appeal continues under the provisions of Part 1.
  3. If the decision was appealable to the Appeal Division under Part 1, would be appealable under Division 14, and *no* application for appeal had been filed at the time Bill 14 came into force, then the appeal must be decided in accordance with the new Part 3.

Therefore, the appeal procedure in Part 3 will only apply to decisions made before the coming into force of Part 3 if the following conditions are met:

1. The decision was appealable under Part 1.
2. The decision is appealable to the Appeal Division under Part 3.
3. No application for appeal has been made at the time Part 3 came into force.

In all other cases, the provisions of Part 3, and in particular the power to issue a stay, will apply to appealable decisions made on or after October 1, 1999, the date Part 3 came into force.

# REPORTER

## Appendix "E"

**Subject: Assessment Appeals**

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In this Appendix:

“assessment appeal” refers to an appeal from a decision made by either the Assessment Department or the Revenue Services Department.

“Assessment Department” refers to both the Assessment Department and the Revenue Services Department.

“officer” refers to an officer from the Assessment Department or an officer from the Revenue Services Department.

## **INTRODUCTION**

Governors’ published policy, in the *Assessment Policy Manual* (Policy 10:40:00), provides the following information regarding appeals to the Appeal Division on assessment matters:

- Should an employer be dissatisfied with the decision of the Assessment Department, an appeal may, subject to sections 96(6) and 96(6.1) of the Act, be made to the Appeal Division;
- An appeal to the Appeal Division must be in writing and made within 30 days of the decision being appealed or a longer period the chief appeal commissioner may allow; and
- An appellant is required to outline the error of law or fact or contravention of the published policy of the governors in the decision under appeal.

Policy 10:40:00 also provides:

It is recommended that the employer exhaust the internal avenues of review within the Assessment Department prior to bringing an appeal to the Appeal Division. If the employer chooses not to follow this recommendation, and appeals directly to the Appeal Division without exhausting the internal avenues of review, the Appeal Division will invite the Assessment Department to respond to the written submissions of the appellant. Any such response will be disclosed to the parties who will have the opportunity to provide rebuttal or comment prior to the matter being considered by the Appeal Division.

Section 96(7) of the Act provides that the commencement of an appeal under subsection 96(6) or 96(6.1) does not relieve an employer from paying an amount in respect of which the appeal is commenced but, if the appeal is successful, the amount to be returned to the employer must be accompanied by interest, calculated in accordance with the policies of the governors, on the amount to be returned.

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## **1.0 THE APPEAL PROCESS**

In general, the appeal processes for assessment appeals are similar to those set out:

- In **Appendix “C”** “Claims Appeals” for initiating an appeal, requesting an oral hearing, and making written submissions; and
- In **Appendix “B”** “Oral Hearings Before the Appeal Division” for scheduling and conducting oral hearings.

However, these general procedures are subject to the specific provisions for assessment appeals in this Appendix.

## **2.0 PARTICIPATION IN AN ASSESSMENT APPEAL**

Under section 96(6) and 96(6.1), an “employer” under the Act may bring an assessment appeal and is a party with standing on these matters. (See **Appendix “A”** on Standing and Jurisdiction.) In addition, the Appeal Division has the discretion to invite the participation of other persons or groups where their participation will assist an inquiry into the merits of the issues.

### **2.1 Workers and Unions**

In an assessment appeal, the Appeal Division may provide notice to the workers or trade union representative of the workers employed by the employer (see Decision of the Governors #75 (1994), 10 *Workers’ Compensation Reporter* 753).

### **2.2 Affected Employers**

Also, because the compensation system is a system of modified collective liability, there may be cases where an employer’s assessment appeal will affect one or more other employers. Where the deputy chief appeal commissioner prior to panel assignment, or the panel after assignment, is satisfied that an employer or group of employers is directly and substantially affected by the outcome of an appeal, these persons may be invited to participate in the appeal on that basis.

## **3.0 WHEN AN OFFICER IS REQUIRED TO ATTEND AN ORAL HEARING**

Where the panel decides to hold an oral hearing, the panel will determine whether to invite the participation of the Assessment Department and/or specific officers, on the basis that this participation will assist the panel’s inquiry into the merits of the particular case (subject to Policy 10:40:00). In such cases, the following procedures and practices apply.

### **3.1 Generally**

- (a) The chief appeal commissioner has the authority under section 85.1 of the Act to determine the practices and procedures of the Appeal Division.
- (b) Policy 10:40:00 requires that the Assessment Department be invited to respond to an employer's written submission if the employer has not exhausted the internal review procedures of the Assessment Department. In general, an oral hearing will not be granted until after the employer has exhausted the internal review procedures of the Assessment Department.
- (c) Neither the Act nor policy provide the Assessment Department with a legal right to participate as a party in a hearing or an appeal (subject to the ability to make a reply submission as provided in Policy 10:40:00).
- (d) If requested to attend the hearing, the officer participates in the hearing as a witness from the Assessment Department, to assist the panel in its inquiry under the Act. As a witness, the officer's role is not to argue the case, nor to defend the Assessment Department's position in the appeal proceedings. See, for example, Decision #00-1788 (November 9, 2000) and Decision #00-1789 (November 9, 2000).

The decision being appealed will be the basis of the evidence of the Assessment Department.

### **3.2 Scheduling**

- (a) The Appeal Division will attempt to accommodate the availability of the Assessment Department staff when scheduling a hearing as long as there is no undue delay. In some cases, the panel assigned to the appeal may identify which officer is specifically needed.
- (b) The employer will be advised that the Assessment Department is participating, or not participating, by means of the Notice of Hearing. This will be copied to the director of Assessments. The panel will consider any submissions from the employer about the participation of the Assessment Department.
- (c) If an officer is attending the hearing, the Assessment Department will be provided with a copy of the employer's submission(s) with the Notice of Hearing but they will be advised that this is for information purposes only. Pursuant to Policy 10:40:00, there is no opportunity for the Assessment Department to provide a reply or other written submission if the employer has exhausted the internal avenues of review.
- (d) In some cases the panel hearing an appeal may hold a case management meeting with the parties in advance of the oral hearing in order to focus the issues and evidence and to facilitate the hearing process.

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### **3.3 Conduct of the Hearing**

- (a) The panel will explain the role of the officer at the start of the hearing. In particular, the panel will advise the officer(s) that they are present as witnesses and are not a party to the appeal. For example, officers are present to give evidence, not argument, and their evidence should relate to the decision being appealed.
- (b) The panel will decide the order of evidence including whether the employer should present its evidence first or whether the officer should give evidence first. Exclusion of witnesses may be required.
- (c) The Appeal Division panel, or its counsel, may question the officer. The officer will then answer questions from the parties. The Appeal Division panel, or its counsel, may also question the witnesses of the parties.
- (d) Some examples of the assistance that can be provided by the officer include explaining the record, providing background information relevant to the decision under appeal, and responding to inquiries from the panel and the employer. There is no opportunity for the Assessment Department to ask questions of the employer's witnesses.
- (e) The Assessment Department will not participate in the argument phase of the hearing. The officer(s) may remain as observers unless there are specific reasons to exclude them, as determined by the panel.

### **4.0 DECISIONS**

The 90-day time frame for decisions has been taken to apply to all matters appealed under section 96(6) and 96(6.1).



# REPORTER

## Appendix “F”

**Subject: Relief of Costs Appeals**

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The policies of the Board with respect to the making of decisions under section 39(1)(d) and (1)(e) are made by the governors. Decisions on individual claims under section 39(1)(d) and (1)(e) are made by Board officers, with a right of appeal to the Appeal Division under section 96(6)(a) of the *Workers Compensation Act*.

The following practices and procedures to be followed by the Appeal Division in the consideration of appeals from decisions made under section 39(1)(d) and (1)(e) have been formulated based on the requirements of the Act, and the existing policies of the Board as set out in Items #102.27, 104.40, and 114.30 to 114.50 of the *Rehabilitation Services and Claims Manual*.

## **1.0 INITIATION OF AN APPEAL**

### **1.1 30-Day Time Limit**

There is a 30-day time limit for initiating such an appeal to the Appeal Division. The question arises as to the effect of this time limit with respect to section 39 determinations which have not been communicated to the employer. Under the current policy of the governors, as set out in Item #114.43 of the *Rehabilitation Services and Claims Manual*, an employer is only advised of a decision not to charge any of the costs of the claim against the reserve established under section 39(1)(e) when and if the employer requests such relief.

Section 96(6)(a) provides the employer a right of appeal to the Appeal Division from a “notice of an assessment under section 39.” Section 101 of the *Workers Compensation Act* states:

Every notice which the board is empowered or required to give to an employer or worker . . . shall be in writing, and may be served either personally or by mailing it to the address of the person to whom it is given. Where a notice is mailed, service of the notice shall be deemed to be effected at the time at which the letter containing the notice, and properly addressed, postage prepaid and mailed, would be delivered in the ordinary course of post.

In order for the time limit for an appeal concerning section 39 to commence, notice of the assessment must be served on the employer. To avoid any confusion as to when the 30-day time limit commences for appealing a decision regarding section 39, the practice of the Appeal Division will be to require that the notice be in the form of a decision with reasons. A cursory determination contained in a file document that section 39 would not be applicable is not appealable to the Appeal Division. If an employer has not received a decision with reasons from a Board officer concerning the merits of the application of section 39, this must be obtained prior to an appeal being commenced to the Appeal Division on this issue.

Extensions of time will be granted to allow appeals to be initiated within 30 days of a review by a manager, Compensation Services.

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If an appeal has already been initiated at the Appeal Division and the employer advises an issue requires further adjudication by the Compensation Services Division prior to consideration of the appeal, the procedure at section 3.5 (2nd paragraph) in **Appendix "C"** applies to any request to withdraw the Appeal Division appeal pending further adjudication. If the employer re-establishes the appeal within the 30-day period, the Appeal Division panel will consider the appeal as being from both the original decision appealed, and the decision arising from the further adjudication.

## **1.2 Grounds for Appeal**

Section 96(6) of the Act and the policy of the governors require that the appellant outline the error of law or fact or contravention of the published policy of the governors in the decision under appeal. If grounds for the appeal are not provided within 21 days following a request for these from the Appeal Division, the appeal will normally be considered to have been abandoned.

## **1.3 De-registered Employers**

On occasion, a relief of costs appeal will be filed when the records of the Assessment Department indicate that an employer's account with the Board is cancelled. These situations usually arise when a representative initiates an appeal on behalf of an employer who is de-registered.

