

Decision of the Governors

Number: 75

Date: December 1, 1994

Subject: Appeal Division Administration, Practice and Procedure

Whereas the *Workers Compensation Act*, as amended, provides:

- A. In Section 85(7)(b) that the Chief Appeal Commissioner shall implement the policies of the Governors with respect to the administration of the Appeal Division.
- B. In Section 85.1 that the Chief Appeal Commissioner may determine the practice and procedure of the Appeal Division subject to any policies of the Governors.

The governors make the following policy with respect to the administration, practice and procedure of the Appeal Division.

1.0 Scope of Proceedings Before the Appeal Division

The role of the Appeal Division is to inquire into the merits of matters properly brought before it.

In appeals commenced under Section 91, the appellant should be required to outline the reasons for the appeal explaining how the Review Board finding is in error.

In appeals commenced under Sections 96(6) and 96(6.1), the appellant should be required to outline the error of law or fact or contravention of the published policy of the governors in the decision under appeal.

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.

The Appeal Division has the discretion to initiate and to conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it. 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 or the Board.

2.0 Representation Before the Appeal Division

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

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. For example, where an employer is no longer registered with the Board, the Appeal Division may give notice of an appeal commenced by a worker to the relevant industry association and the employers' advisor. Or 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.

3.0 Panels

Matters coming before the Appeal Division shall be determined by either a one-member panel or a three-member panel, as decided by the chief appeal commissioner. In cases where an oral hearing has been granted, the chief appeal commissioner shall consider any preference expressed by a party in making this decision.

A one-member panel shall consist of either the chief appeal commissioner or a non-representational appeal commissioner selected by the chief appeal commissioner.

A three-member panel shall generally consist of either the chief appeal commissioner or a non-representational appeal commissioner who shall preside over the panel and one appeal commissioner chosen from the worker representatives and one appeal commissioner chosen from the employer representatives.

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

In matters under Sections 10(8) and 11 and in exceptional cases where the chief appeal commissioner considers that the issues warrant it, the chief appeal commissioner has the authority to constitute a panel consisting of three non-representational appeal commissioners, which may include the chief appeal commissioner.

4.0 Hearings

A party in any case shall have the right to request an oral hearing, but must provide reasons why an oral hearing is necessary. The Appeal Division has the discretion to decide whether an oral hearing will be granted in any case. Parties will be notified in advance of the final decision whether an oral hearing will be held.

The Appeal Division shall 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.

An oral hearing may not be granted if:

- (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.

The chief appeal commissioner shall determine the extent to which oral hearings will be 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 when a request for an oral hearing has been granted.

5.0 Application of Board Policy by the Appeal Division

The Appeal Division shall apply and interpret the *Act*, Regulations and existing Board published policy. The Appeal Division does not have the authority to create new policy. The Appeal Division must make its decisions according to the merits and justice of each case as directed in Section 99.

Where the chief appeal commissioner considers it necessary that the governors address a policy issue prior to a decision being made in one or more appeals, the chief appeal commissioner has the authority to bring that policy issue before the governors for consideration and to postpone the Appeal Division's decision in the appeal until the policy issue has been addressed by the governors.

6.0 Discretionary Authority

In matters which come before it, the Appeal Division has the authority to exercise the Board's discretion to refer a worker to a Medical Review Panel pursuant to Section 58(5) of the *Act* with or without the worker's consent.

The Appeal Division may exercise its discretion pursuant to Section 91(2) to direct the Review Board to reconsider in any case where the Appeal Division considers it appropriate.

The Appeal Division has specific authority to reconsider a decision of the Appeal Division under Section 96.1.

The Appeal Division shall exercise the authority of the Board under Section 96(2) 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*.

The Appeal Division shall not otherwise exercise the Board's plenary independent power to reopen, rehear and redetermine matters under Section 96(2).

7.0 Authority of the Chief Appeal Commissioner to Delegate

Under Section 85(8) of the *Act*, 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.

8.0 Decisions

Decisions shall be written in plain language explaining the conclusion reached and the reasons for that conclusion.

A decision of the Appeal Division shall be signed by all members of the panel that made the decision. A dissent shall be signed by the appeal commissioner dissenting.

9.0 Publication of Appeal Division Decisions

While Section 99 provides that the Board and therefore the Appeal Division “. . . is not bound to follow legal precedent,” the publication of Appeal Division decisions can usefully assist in communicating and creating an understanding of the meaning of the *Act*, Regulations and Board policies, practices and procedures. Publication can also aid in the goal of having like cases treated alike and explaining the meaning and effect of changes in the law and policy under which the workers’ compensation system operates.

Publication further serves the useful role of holding the system publicly accountable.

These goals do not require the publication of every decision. In addition, the right of privacy of parties established in Section 95 has to be respected.

Selected decisions of the Appeal Division shall be published under the direction of the chairman with the assistance of the chief appeal commissioner to ensure that all key decisions are reported.

10.0 Governors’ Decisions No. 1 and 8

This Decision replaces governors’ Decision No. 1 dated April 11, 1991 (*Workers’ Compensation Reporter*, Vol. 7: p. 7) and governors’ Decision No. 8 dated January 6, 1992 (*Workers’ Compensation Reporter*, Vol. 7: p. 171).

THIS POLICY IS EFFECTIVE DECEMBER 1, 1994.