If the Assessment Department is able to identify a successor employer that would be entitled to relief of cost if the appeal is successful, the Appeal Division will provide disclosure and process the appeal on behalf of that employer.

If the Assessment Department is not able to identify a successor employer and the Appeal Division is unable to identify another party who would be entitled to relief of cost if granted, then the file will be assigned to a panel for a decision on whether there is "an employer" with standing to initiate an appeal as required by section 96(6) of the Act. Any submissions on that issue by the representative who initiated the appeal would be considered at that time.

Section 96(7) of the Act provides that the commencement of an appeal under subsection 96(6) or 96(6.1) does not relieve an employer from paying an amount in respect of which the appeal is commenced but, if the appeal is successful, the amount to be returned to the employer must be accompanied by interest, calculated in accordance with the policies of the governors, on the amount to be returned.

Also, the 90-day time frame for decisions has been taken to apply to all matters appealed under section 96(6) and 96(6.1).

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## **2.0 PARTICIPATION BY THE WORKER IN AN APPEAL OR REHEARING OF A DECISION UNDER SECTION 39**

### **2.1 Worker Is Not a Party**

The policy of the governors, as stated in Item #114.41 of the *Rehabilitation Services and Claims Manual*, is that:

Section 39(1)(e) is concerned only with the class to which the costs of the claim are to be charged and cannot affect the entitlement of the claimant.

In Item #102.27 of the Manual, the jurisdiction of the Review Board under section 90 of the Act to consider an appeal from a decision “with respect to a worker” is defined as follows:

The limiting words ‘with respect to a worker’ mean that the decision under appeal must be a claims decision involving an issue of a kind or class that affects workers financially.

The review board has no jurisdiction if the issue in dispute is simply one of cost allocation among employers, or among classes of employers.

Pursuant to the governors’ policy, the decision under section 39(1)(e) cannot affect the entitlement of the claimant, and the worker is therefore not a party to the appeal.

### **2.2 Where Participation of the Worker Assists in the Inquiry**

In Decision of the Governors #75 (1994), 10 *Workers’ Compensation Reporter* 753, the governors stated that:

Where the participation of other parties in the procedure will assist inquiry into the merits of the issues, the Appeal Division may give notice to or allow intervention by these other parties.

... in appeals commenced under Sections 96(6) and 96(6.1) the Appeal Division may give notice of the appeal to the workers or trade union representative of the workers employed by the employer who may have an interest in the appeal.

The participation of the worker may assist the Appeal Division in its inquiry into the merits of the issues raised on an appeal under section 96(6)(a) concerning section 39. The question as to whether the worker suffered from “a pre-existing disease, condition or disability” is one on which the worker’s evidence as to their prior medical and employment history may well be relevant.

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The practice of the Appeal Division is to notify a worker when the employer receives disclosure of the claim file after filing an appeal. Nevertheless, in regard to a decision under section 39, the worker's comments are not essential to the Appeal Division's consideration of the matter. Natural justice does not require the worker's participation as the worker will not be affected by the proceeding. The worker's comments may be provided by the worker on their own initiative, or in response to a specific request by the panel of the Appeal Division considering the matter. The worker is advised that he/she may on application be provided with copies of the documentation submitted by the employer in connection with the appeal. While workers will be informed that the decision on the appeal cannot affect their entitlement, they will be permitted, if they wish, to provide comment for the purpose of assisting in the Appeal Division's inquiry. If the worker's current address is not readily available, the Appeal Division will not pursue attempts to notify the worker of a relief of costs appeal. If the worker is deceased, the Appeal Division will generally not notify a worker's dependents, or the estate, of a relief of costs appeal.

In the course of considering an appeal under section 39, a panel of the Appeal Division may exercise its discretion to request further information from the worker to assist in its inquiry into the merits of the issues.

### **3.0 DECISION NOT TO AFFECT THE WORKER'S ENTITLEMENT**

As noted above, a decision under section 39 cannot affect the entitlement of the worker. If the worker's entitlement could be affected, the decision would be one with respect to a worker and would be appealable to the Review Board under section 90. It would be clearly contrary to both the intention of the legislature as evidenced in section 90 of the Act, and the policy of the governors, for the Appeal Division to make a decision on an appeal under section 39 which could affect a worker.

If an employer is disputing a decision that the worker had no pre-existing disability, an appeal may be made to the Review Board concerning the application of section 5(5) of the Act to the claim. The Appeal Division will suspend its consideration of an appeal or rehearing of a decision under section 39(1)(e) if it is notified that the application of section 5(5) is being considered by the Claims Division or the Review Board, pending the determination of that issue on the claim.

In order to comply with the policy of the governors, the decision of the Appeal Division on section 39 matters must be rendered in a fashion which does not affect the entitlement of a worker. To comply with that requirement, if the appeal is allowed the Appeal Division may not specifically identify whether this is being done on the basis of there being a pre-existing disease, condition or disability where, to do so, would pre-empt a decision by a Board officer or a right of appeal to the Review Board on an issue affecting the worker. Reasons will, however, be provided for every decision. The Appeal Division will observe the governors' policy in a fashion consistent with the Appeal Division's primary obligation to ensure compliance with the provisions of the *Workers Compensation Act*.

## **4.0 APPEALS RELATED TO THE HISTORICAL SECTION 39(1)(e) PROJECT**

To ensure the personal privacy of workers is protected, the information and privacy commissioner recommended that employers not be given access to workers' files unless there is a valid appeal. In a resolution dated June 11, 1996, the Panel of Administrators determined that effective July 1, 1996, employers cannot review the file before initiating an appeal.

This aspect of this decision is concerned with the practice and procedure to be followed by the Appeal Division respecting appeals related to the Historic Section 39(1)(e) Project. The Historic 39(1)(e) Project involves reviewing files for relief of costs considerations where wage loss exceeded 13 weeks, and ended between March 15, 1978 and December 31, 1993.

- Section 96(6) of the *Workers Compensation Act* provides an employer may appeal to the Appeal Division within 30 days from a decision on relief of costs. This right of appeal will include decisions from the Historic 39(1)(e) Project.
- The governors' published policy in Decision of the Governors #75 requires written reasons for appeal. Consistent with procedures for other appeals, if written reasons have not already been provided, the appeal officer will write to the representative, requesting them. The letter will indicate that failure to respond within 21 days will result in the appeal being considered abandoned, and any further consideration will require an extension of time to appeal.
- Consistent with procedures for other appeals, the representative must request disclosure in writing if disclosure has not already been provided (such as on a prior appeal), but updated disclosure will be provided automatically. The appeal must remain active while disclosure is provided. The worker will be advised when the employer is granted disclosure of the file.
- After reviewing the file, it is open to the employer to withdraw the appeal, and seek reconsideration by submission to a manager.
- While awaiting reconsideration by the manager, the employer must withdraw the appeal before the Appeal Division, or the appeal will proceed to an appeal panel for a decision within 90 days. There is no provision for "suspending" an appeal before the Appeal Division. As in other cases where an appeal is withdrawn pending a request for reconsideration, the appellant can re-establish that appeal within 30 days of any reconsideration. A delay beyond 30 days of the reconsideration decision will require an application for an extension of time.
- The initial appeal should be re-established within 30 days of the manager's reconsideration decision. If the reconsideration addresses the merits, an appeal of that reconsideration would also allow the Appeal Division to address the merits.

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## **5.0 NECESSITY FOR REASONS IN DECISIONS BEING APPEALED UNDER SECTION 96(6) AND 96(6.1)**

On April 24, 1997, a three-person panel of the Appeal Division considered an appeal from a review clerk's decision. Their decision, #97-0525, observed that the decision letter contained no reasons for denying relief of costs. Section 96(6) and (6.1) allow an employer to appeal "on the grounds of error of law or fact or contravention of a published policy of the governors." An appeal can only be allowed on the merits in relation to one of these grounds. Without reasons in the decision letter, the panel concluded, it was difficult for them to discharge their obligation under the Act to ensure full and proper consideration be given to whether these grounds had been met. Furthermore, the absence of reasons may impair the employer's opportunity to exercise the right of appeal in a meaningful fashion. The panel noted that it was not addressing the adequacy of the reasons provided, but the absence of reasons.

The panel allowed the appeal on a preliminary basis. They declined to hear the appeal on the merits, set aside the review clerk's decision, and remitted the matter to the Compensation Services Division to provide a decision with reasons.

Against that background, the following practice and procedure applies:

- Appeals under sections 96(6) and (6.1) will be reviewed by the Appeal Division on a preliminary basis. If reasons have not been provided, the appeal will not proceed.
- The matter will be returned to the appropriate Division of the Board to render a decision with reasons.

The employer has a right of appeal to the Appeal Division from the further decision of the appropriate Division within 30 days.



# REPORTER

## Appendix “G”

**Subject: Section 11 Determinations by the Appeal Division**

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## **1.0 SECTION 11 APPLICATIONS**

In Decision of the Governors #4 (1991), 7 *Workers' Compensation Reporter* 19, the governors assigned to the chief appeal commissioner and the Appeal Division the Board's obligation to issue certificates under section 11. Section 11 Certificates are provided on request by the court, or on request by any party to a legal action. A request for a section 11 Certificate shall be made in writing to the Appeal Division.

In establishing time frames for section 11 Certificates, the Appeal Division will take into account the requirements of the legal action, and, in particular, any trial date which has been scheduled.

### **1.1 Standing to Make Application**

The court or any party to a legal action may, any time after a legal action has been commenced, request a Certificate under section 11 of the Act. A request for a section 11 Certificate shall be made in writing to the Appeal Division.

### **1.2 Timing of Application**

A section 11 application should be made well in advance of any trial date. The Appeal Division generally requires 90 days from the completion of submissions, and provision by the parties of all necessary information, to issue a section 11 determination. If the application for a section 11 determination is made less than 90 days before a trial date, the Appeal Division will not be able to process the application. For applications made earlier, it may nevertheless be necessary to adjourn the trial date if insufficient time is available for the Appeal Division's consideration.

### **1.3 Pleading a Defence Under Section 10**

The practice of the Appeal Division is to address a section 11 application without requiring a defence under section 10 of the *Workers Compensation Act* to be plead in the Statement of Defence (although pleading such a defence may still be prudent, as well as necessary for the purposes of the legal action). It is necessary, however, that the application come within the terms of section 11 as involving an action based on a disability caused by occupational disease, personal injury or death, and that the matter sought to be determined be relevant to the action and within the competence of the Workers' Compensation Board.

### **1.4 Application for Compensation (Form 6)**

It is prudent for the Plaintiff to file a Form 6 *Application for Compensation & Report of Injury or Occupational Disease* on a "provisional" basis pending the outcome of the section 11 application. This protects the Plaintiff's right to proceed with a worker's compensation claim, should

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the legal action ultimately be found to be barred. The general requirement of section 55 of the Act is that an application for compensation be filed within one year of the date of injury. Reference should be made to section 10 of the Act regarding subrogation and election.

## **1.5 Initiating the Application**

A section 11 application is initiated by writing to the Appeal Division, Workers' Compensation Board:

Mailing Address:	Located at:
PO Box 5350 Stn Terminal	6951 Westminster Highway
Vancouver BC V6B 5L5	Richmond BC V7C 1C6

Fax: 604 279-7404 or 604 276-3349  
Telephone: 604 276-3067  
Toll-free telephone in B.C.: 1 800 661-2112

The Appeal Division must be advised of the trial date, if the matter has been set for trial. The Appeal Division also requires the following materials:

- (a) The birth date(s), current address(es) and social insurance number(s) of the parties to the legal action;
- (b) Any claim numbers for related Workers' Compensation Board claims;
- (c) Names and current addresses of the employer(s) of all plaintiffs, defendants and third parties;
- (d) Copies of the following documents:
  - Writ of Summons;
  - Statement of Claim & Statement of Defence, if filed;
  - Any statements made to I.C.B.C. (in motor vehicle accident cases); and
  - Transcripts of Examinations for Discovery, if held;
  - Any Third Party pleadings;
  - Any affidavits and motions filed in the legal action.

All parties to the legal action are notified by the Appeal Division and are given the opportunity to participate in the section 11 application. The matter will generally proceed by way of written submissions, although it is open to a party to request an oral hearing. If counsel wish to postpone the provision of submissions pending the completion of Discoveries, this will normally be approved by the Appeal Division.

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## **2.0 STANDING OF OTHER PERSONS ADVERSELY AFFECTED**

Other persons who might be adversely affected by the section 11 determination may be given standing to participate, even though they are not a party in the legal action. This would include, for example, the putative employer of a Plaintiff, Defendant or Third Party who is alleged to have been a worker at the time of their injury. Natural justice requires that the alleged employer have the opportunity to participate, in view of the possibility that the section 11 proceeding may lead to a claim for workers' compensation benefits being established.

## **3.0 ORAL HEARING**

The matter may proceed by way of oral hearing. The provisions of section 7.2 of this Decision are generally applicable. A preliminary request for an oral hearing should be made in writing, addressed to the Appeal Division, and should provide reasons as to why an oral hearing is necessary. The request should also indicate whether a one- or three-person panel is preferred. An oral hearing may be granted, for instance, if a significant issue of credibility is involved. An Appeal Division panel has the discretion to convene an oral hearing, whether or not one is requested, if the panel considers this necessary.

## **4.0 PRIOR DECISION BY A BOARD OFFICER**

The Appeal Division will, in considering a section 11 application, consider all of the evidence and argument anew irrespective of a prior decision by a Board officer.

## **5.0 SUBMISSIONS**

### **5.1 Requesting Party Provides First Submission**

The party requesting the section 11 application is asked to provide the first submission. This submission should identify the determinations requested, set out the factual background, and provide all the evidence and argument necessary to the Appeal Division's consideration of the issues. Counsel should not assume that the Appeal Division will carry out any further investigations, although the panel has the authority to undertake further inquiries if they believe it is necessary.

### **5.2 Legal Argument and Evidence**

Legal argument should include reference to the policy of the governors which consists of:

- (a) *Rehabilitation Services and Claims Manual*;
- (b) *Assessment Policy Manual*;

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- (c) *Prevention Division Policy and Procedure Manual*;
  - (d) *Prevention Manual*;
  - (e) *Workers' Compensation Reporter*, Decision Nos. 1 to 423 (unless specifically retired);
  - (f) Decisions of the governors/Panel of Administrators declared to be policy (to be published in the *Workers' Compensation Reporter*).

The Appeal Division is not bound to follow legal precedent, however, it does strive for consistency in its decision-making. Selected Appeal Division decisions are published in the *Workers' Compensation Reporter*. These include thirty decisions on section 11 applications, published in the *Workers' Compensation Reporter* at Volume 9 Number 5, amongst others published since then. These decisions may be accessed at the following web site address: <http://www.worksafebc.com/policy/appeals/appdiv01.asp>.

In addition, all Appeal Division decisions since January 1, 2000, including section 11 determinations, are available on the Board's internet web site located at <http://www.worksafebc.com>. All section 11 determinations prior to January 1, 2000 will also be available on the web site so long as the determination was filed in a British Columbia court registry.

Evidence may be submitted in any form, such as handwritten statements by witnesses, business records, sworn affidavits, transcripts of evidence given under oath at an Examination for Discovery, or *viva voce* evidence at an oral hearing before the Appeal Division. While the strict rules of evidence do not apply, the form of the evidence may affect the weight given to the evidence.

### **5.3 Exchange of Submissions**

The first submission is provided to the participating parties, who are asked to provide their submissions in reply. Their responses are provided to the first party, who is given an opportunity to provide rebuttal argument. A three-week time frame is normally granted for the provision of each submission, which may be extended upon request. A shorter time frame may be required if a trial date is impending.

Counsel must provide a copy of their submissions to opposing counsel and to any other interested party at the same time as they send their submissions to the Appeal Division.

### **6.0 USE OF EXISTING WCB FILES**

If a WCB claim file has been established, or if an employer assessment file or prevention file exists, it will be available to the Appeal Division panel. Disclosure of a file, for the purposes of the legal action, may be obtained by writing to the legal disclosures clerk at the Board. A Court

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Order under Rule 26(11) of the British Columbia, *Rules of Court* or the written consent of the “worker” or employer, as the case may be, is required.

## **7.0 SCOPE OF AUTHORITY UNDER SECTION 11**

The Appeal Division can, by the terms of section 11, determine any matter that is relevant to the action and within its competence under the *Workers Compensation Act*. Without limiting the generality of that authority, the Appeal Division may determine whether:

- (a) a plaintiff, defendant or third party was, at the time the cause of action arose, a worker or employer within the meaning of Part 1 of the Act;
- (b) injury, disability or death of a plaintiff arose out of, and in the course of, the plaintiff’s employment;
- (c) any action or conduct of a defendant, third party, employer, the employer’s servant or agent, which caused the alleged breach of duty of care, arose out of, and in the course of employment;
- (d) an employer or the employer’s servant or agent was, at the time the cause of action arose, employed by another employer; and
- (e) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1 of the Act.

## **8.0 DECISIONS**

The matter will be assigned to an Appeal Division panel for consideration. This assignment may occur prior to submissions being completed if preliminary matters arise requiring the panel’s consideration. Once submissions are complete, and the matter has been considered, the panel will issue both a Certificate and written reasons for its decision. Both documents will be signed by the appeal commissioner(s) who made the decision. Unfiled copies will be provided to each party, followed by filed copies after they have been entered in the legal action with the Court Registry.

Section 85.2(6) of the *Workers Compensation Act* states that, “A decision of the appeal division or of a panel shall be deemed to be a decision of the board.” There is no avenue of appeal from a section 11 determination. The privative clause applies – under section 96(1) of the Act, the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under Part 1 of the Act.

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## 9.0 EFFECT ON THE LEGAL ACTION

The Appeal Division does not determine the effect of the Certificate on the legal action. It is beyond the Appeal Division's jurisdiction to determine whether a legal action is barred. Following a section 11 Certificate, an application may be made in Chambers to determine whether the action should be dismissed based on section 10 of the Act and the findings contained in the Certificate.

## 10.0 RELATED COURT DECISIONS

The following is a non-exhaustive list of some decisions of the British Columbia courts dealing with section 11 Certificates:

- *Smith v. Vancouver General Hospital* (1981), 31 B.C.L.R. 358 (C.A.)
- *Anderson v. Spaidal* (1985), 68 B.C.L.R. 135 (C.A.)
- *Bradshaw v. Herman and WCB*, [1985] 1 W.W.R. 279 (B.C.C.A.)
- *Murphy v. Dowhaniuk and WCB* (1986), 7 B.C.L.R. (2d) 335 (C.A.)
- *Virk v. Bannister* (1989), 36 B.C.L.R. (2d) 241 (B.C.C.A.)
- *Radhak v. British Columbia (WCB)* (1990), 45 B.C.L.R. (2d) 94 (S.C.)
- *Hunt v. T&N, plc* (1994), 96 B.C.L.R. (2d) 300 (S.C.)
- *Yuen v. Woodward* (25 September 1990), Vancouver B883719 (B.C.S.C.), [1990] B.C.J. No. 2928 (Q.L.)
- *Clack v. Duffus* (1995), 5 B.C.L.R. (3d) 120 (S.C.)
- *Parmar v. Virk* (1995), 5 B.C.L.R. (3d) 343 (S.C.)
- *Erlandson v. Roufousse* (1995), 11 B.C.L.R. (3d) 256 (S.C.)
- *Hazell v. Toews* (22 September 1997), Victoria 2424/94 (B.C.S.C.), [1997] B.C.J. No. 2495 (Q.L.)
- *Greyhound Canada Transportation Corp. v. Brzozowski* (2000), 76 B.C.L.R. (3d) 266 (C.A.)
- *Kovach v. B.C. [WCB]*, [2000] 1 S.C.R. 55

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- *Krentz v. Thodos* (3 December 1998), Vancouver B963569 (B.C.S.C.)
  - *Zacharias v. Lo* (31 March 1999), New Westminster S0042785 (B.C.S.C.), [1999] B.C.J. No. 881 (Q.L.)

## **11.0 OTHER MATTERS**

The Appeal Division will deal only with the request for a certificate under section 11. Inquiries concerning the filing of a claim for compensation should be made to the Compensation Services Division of the Board.

Inquiries as to the Board's subrogated interest in a legal action under section 10 of the *Workers Compensation Act* in claims made to the Board should be directed to the Legal Services Division of the Board (telephone 604 276-3121, fax 604 279-8116).

Section 10(5) of the *Workers Compensation Act* provides that:

If after trial, or after settlement out of court with the written approval of the board, less is recovered and collected than the amount of the compensation to which the worker or dependant would be entitled under this Part, the worker or dependant is entitled to compensation under this Part to the extent of the amount of the difference.

# REPORTER

## Appendix “H”

**Subject: *Criminal Injury Compensation Act*<sup>1</sup>  
Requests for Leave and Review**

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<sup>1</sup> Unless otherwise stated, all references in this Appendix to the Act or the *Criminal Injury Compensation Act* should be taken to be reference to the *Criminal Injury Compensation Act*, R.S.B.C. 1996, c. 85, as amended.

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## **1.0 LEAVE TO REVIEW**

### **1.1 Generally**

The Appeal Division can further review the findings and report of an appeal committee, but only if the chief appeal commissioner (or delegate) has first given leave. (There is also a provision in the Act for the appeal committee itself to give leave for a further review of its findings and report by the Appeal Division. This rarely happens, and is not dealt with here.) Only if leave is given will the Appeal Division proceed to review the merits of the applicant's case.

Applications for leave for further review must be in writing and should be addressed to the Appeal Division. If leave to appeal is granted, the Appeal Division will further review the findings and report of the appeal committee, or the decision provided by the Board officer to the victim or his dependant.

The need to obtain leave for a further review of an appeal committee's findings and report suggests that the legislature intended to provide a more narrow basis for review than a simple right of appeal. The legislature's use of the word "review," rather than "appeal," supports this interpretation.

The *Criminal Injury Compensation Act* does not state the grounds upon which the chief appeal commissioner will exercise discretion to grant leave for further review. The following factors are drawn from past leave decisions. Reference to these grounds in applications for leave will help the chief appeal commissioner make leave decisions more quickly. Leave may be given for other reasons as well, and applicants may present any information they consider supports their application for leave.

### **1.2 Factors for Consideration**

Leave may be granted if any of the following factors appear to exist:

1. substantial and material new evidence;
2. strong reasons to doubt the correctness of the findings, such as the presence of the following in the findings:
  - (a) an error of law on the face of the record;
  - (b) an error with respect to an important fact, which error is clear from the record;
  - (c) the absence of any evidence to support the findings; or
  - (d) an obvious oversight of some material evidence (as opposed to considering and rejecting such evidence – it is not intended that leave be granted simply for the purpose of reweighing the evidence considered by the appeal committee);

- 
3. a breach of the rules of natural justice;
  4. an issue concerning the interpretation of the Act or policy of significance beyond the particular case.

This list, although not exhaustive, describes situations in which there has been a serious flaw in the decision-making process, or a significant issue of statutory or policy interpretation has been raised, and where further review is warranted.

A leave application will usually be considered by a non-representational appeal commissioner, exercising the delegated authority of the chief appeal commissioner under section 22(5) of the Act (as set out in **Appendix “O”**).

## **2.0 THE PROCESS**

### **2.1 “One-Step” or “Two-Step”?**

Until mid-2000, the Appeal Division always used a “two-step” process. That is, applicants first made an application for leave, and a decision was issued allowing or denying leave for further review. If leave for further review was granted, applicants were invited to provide further submissions in support of the merits of their case. The file was then assigned to an Appeal Division panel (often the same panel that made the leave decision) to issue a decision on the merits. There were therefore two decisions, often separated by several months, and requiring considerable processing by Appeal Division staff.

In practice, the great majority of applicants provided all of their submissions initially, in support of the application for leave, and did not provide additional submissions on the merits. Therefore, the Appeal Division has established a “one-step” process, in which both the decision on the leave application and the decision on the merits are made at the same time by the same panel, and reported in the same decision document.

In most cases, the “one-step” process will be used, but in some circumstances the two-step process may be preferable; those circumstances are described below. Regardless of the process used, the following procedures apply.

### **2.2 Procedures Under Either Process**

In general, the procedures set out in section 3.1 of **Appendix “C”** for “Written Submissions” will be followed although there is no legal requirement that a decision be made on the appeal within any specified time frame.

Applicants will be requested, at the outset, to provide submissions which address, as separate matters, both the grounds upon which leave is requested, and the merits of their case in the event leave is granted. Applicants will be asked to provide written submissions in all cases —

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the determination as to whether an oral hearing will be held will be left to the discretion of the Appeal Division panel as part of the consideration of the leave application (i.e. rather than being addressed by the chief appeal commissioner on a preliminary basis).

Requests for an oral hearing, in addition to any preference as to a one- or three-person panel, should be made by the applicant with their written submissions. Applicants should be aware that, if the request for an oral hearing is not granted, the Appeal Division panel may proceed to address the merits at the same time the panel makes the decision to grant leave.

An applicant cannot expect to receive a copy of the leave decision, with a fresh opportunity to provide submissions, prior to the Appeal Division panel proceeding to make a decision concerning the merits of the case.

Section 7 of the *Criminal Injury Compensation Act* provides that “[t]he Attorney General may appear and be heard at the hearing of any matter by the Board under this Act.” In the past the Appeal Division has given notice to the attorney general only if leave was granted. Our practice now requires the Appeal Division giving notice to the attorney general of the leave application at the outset and inviting any comments concerning both the leave application and the merits.

### **2.3 Factors Influencing Choice of Process**

The one-step process is intended to reduce delay; however, the primary consideration is to ensure that fair procedures are followed. Where the panel considers there is doubt as to whether a one- or two-step process should be followed, this should be resolved in favour of using a two-step process.

Factors considered in deciding whether to use a one-step or a two-step process include the following:

- the application was initiated under the old two-step process and the applicant was not notified of the change in procedure and invited to provide submissions concerning the merits;
- an oral hearing is to be convened to hear the merits;
- further evidence or submissions are being requested by the Appeal Division panel;
- leave is granted on an issue or basis not addressed in the applicant’s submissions;
- the panel considers further inquiry is needed;
- new evidence is obtained by the panel (NOTE: the obligation to disclose new evidence, such as from expert textbooks or journals, may not apply if it is available from a public source that was available to the applicant at the time submissions were prepared);
- the single-person panel requests reassignment to another panel or a three-person panel;

- 
- the panel considers, for any reason, that a two-step process is required to ensure that the issues under consideration have been identified and that parties have had an opportunity to respond.

Where a two-step process is utilized by the Appeal Division panel, fresh notification will be provided to the attorney general.

Where the panel granting leave has determined that a two-step process is required, it is open to the panel to request a review of the panel assignment following the issuance of the leave decision. In those circumstances, consideration would be given by the chief appeal commissioner as to whether the case should be reassigned to a different panel or a three-member panel for deciding the merits.



# REPORTER

## Appendix "I"

**Subject: Allocation of Claim Costs Appeals [Section 10(8)]  
and Other Employer Appeals**

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## 1.0 GENERAL

There are a variety of decisions which employers can appeal to the Appeal Division under section 96(6) and 96(6.1) on the grounds of error of law or fact or contravention of a published policy of the governors.

The practices for employer appeals relating to assessments and relief of costs are set out in **Appendix "E"** and **Appendix "F"** respectively.

However, this category also includes other employer appeals. Some appeals relate to matters specifically identified in section 96(6). Other appeals relate to matters identified by the governors as appealable under the general provisions in section 96(6) or 96(6.1).

These other employer appeals include appeals on the following matters:

- transfer of claim costs under section 10(8) of the Act;
- penalty for defaults in payment or return under section 47(2) of the Act; and
- levies under section 73 of the Act.

For the other employer appeals commenced under section 96(6) or 96(6.1):

- (a) the practices and procedures set out in **Appendix "C,"** Claims Appeals are generally applicable, subject to the specific practices and procedures set out in this Appendix;
- (b) the chief appeal commissioner may give notice of the appeal to the workers employed by the employer, or trade union representative of those workers, who may have an interest in the appeal (see Decision of the Governors #75 (1994), 10 *Workers' Compensation Reporter* 753);
- (c) as set out in section 96(7) of the Act, the commencement of an appeal under subsection 96(6) or 96(6.1) does not relieve an employer from paying an amount in respect of which the appeal is commenced but, if the appeal is successful, the amount to be returned to the employer must be accompanied by interest, calculated in accordance with the policies of the governors, on the amount to be returned; and
- (d) the 90-day time frame for decisions has been taken to apply to all matters appealed under section 96(6) and 96(6.1).

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## **2.0 ALLOCATION OF CLAIM COSTS APPEALS**

### **2.1 Appeals of Section 10(8) Decisions to the Appeal Division**

The Panel of Administrators, in a December 11, 1996 resolution, assigned to the president of the Board the authority to determine which division, department or Board officers will make decisions under section 10(8) of the Act. By delegation dated February 17, 1997, the president delegated the first-level decision-making authority to the director, Central Services, Compensation Services Division.

The Panel of Administrators' resolution also provided that the Panel designates that notice of a decision pursuant to section 10(8) is a notice under the provisions of section 96(6.1) and is therefore appealable to the Appeal Division.

Section 96(6.1) provides for an appeal to the Appeal Division within 30 days, or within a longer period the chief appeal commissioner may allow, on the grounds of error of law or fact or contravention of a published policy of the governors.

### **2.2 Procedure**

The following establishes general procedural guidelines for the processing of section 96(6.1) appeals to the Appeal Division from section 10(8) decisions.

#### **(a) Initiating the Appeal**

Decision of the Governors #75, (1994), 10 *Workers' Compensation Reporter* 753, states that in appeals commenced under section 96(6.1), the appellant should be required to outline the error of law or fact or contravention of published policy of the governors in the decision under appeal.

- This requirement should normally be fulfilled in a "Notice of Appeal by Employer," or by a letter of appeal to the Appeal Division. In that latter event, the appellant will be informed of the opportunity to request an oral hearing and will be provided 10 days to make such a request.
- If the appeal is initiated by telephone, the appellant will be required to file a Notice of Appeal or provide a letter of appeal fulfilling this requirement within 21 days of the Appeal Division's request for same. If this request is not fulfilled within 21 days, the appeal will be considered abandoned. An extension of time to appeal would have to be sought if the party later sought to bring an appeal forward.

Any request for an oral hearing should be made by the appellant at the time the reasons for appeal are provided. The request should include the appellant's reasons for the oral hearing request.

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## **(b) Extension of Time to Appeal**

If the appeal has not been initiated within 30 days of the appellant receiving the decision sought to be appealed, the appellant will be required to request from the chief appeal commissioner an extension of time (E.O.T.) to appeal. If the E.O.T. request is made more than 60 days after the appellant received the decision sought to be appealed, the respondent(s) will be provided an opportunity to make submissions in relation to the E.O.T. request. The factors considered on an E.O.T. request include whether substantial and material new evidence has arisen or been discovered, and whether exceptional circumstances prevented the party from initiating the appeal in time. This list of factors is not exhaustive and other factors may be taken into account. No single factor will be considered determinative.

- If E.O.T. is not granted, the appeal does not proceed
- If E.O.T. is granted, the appeal proceeds

## **(c) Disclosure, Commencement and Appellant Submissions**

After obtaining the relevant claim file (containing the yellow section 10(8) file), the appeal officer will provide updated disclosure of the yellow section 10(8) file to the appellant employer and the other employer(s) which was/were a party to the section 10(8) decision. In addition, the Appeal Division will request that the Prevention Division provide any files or reports that Division may have in relation to the workplace incident which gave rise to the claim. Any such material received by the Appeal Division, together with the updated disclosure of the yellow file, should be disclosed to the parties in the normal course, together with the following correspondence:

- for appellant – a request for written submissions on the merits of the appeal within 14 days (unless an oral hearing request has been made);
- for respondent(s) – a request that any Notice of Participation be provided within 14 days.

The appeal officer will send these letters on the same date and that date will be the date the appeal commences for the purposes of the section 91(3) 90-day time frame for Appeal Division decision-making.

Once the appeal has commenced, the appeal officer will refer any request for an oral hearing to the deputy chief appeal commissioner for preliminary consideration, and if the oral hearing request is allowed, the request for written submissions will not be made and the appeal will be forwarded to the hearing coordinator for scheduling the oral hearing after the respondent(s) have indicated whether they intend to participate in the appeal.

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**(d) Opportunity for the Worker to Participate**

The worker whose claim is at the root of the application will be forwarded correspondence by the appeal officer (copies to the parties) at the same time correspondence is forwarded to the parties. The worker will be informed of the appeal and that the appeal will not affect the benefits payable under the claim. The worker will also be provided an opportunity to participate in the appeal and will be requested that she/he return a Notice of Participation within 14 days if she/he intends to participate in the appeal.

If the worker elects to participate in the appeal, the worker will be provided with disclosure of the yellow section 10(8) file contained in the claim file.

**(e) Employer Is De-registered**

Where the employer or the independent operator from the class affected by the application is de-registered, the deputy chief appeal commissioner will generally invite the participation of the Employers' Advisors in the appeal.

The panel may also request that the deputy chief appeal commissioner invite the participation of the Industry Association where, after reviewing submissions and evidence, the panel considers that such participation would assist an inquiry into the merits of the appeal.

**(f) Submissions by Respondent(s)**

If the appeal is proceeding by way of written submissions, the parties will be given an opportunity to respond to each others' submissions.



## Appendix "J"

### Subject: Authorizations for Representatives Before the Appeal Division

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Pursuant to section 85.1 of the *Workers Compensation Act*, the Appeal Division is responsible for its practices and procedures and this responsibility requires monitoring issues such as the validity of authorizations. Regarding the Appeal Division's practices related to authorizations, the following procedures apply:

1. Written authorizations are required from workers and employers (and Industry Associations in some circumstances) in order for another person to represent them before the Appeal Division. This is necessary to protect the confidentiality of information on files and appeals and to ensure the Appeal Division is dealing with persons who are entitled to participate in an appeal before the Division.
2. There is an obligation on representatives to advise the Appeal Division whether the status of the persons they represent has changed. In the case of workers, obvious examples of changed status include when a worker revokes a previous authorization or dies. In the case of employers examples include when a business has been sold (assets or shares), merged with another employer, become bankrupt or inactive, ceased to operate, or otherwise the employer's status with the Board has changed. This list is not intended to be exhaustive. The death of a worker, or bankruptcy of an employer, does not necessarily end an appeal but it may require consideration of the rights of the worker's estate to continue the appeal or consideration of whether a relief of cost appeal would be moot.
3. Authorizations from workers, or persons claiming workers' compensation, or criminal injury compensation, should include the following statement:

This authorization is for my worker's compensation [or criminal injury compensation] claim number [\*] (optional: and related claim numbers [\*,\*]). It is valid until revoked by me in writing or until my death.

4. Authorizations from employers on claims matters (including relief of costs appeals) should include the following statement:

This authorization relates to WCB claim number [\*] (optional: and related claim numbers [\*,\*]) and it is valid until revoked in writing or our business has been sold (assets or shares), merged with another employer, becomes inactive, ceases to operate or is otherwise no longer active with the WCB.

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5. Authorizations from employers on assessment and prevention matters should include the following statement:

This authorization relates to WCB account number [\*] and it is valid until revoked in writing or our business has been sold (assets or shares), merged with another employer, becomes inactive, ceases to operate or is otherwise no longer active with the WCB.

6. Authorizations with the language noted above will be accepted for a period of up to five years from the date they are signed.
7. Authorizations without the above statements will be treated as invalid if two or more years have elapsed between the signing of the authorization by the worker or employer and the filing of an appeal. Where there is an invalid authorization the Appeal Division will only communicate directly with the worker or employer. “Blanket” authorizations which authorize representation for all matters, authorizations with statements like “valid until revoked” or “valid until further notice” and authorizations with variations on the language noted above will be treated as valid for two years.
8. In general, authorizations can be for more than one purpose. For example, an authorization can include one of the above statements and also include other language that authorizes a representative to receive medical information on behalf of a worker or employer. It can also be used for representation before the Review Board or the Board itself as well as the Appeal Division.
9. All authorizations will be subject to events such as written revocation, bankruptcy of an employer, death of a worker etc. That is, an authorization can become void at any time on the occurrence of these events.
10. These requirements are effective for all appeals filed with the Appeal Division on and after November 1, 2000.
11. As a result of sections 94 and 95 of the Act, authorizations are not required from the Workers’ or Employers’ Advisors’ Offices for appeals filed from their offices. Normally, correspondence from an advisor will be sufficient authorization.
12. Where more than one representative has been authorized by an employer or worker on the same account or claim number and on the same matter before the Appeal Division, the Appeal Division will consider that no authorization is valid. The Appeal Division will advise the employer or worker of the situation and advise them that the Appeal Division can only communicate directly with them, and not the representatives, until the issue of representation has been resolved.

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13. The worker or employer (or, in applicable cases an industry association) must be the party making the authorization. The Appeal Division will consider void an authorization from one representative that attempts to authorize a second representative to represent an employer or worker or association.
  14. In general, the pleadings in applications for certificates for a legal action pursuant to section 11 of the *Workers Compensation Act* will be evidence of the representatives of the parties.



# REPORTER

## Appendix “K”

**Subject: Contact with Appeal Commissioners by Parties**

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## **1.0 PURPOSE**

The Appeal Division is a quasi-judicial tribunal serving as the last level of appeal on non-medical issues in the workers' compensation system in British Columbia. The Appeal Division has a responsibility to ensure compliance with the requirements of natural justice and procedural fairness, and to maintain the integrity of the decision-making process.

The following is intended to provide guidance to the workers' compensation community concerning the Appeal Division's practices and procedures regarding contact between appeal commissioners and parties to Appeal Division proceedings. The guidelines provided concerning the conduct of parties also apply to their representatives and witnesses, as well as Board officers.

The central focus of this directive concerns the provision of evidence and argument in connection with the hearing of a particular appeal or other matter before the Appeal Division. These guidelines largely involve a statement of current practice, rather than representing a change in approach by the Appeal Division.

## **2.0 GUIDELINES**

### **2.1 Generally**

Feedback concerning the performance of the Appeal Division, and input concerning our practices and procedures, is welcome. Comments of this nature should be sent to the chief appeal commissioner.

Worker and employer interest perspective appeal commissioners may maintain active contact with the respective constituency. Such contacts do not place the appeal commissioner in a real or apparent conflict of interest. However, all appeal commissioners must avoid relationships or associations which could impair the appeal commissioner's ability to discharge his or her duties fairly and impartially.

### **2.2 Consideration of Particular Matters**

Evidence and argument concerning a particular appeal or other matter may be presented to an appeal commissioner, or panel of appeal commissioners, either orally (in an oral hearing, if granted), or in writing. In either case, notice is given to the other party, and that party is given the opportunity to participate.

Direct contact with an appeal commissioner concerning a particular matter or decision, such as by telephone call or by conversation outside a scheduled oral hearing, would be a private communication. Private communication with a decision-maker – whether by a party, witness, representative or board officer – may well give rise to an apprehension of bias, and invalidate any subsequent Appeal Division decision. Similarly, direct oral communication with the Appeal

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Division (such as to the chief appeal commissioner or deputy chief appeal commissioner) which concerns a matter before a panel of the Appeal Division, may also have the potential to give rise to an apprehension of bias.

The appeal commissioners' code of conduct stipulates that at any stage of a proceeding, appeal commissioners must not communicate about the proceeding, directly or indirectly, with any party, representative or witness, except in the presence of all parties and/or their representatives, or unless the correspondence is copied to all the parties and/or their representatives. Consequently, contact with the Appeal Division by parties with respect to proceedings should normally be conducted through administrative staff of the Appeal Division.

The Appeal Division has an established protocol in the event a provincial cabinet minister, or their offices, contact the Appeal Division in relation to a specific appeal.

### **2.3 Inquiries by Parties**

Appeal officers will automatically provide general information such as the scheduled due date for an Appeal Division decision and any extension of the due date for the making of the decision. Appeal officers will, on request, advise parties of the names of the appeal commissioner(s) hearing a matter. Appeal officers are obviously not able to provide "predictions" as to when a decision will be issued in advance of its completion. On matters to which the 90-day time frame for decision-making does not apply, the appeal officers may, on request, seek direction from the chief appeal commissioner to ascertain whether a general estimate of the likely time frame for decision-making may be provided.

### **2.4 Telephone Contact**

For the reasons outlined in section 9.0 of this Decision, the Appeal Division will not normally direct telephone calls through to appeal commissioners from individuals or entities related to the hearing of an appeal or other matter for adjudication by the Appeal Division. Telephone calls will normally be taken by administrative staff of the Appeal Division. If the nature of the telephone call requires that it be documented, a memo will be placed on file and will be subject to the normal appeal disclosure practices. Submissions in relation to an appeal or other matter are not accepted by way of telephone conversation with Appeal Division staff. This, of course, does not preclude an Appeal Division panel from conducting all or part of an oral hearing for an appeal by way of telephone conference call involving all parties participating in the appeal.

### **2.5 Hearings**

Where an oral hearing is granted, this is normally arranged so that the appellant and other party may attend in person before the appeal commissioner(s).

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It is also open to the Appeal Division panel to convene a hearing by telephone. This might be undertaken, for example, where some additional information or clarification is required and no other party is participating. This will only be undertaken at the discretion of the panel. The panel must ensure compliance with the requirements of natural justice. Parties will normally be advised in advance of the planned telephone inquiry or hearing.

## **2.6 Time Issues**

Parties should not press a panel to hasten the adjudicative process through correspondence directed to the panel after submissions have completed. Such communications will normally be unnecessary where there is a 90-day time frame for Appeal Division decision-making. If there are any communications of this nature, they should be sent to the attention of the chief appeal commissioner. The chief appeal commissioner may, if he considers it appropriate, bring the general issue to the attention of the panel without normally disclosing the correspondence.

## **2.7 Post-Decision Contact**

After the Appeal Division decision has been issued, neither the parties to the decision nor board officers should correspond with or telephone the appeal commissioner(s) regarding it.

If the decision failed to address an issue raised in the appeal or contains a clerical error (such as an apparent typographical error as to a date), the party may write to the chief appeal commissioner to request that the matter be returned to the panel for correction or completion of the decision. If a party objects to a decision, and believes grounds may exist for reconsideration of the Appeal Division decision, the party may write to the chief appeal commissioner seeking reconsideration of the decision. Such correspondence should not be copied to the appeal commissioner(s) who issued the decision.

The Appeal Division manager will normally handle any telephone calls regarding an Appeal Division decision that has been issued.

## **2.8 Chief Appeal Commissioner**

The chief appeal commissioner is responsible to the governors for the general operation of the Appeal Division under section 85(7) of the *Workers Compensation Act*. The chief appeal commissioner appoints appeal commissioners, and has authority to establish panels of the Appeal Division and to refer a matter that is before a panel to the Appeal Division or another panel.

It is open to parties, at any time, to communicate in writing a concern with respect to the handling of an appeal or other matter to the chief appeal commissioner. However, the chief appeal commissioner will generally defer consideration of the matter until the panel of the Appeal Division has issued its decision, at which time, and in appropriate circumstances, the matter may be treated as an application for reconsideration of the Appeal Division decision.

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## **2.9 Conclusion**

The Appeal Division wishes to remain accessible to, and responsive to the concerns of, parties. However, care must be taken to avoid communications with appeal commissioners which would undermine the confidence of the parties in the integrity of the decision-making process. The parties to a proceeding are entitled to expect that the hearing of a matter will not be influenced by private communications which have not been disclosed to them.

These guidelines are intended as an explanation and public recording of the practices and procedures of the Appeal Division. This directive is intended to further general awareness and understanding of our practices and procedures, as part of our commitment to openness and accountability in the operation of the Appeal Division.



# REPORTER

## Appendix "L"

**Subject: Code of Conduct — Appeal Commissioners**

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## **1.0 PURPOSE**

This Code of Conduct sets out the principles which guide the Appeal Division as an internal but independent quasi-judicial appeal tribunal within the workers' compensation system.

The Code establishes reasonable, standard expectations governing the conduct of all appeal commissioners in the course of their duties as appeal commissioners, including the chief appeal commissioner and the deputy chief appeal commissioner. The Code states the minimum standards expected of appeal commissioners, recognizing the difficulty of establishing rules to capture such ethical issues. It is expected the spirit of the Code will also provide guidance for those matters not specifically mentioned. While it is the primary responsibility of each appeal commissioner to ensure his or her own compliance with this Code, it is expected that if an appeal commissioner reasonably believes another appeal commissioner is in breach of this Code, he/she will bring that matter to the attention of that appeal commissioner, in the collegial spirit of the Appeal Division. It is also expected that in the event an appeal commissioner becomes aware of conduct of a colleague that may threaten the integrity of the Appeal Division or its processes, the appeal commissioner will inform the chief appeal commissioner of the circumstances as soon as possible.

The Code recognizes the existence of the Board's general Standards of Conduct, and has incorporated portions of those standards where appropriate, but establishes principles independent of those created by the Board which address more specifically the quasi-judicial nature of the Appeal Division.

## **2.0 CONFLICTS OF INTEREST**

- 2.1 Appeal commissioners must exercise their duties and responsibilities in a neutral, impartial manner. Appeal commissioners must avoid all real or apparent conflicts of interest and must arrange their private affairs in a manner intended to avoid the possibility of a real or apparent conflict of interest arising in their role as an appeal commissioner. A conflict of interest arises when an appeal commissioner's relationships or activities inhibit, or may reasonably be thought to inhibit, the impartial discharge of his or her obligations as an appeal commissioner.
- 2.2 An appeal commissioner must not participate in a proceeding where the appeal commissioner has (or has had within the last 12 months) a significant or close personal, professional or business relationship with a party, a party's representative, or witness to a proceeding.
- 2.3 For greater certainty:
  - a "real conflict of interest" occurs when an appeal commissioner has a personal attitude, interest (either pecuniary or non-pecuniary), relationship or association (past or present) that impairs the appeal commissioner's ability to discharge her/his duties fairly and impartially;

- 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;
  - the fact that an appeal commissioner has been appointed as either a worker-interest perspective appeal commissioner or employer-interest perspective appeal commissioner, and maintains active contact with the respective constituency, does not, by itself, place that appeal commissioner in a real or apparent conflict of interest;
  - a “proceeding” includes any matter before the Appeal Division, including an appeal, application, further review, request for reconsideration, request for a determination, or request for leave, and includes all preliminary and post-decision actions in relation to a matter. For the purposes of determining whether a person has been involved in a “proceeding,” “proceeding” means the whole conduct of the matter before the Board.
- 2.4 All appeal commissioners must declare those persons, or organizations, who might reasonably be expected to participate as a party, witness or representative, or otherwise be involved, in an Appeal Division proceeding, and whose presence in a case before that appeal commissioner might give rise to a real or an apparent conflict of interest. Those persons and organizations will be included in a central “Conflict List” maintained by the Office of the Deputy Chief Appeal Commissioner, and the Appeal Division must not assign the appeal commissioner to cases in which persons, or organizations, so declared are involved. Appeal commissioners must notify the deputy chief appeal commissioner of any changes to the “Conflict List.” The Office of the Deputy Chief Appeal Commissioner must distribute the “Conflict List” semi-annually and each appeal commissioner must ensure his/her “Conflict List” is current.
- 2.5 An appeal commissioner who has reason to believe he or she has a real or apparent conflict of interest with respect to a proceeding to which he or she has been assigned, must advise the deputy chief appeal commissioner as soon as possible. If an appeal commissioner is in doubt as to whether or not he or she has a real or apparent conflict of interest, he or she must seek the advice of the deputy chief appeal commissioner or the chief appeal commissioner. The appeal commissioner involved may either decide to withdraw from the matter, and so inform the deputy chief appeal commissioner as soon as possible, or seek a determination from the deputy chief appeal commissioner as to whether the appeal commissioner should step down from the matter. If the appeal commissioner involved is the deputy chief appeal commissioner, she or he must advise the chief appeal commissioner.
- 2.6 If an appeal commissioner reasonably believes another appeal commissioner has a real or apparent conflict of interest with respect to a proceeding to which the latter appeal commissioner has been assigned, the appeal commissioner holding the reasonable belief should bring the matter to the attention of the latter appeal commissioner. In the event this does not resolve the matter, the appeal commissioner holding the reasonable belief

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must bring the matter to the attention of the deputy chief appeal commissioner. The deputy chief appeal commissioner, in consultation with the potentially conflicted appeal commissioner, will determine whether the panel should be reconstituted.

- 2.7 If a party to a matter that is then currently before an Appeal Division panel raises an allegation of a real or apparent conflict of interest against a member of the panel, it is suggested that the panel and parties together discuss the matter as soon as practicable after the allegation is raised. It is expected that parties will make any such allegations at the earliest opportunity after learning the circumstances that gives rise to any such allegation. If the matter cannot be resolved through a discussion among the panel and the parties, and the panel considers it necessary, the party making the allegation will be required, within a reasonable period, to provide details in writing to the panel of the evidence and argument it relies upon to establish the allegation. At the panel's option, the panel can accept the details orally. If after considering that evidence and argument, and any evidence and argument the other parties present on the issue, the panel determines a real or apparent conflict of interest exists, the panel will be reconstituted. If the panel concludes neither a real nor apparent conflict of interest exists, the panel must inform the parties in writing and must inform the parties of the opportunity to adjourn the matter to seek reconsideration from the deputy chief appeal commissioner who will consider the objection afresh and rule on the conflict of interest allegation. If the deputy chief appeal commissioner was earlier involved in the conflict issue, any reconsideration will be performed by the chief appeal commissioner (or delegate). The ruling of the deputy chief appeal commissioner, or chief appeal commissioner (or delegate), as the case may be, is final and conclusive. If at any stage of the process contemplated in this paragraph, the challenged member decides to step aside from the panel, the parties will be so advised and the panel will be reconstituted.
- 2.8 If an appeal commissioner removes him/herself, or is removed, from participating in a proceeding before the Appeal Division on the basis of a real or apparent conflict of interest, the appeal commissioner must not participate in any manner in the proceeding.
- 2.9 If a party to an Appeal Division decision raises an allegation of a real or apparent conflict of interest against a member of the Appeal Division panel, the allegation will be reviewed by the chief appeal commissioner and, if a *prima facie* case is established, will be treated as a request for reconsideration of the Appeal Division decision on the basis of an alleged breach of the principles of natural justice. If the chief appeal commissioner was a member of the panel which issued the decision, the allegation will be reviewed by the deputy chief appeal commissioner.
- 2.10 Delegations by the chief appeal commissioner published in the *British Columbia Workers' Compensation Reporter* provide that, in the event the chief appeal commissioner determines she or he is or would be exposed to a possible or actual conflict of interest or appearance of bias with respect to a given case, all necessary powers of the chief appeal commissioner are delegated to the deputy chief appeal commissioner in relation to the

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specific matter. Such delegations further provides that when the deputy chief appeal commissioner is similarly situated, her or his powers and duties are delegated to named appeal commissioners in relation to the specific matter.

### **3.0 CONDUCT OF APPEAL COMMISSIONERS**

- 3.1 Appeal commissioners must approach the hearing and determination of every appeal or application with a mind that is genuinely open, with respect to every issue, and open to persuasion by convincing evidence and argument. Appeal commissioners must avoid doing or saying anything that would cause a reasonable, well-informed individual to think otherwise. Appeal commissioners must treat participants in a manner that is respectful and courteous.
- 3.2 At any stage of a proceeding before the Appeal Division, appeal commissioners must not communicate about the proceeding, directly or indirectly, with any party, representative or witness, except in the presence of all parties and/or their representatives, or unless the correspondence is copied to all the parties and/or their representatives.
- 3.3 Appeal commissioners will foster a collegial approach in performing their adjudicative functions and exchange views, information and opinions in a spirit of respect for the independence of each other as decision-makers.
- 3.4 Appeal commissioners must be conscientious in the performance of their duties, and must ensure that their outside activities do not interfere with the impartial, effective and timely performance of their responsibilities. Appeal commissioners must not engage in activities that bring the Appeal Division into disrepute. Unless so authorized by the chief appeal commissioner, appeal commissioners must not perform outside activities in a manner that appears to be officially supported by or connected to the Appeal Division, or appears to represent Appeal Division opinion or policy. Appeal commissioners must not use their position in the Board to lend weight to the public expression of a personal opinion.
- 3.5 As a result of their duties, appeal commissioners acquire confidential information. In accordance with section 95 of the *Workers Compensation Act*, appeal commissioners must not disclose to anyone such confidential information except in the performance of their duties, under authority of the Board, when required by law, or authorized under the *Freedom of Information and Protection of Privacy Act*.
- 3.6 Appeal commissioners must not sign affidavits relating to information obtained by them as a result of their employment at the Board unless the affidavit is approved by the chief appeal commissioner or counsel acting for the Board. This does not apply to situations in which the appeal commissioner is in dispute with the Board or chief appeal commissioner or where there is a legal obligation on the appeal commissioner to provide the information.

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- 3.7 Appeal commissioners must not use Board assets, space or time for any non-Board purpose without the prior authorization of the chief appeal commissioner or the deputy chief appeal commissioner. This policy does not prohibit appeal commissioners from, for instance, making or receiving occasional brief electronic messages or private telephone calls.
- 3.8 Appeal commissioners must not directly or indirectly ask for, or accept, a gift, favour, service, or promise of future benefit from any individual or organization which appears before the Appeal Division. This provision is not intended to prohibit the normal presentation of gifts to persons participating in public functions, or the normal exchange of gifts between friends, that does not amount to a real or apparent conflict of interest, or does not otherwise bring suspicion on the appeal commissioner's objectivity and impartiality. Subject to paragraphs 2.1 to 2.10 of this Code, this provision is also not intended to prohibit the infrequent attendance at lunches, dinners, or public events, of a common and reasonable nature, in the company of an individual or representative of an organization which regularly appears before the Appeal Division. If there is any doubt regarding the propriety of accepting a gift or accepting an invitation to attend an event, the appeal commissioner should consult with the chief appeal commissioner.
- 3.9 Appeal commissioners are free to engage in political activities, so long as they are able to maintain their impartiality, and the perception of impartiality, in relation to their duties and responsibilities. Appeal commissioners' political activities must be clearly separated from activities related to their role as appeal commissioners. Appeal commissioners must not engage in political activities during working hours or use Board facilities, equipment or resources in support of such activities.
- 3.10 Appeal commissioners are bound by the *Workers' Compensation Board's Harassment Policy*.
- 3.11 Appeal commissioners using the Board's internet facilities must comply with the "WCB Internet Policy Statement" and the "Internet Usage Agreement."

#### **4.0 OBLIGATION AFTER CEASING TO BE AN APPEAL COMMISSIONER**

- 4.1 Appeal commissioners who cease to hold office continue to be bound by the obligations of confidentiality in respect of any matter arising while they were an appeal commissioner. They are also prohibited from appearing or making written submissions in a proceeding or matter before the Appeal Division as counsel, advocate or representative on behalf of a party to the proceeding or matter until the later of six months after the appeal commissioner's appointment ends, or six months after the final written decision for which the appeal commissioner was a member of a panel is issued.

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## 5.0 COMPLIANCE

- 5.1 Any appeal commissioner who in good faith believes there has been a breach of this Code, and reports the matter to the chief appeal commissioner (or chair of the Panel of Administrators in the case of an alleged breach by the chief appeal commissioner), is protected from any reprisal.
- 5.2 The chief appeal commissioner, or chair of the Panel of Administrators, as the case may be, shall, if the allegation is not considered frivolous or vexatious, make whatever inquiries or investigations she or he determines necessary, and will report the results, and any steps consequently taken, to the person who made the report. If the chief appeal commissioner, or chair of the Panel of Administrators, as the case may be, considers the allegation is substantive, the appeal commissioner against whom the allegation was made will also be apprised at a time to be determined by the chief appeal commissioner or the chair of the Panel of Administrators, as the case may be.
- 5.3 Breach of a provision of this Code by an appeal commissioner may constitute grounds for discipline, up to and including dismissal. Pursuant to section 85(4) of the *Workers Compensation Act*, issues of dismissal would be addressed by the Panel of Administrators. Discipline other than dismissal would be addressed by the chief appeal commissioner. If the breach occurs in good faith or through inadvertence, such factors will be taken into account in determining if discipline is imposed and the disciplinary sanction warranted.



# REPORTER

## Appendix “M”

**Subject: Public Access to Appeal Division Decisions —  
Writing Decisions Without Reference to Identifiers**

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## 1.0 1999 RESOLUTIONS

Section 85.1 of the *Workers Compensation Act* (the Act) provides that the chief appeal commissioner may determine the practice and procedure for the conduct of appeals by the Appeal Division. This authority is subject to any policies of the governors and any bylaws enacted or resolutions passed under section 82.

On November 19, 1999, the Panel of Administrators resolved, in part:

1. Appeal Division decisions under the Act, and under the *Criminal Injury Compensation Act*, generally be written without reference to identifiers effective no later than January 1, 2000.
2. Appeal Division decisions under Part 3 of the Act (as amended October 1, 1999 by Bill 14, the *Workers Compensation (Occupational Health and Safety) Amendment Act*), generally be written without reference to identifiers effective from the date of this resolution.
3. Past and future decisions of the Appeal Division under section 11 of the Act filed in British Columbia court registries be made publicly available without removal of identifying information.
4. In unusual circumstances where writing a decision without reference to identifiers is not practicable, the Appeal Division may include identifiers in the decision but must then prepare an edited version of the decision so as to permit public access to the decision while ensuring compliance with the confidentiality and privacy provisions of the Act and the *Freedom of Information and Protection of Privacy Act*.
5. The Appeal Division establish an Internet web site, with a search engine, which will permit public access to Appeal Division decisions without identifiers, and to unedited section 11 decisions which have been filed in British Columbia court registries.

## 2.0 WRITING DECISIONS WITHOUT REFERENCES TO IDENTIFIERS

### 2.1 Confidentiality and Privacy

This Appendix provides general guidelines for the writing of Appeal Division decisions without reference to identifiers, to ensure compliance with the confidentiality and privacy provisions of the Act and the *Freedom of Information and Protection of Privacy Act*.

Information which in and of itself would not need to be protected (such as geographic locations) will be protected to the extent necessary to safeguard confidentiality and privacy. Where there is doubt as to whether particular data would tend to identify a party and as to whether a descriptive term or coded initial should be used, the doubt should generally be resolved in a fashion which better protects confidentiality and privacy. It is anticipated that appeal commissioners will approach situations not covered by these guidelines by writing in a manner that will allow the decision to be accessible to the general public, without compromising confidentiality and privacy.

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## **2.2 Names**

No names will be used in Appeal Division decisions, unless the name is taken from a public source (such as a published medical article or textbook, a court judgment, or Hansard). This means that the names of workers, employers (whether an individual or a company), and witnesses (lay or expert) will not be used in the decision.

The highest level of protection of privacy is to be afforded to parties and lay witnesses. They may be identified by role (the worker, employer, manager, etc.) or by a coded initial which does not correspond to their name. (Mr. Smith would be Mr. A rather than Mr. S).

A lower level of protection will be provided for expert witnesses, such as doctors. They may be referred to by title (e.g. the worker's attending physician) or by an actual initial. This applies to treating physicians in the community, and to physicians employed by the Board. A coded initial may be used for expert witnesses at the discretion of the panel where the panel considers that utilizing the actual initial might serve to identify a party or lay witness.

Names of treating facilities will be dealt with in a similar fashion – they may be referred to by title (e.g. a local hospital or physiotherapy clinic) or by an actual initial. A coded initial may be used where the name of the facility might serve to identify a party or lay witness.

Other decision makers will normally be referred to by title (e.g. claims adjudicator, Review Board vice chair, assessment officer, variance and sanction review officer, etc.). An actual initial may be used where the panel considers this necessary.

## **2.3 File Copy of Decision and Cover Letter to Parties**

The file copy of a decision will include a “header” at the top of each page with identifying information (name and claim or account number) to ensure the accuracy and integrity of file records. The parties to the appeal or other matter will be provided with a copy of the decision with the identifying “header,” by cover letter addressed to the parties. If coded initials are used (e.g. witnesses A, B and C), the cover letter will normally provide the identity associated with each coded initial (but not those for which an actual initial was used as the meaning will be self-evident to the parties). The cover letter will also explain that names have not been used in the body of the decision, in order to protect the privacy of the parties. The “header” and “cover letter” will be provided to the parties and retained on the Board's file, but will not be publicly accessible.

The “header” and “cover letter” will be removed from the Appeal Division decision before it is made publicly accessible. The decision placed on the internet will retain the Appeal Division decision number for reference (e.g. #00-xxxx). The paragraphs in the Appeal Division decision will be numbered for ease of reference to particular passages in the decision.

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## **2.4 Names of Representatives**

Names of representatives will not be used. They will be referred to by their role (e.g. the worker's union representative, the worker's lawyer, counsel for the employer, etc.). Alternatively, a representative may be referred to by their actual initial.

## **2.5 Claim Numbers and Account Numbers**

WCB file numbers (worker's claim file number, employer's account number, sanction report number, etc.) will not be included in the body of a decision.

## **2.6 Payroll, Revenue Data, and Salary Information**

Employers' payroll and revenue data will be protected in decisions. In some cases, protecting the identity of the employer will be sufficient as the payroll or revenue data would not be identifiable by itself. Where the reasons and analysis in the Appeal Division decision might tend to identify the employer, it may be necessary to refer to the payroll or revenue data in general or approximate terms.

If the decision cannot be written in a meaningful fashion without providing specific figures in the body of the decision, it may be necessary to use a second level of editing as contemplated by paragraph 4 of the Panel of Administrators' resolution (see Guideline 2.8 below).

Similarly, in addressing issues concerning a worker's employability, care must be taken to avoid disclosing the salaries paid by particular identifiable employers. This might arise, for example, in connection with a worker's job search efforts and contacts with various employers.

## **2.7 Geographic Locations**

Geographic locations will not be used where this might lead to the identification of a party or lay witness. If geographic location is a relevant matter, it is preferable to use a general description (e.g. a northern community) rather than identifying the specific town or community.

As noted above, names of treating facilities (such as a local physiotherapy clinic or hospital) must similarly be protected as naming the facility would have the same effect as identifying the community.

## **2.8 Second Level of Editing in Exceptional Circumstances**

In limited and exceptional circumstances, it may be appropriate for an Appeal Division panel to issue a decision to the parties which is further edited for privacy considerations before the decision is made accessible to the public. It is anticipated this will occur rarely, such as in cases

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where the ability of parties to understand the facts, evidence or reasoning will be made unduly difficult by complying with the above guidelines. In this event, it will be the responsibility of the Appeal Division panel issuing the decision to provide the two versions of the decision.

## **2.9 Citing Prior Decisions**

Sometimes appeal commissioners will refer readers to the background or evidence set out in the decisions being appealed, rather than repeating that evidence in full in the Appeal Division decision. For example, the Appeal Division panel may state in its decision that the background to the appeal was well summarized in the Review Board finding and need not be repeated. This practice facilitates a “streamlined” decision-writing process and may continue. The fact that Appeal Division decisions will be made publicly accessible does not mean the decisions must necessarily be written for the broader audience. The appellant and other parties to the appeal will remain the primary focus for the decision, while recognizing the broader public interest. The panel will determine the extent to which it is necessary to set out the background and evidence necessary to address the issues raised by the parties and to set out the basis for the panel’s decision, consistent with the Hallmarks of Quality Decisions (15 *Workers’ Compensation Reporter* 111).

## **2.10 Quotations**

Quotations contained in Appeal Division decisions must, for obvious reasons, also be edited to protect privacy. This will normally be accomplished by substituting a descriptive term for a name, and using square brackets to show the change, e.g. [the worker].

## **2.11 Conclusion**

The move to place Appeal Division decisions into the public domain represents a very significant change in approach for the workers’ compensation system. In preparing these guidelines, we have taken into account the general practices followed in editing decisions for publication in the *Workers’ Compensation Reporter*. That past practice stands as a guide as to the level of confidentiality and privacy parties would reasonably expect to be preserved. We consider that the Appeal Division should maintain a similar level of protection for confidentiality and privacy, in placing decisions on the internet. To the extent there is some variation in the practices followed in the Reporter, and to promote consistency in the general approach to be followed in the Appeal Division for such matters, these guidelines have been developed for use by appeal commissioners in drafting decisions without identifiers.

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A review of these guidelines after a period of time, with the benefit of input from the community and appeal commissioners concerning the operation of the guidelines in practice, may well be appropriate.

# REPORTER

## Appendix "N"

### Subject: Individual's Consent to Disclosures of Personal Information

I, \_\_\_\_\_, Social Insurance Number: \_\_\_\_\_  
*(name of individual)* *(optional)*

Date of Birth: \_\_\_\_\_, residing at: \_\_\_\_\_

\_\_\_\_\_, telephone number: \_\_\_\_\_  
*(full address)*

do hereby authorize the Workers' Compensation Board to disclose the following information:

\_\_\_\_\_

from my workers' compensation claim file(s) number(s): \_\_\_\_\_

to \_\_\_\_\_

*(specify name and address of the body or person [the "Recipient"] to receive this information)*

I hereby consent to the Recipient's use and submission of the information disclosed for the purposes of representing another person in an adjudication, appeal or other proceeding under a *Workers Compensation Act* claim. I understand and accept that if the Recipient submits material from my claim file(s) in a matter related to another worker/dependent, that material from my claim file(s) would become a permanent part of that other person's claim file. I also understand and accept that material, including material that came from my claim file, which is part of the other person's claim file would be subject to disclosure now and in the future to parties who would be entitled to disclosure of that other person's claim file.

This consent shall be and remain in effect until: \_\_\_\_\_  
*(indicate in days/months/years)*

\_\_\_\_\_  
*(signature of individual giving consent)*

\_\_\_\_\_  
*(date)*



## Appendix "O"

### Subject: Delegation by Chief Appeal Commissioner

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1. Section 85(8) of the *Workers Compensation Act* provides:

The chief appeal commissioner may delegate in writing any of the chief appeal commissioner's powers and duties to an appeal commissioner subject to any terms and conditions set out in the delegation.

2. I appoint Paul Petrie to serve as deputy chief appeal commissioner of the Appeal Division. I delegate to him the powers of the chief appeal commissioner under sections 85(7)(b), 85(7)(c), 85.2, and 91(3).
3. In the event of my determining that I am or would be exposed to a possible or actual conflict of interest or appearance of bias with respect to a given case, I delegate all necessary powers to the deputy chief appeal commissioner to act in my place. I also delegate to the deputy chief appeal commissioner the power to exercise all powers, duties, functions and responsibilities of the chief appeal commissioner in my absence.
4. I appoint Randy Lane to serve as assistant chief appeal commissioner of the Appeal Division. I delegate to him the powers of the chief appeal commissioner under sections 85.2, and 91(3). I also delegate to Randy Lane the powers of the chief appeal commissioner under sections 85(7)(b), 85(7)(c), and those delegated to the deputy chief appeal commissioner in paragraph 3 above, but limited to situations where the deputy chief appeal commissioner is absent or has determined himself to be exposed to a possible or actual conflict of interest or appearance of bias with respect to a given case.
5. I delegate to Herb Morton the same powers and duties as delegated in paragraph 4 above to Randy Lane, but limited to situations where Randy Lane is absent, or has determined he is exposed to a possible or actual conflict of interest or appearance of bias with respect to the given case.
6. I delegate to Sonja Hadley the same powers and duties as delegated in paragraph 5 above to Herb Morton, but limited to situations where Herb Morton is absent, or has determined he is exposed to a possible or actual conflict of interest or appearance of bias with respect to the given case.
7. I delegate to Marguerite Mousseau the same powers and duties as delegated in paragraph 6 above to Sonja Hadley, but limited to situations where Sonja Hadley is absent, or has determined she is exposed to a possible or actual conflict of interest or appearance of bias with respect to the given case.

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8. I delegate the following authority and power to all non-representational appeal commissioners:
    - a. the same authority as set out in Decision No. 8 [as published at (1992), 8 *Workers' Compensation Reporter* 331] to determine whether grounds have been provided for reconsideration of a decision of the former commissioners;
    - b. the power to direct that the Appeal Division reconsider a matter or that the applicant may make a new claim to the Board with respect to a matter pursuant to 96.1(3) of the *Workers Compensation Act*, section 23(3) of the *Criminal Injury Compensation Act*, or the common law grounds for reconsideration articulated in Appeal Division Decision #93-0740 [*Right to Reconsider Appeal Division Decisions* (1993), 10 *Workers' Compensation Reporter* 127];
    - c. to consider and decide a request for an extension of time to appeal, under Section 91(1), 96(6), or 96(6.1) of the *Workers Compensation Act*;
    - d. to grant leave for a further review of the decision of an officer of the Board, or the findings and report of an appeal committee, under section 22(5) of the *Criminal Injury Compensation Act*.
  9. I retain the powers, duties and authority delegated by me in this decision and will exercise these concurrently with the appeal commissioner(s).
  10. These delegations are effective from June 1, 2002 to December 31, 2002, so long as the delegate remains an appeal commissioner.
  11. Subject to paragraph 12 in this delegation, this delegation replaces those contained in Appendix "O" of Appeal Division Decision No. 33 (21 November 2001 and stated to be effective 26 November 2001).
  12. Any delegated authority or assignment of matters to an appeal commissioner prior to June 1, 2002, pursuant to a delegation of the chief appeal commissioner or acting chief appeal commissioner, continues so that the appeal commissioner may carry out and complete his or her duties and responsibilities, and continue to exercise the powers, contemplated in the delegation, until those specific matters are completed.

# REPORTER

## Appendix "P"

### Subject: Employers' Advisors and Workers' Advisors

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When the Appeal Division refers a worker or employer to the Compensation Advisory Services of the Ministry of Skills, Development and Labour, it will make the following reference.

#### Employers' Advisors Office

The B.C. legislature provides impartial advisors who are available to assist employers with this appeal. If you require assistance, contact the Employers' Advisors Office at:

RICHMOND	604 660-7253	KAMLOOPS	250 828-4397
Toll free	1 800 925-2233	Toll free	1 866 301-6688
Fax	604 660-7498	Fax	250 828-4563
PRINCE GEORGE	250 565-4285	VICTORIA	250 952-4821
Toll free	1 888 608-8882	Toll free	1 800 663-8783
Fax	250 565-4288	Fax	250 952-4822
KELOWNA	250 717-2050	ABBOTSFORD	604 870-5492
Toll free	1 866 855-7575	Toll Free	1 866 870-5492
Fax	250 717-2051	Fax	604 870-5498

#### Workers' Advisors Office

The B.C. legislature provides impartial advisors who are available to assist injured workers with procedural issues and appeal preparation. If you require assistance, contact the Workers' Advisors Office at:

RICHMOND	604 660-7888	KAMLOOPS	250 371-3860
Toll free	1 800 663-4261	Toll free	1 800 663-6695
Fax	604 660-5284	Fax	250 371-3820
NANAIMO	250 741-5504	PRINCE GEORGE	250 565-4280
Toll free	1 800 668-2117	Toll free	1 800 263-6066
Fax	250 741-5516	Fax	250 565-4283
VICTORIA	250 952-4393	CAMPBELL RIVER	250 830-6526
Toll free	1 800 668-4066	Toll Free	1 888 643-0013
Fax	250 952-4399	Fax	250 830-6528

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KELOWNA  
Toll free  
Fax

250 717-2096  
1 866 881-1188  
250 717-2010

ABBOTSFORD  
Toll Free  
Fax

604 870-5488  
1 888 295-7781  
604 870-5494

## Appendix "Q"

**Subject: Reliance on Appeal Division Decisions  
Available on the Internet**

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Since Appeal Division decisions from January 1, 2000 are available on the internet [[www.worksafebc.com](http://www.worksafebc.com)], Appeal Division panels, in making their decisions, may reference and rely upon any such past decisions available on the web site without first disclosing such decisions to the parties and inviting further submissions.

This practice also applies to any pre-2000 Appeal Division decision which has been published in the British Columbia *Workers' Compensation Reporter* series.

