

WORKERS' COMPENSATION

REPORTER

WORKERS' COMPENSATION REPORTER

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Chairman's Introduction

The Governors of the Workers' Compensation Board have assigned to the Chairman the task of supervising the continuation of the *Workers' Compensation Reporter*. They have decided that the *Reporter* is to include decisions of the Governors and selected decisions of the Appeal Division. It will also include selected findings of the Review Board and decisions of the Courts on matters affecting the interpretation and administration of the Act and other matters of interest to the community. As Chairman of the Governors, I will be responsible for the content of all future issues of the *Reporter*.

Since 1984, there have been 40 decisions published in the *Workers' Compensation Reporter*. The majority of these decisions have been consumer price index and maximum wage rate adjustments. It is my intention to turn the *Workers' Compensation Reporter* into a useful and comprehensive source of information for all participants in the British Columbia workers' compensation system.

The *Reporter* is to be a reference source for important matters of policy and the interpretation of the Act. Not everything that is published in the *Reporter* will be an expression of policy of the Governors. Decisions of the Courts and Appeal Division and findings of the Review Board are independent judicial and quasi-judicial decisions. Selection of these decisions or findings for publication does not necessarily mean the Governors agree with their reasoning or conclusion. They are published in furtherance of the goals expressed by the Governors in their Decision No. 1.

Policy that has been adopted and approved by the Governors is found in the *Assessment, Occupational Safety and Health, and Rehabilitation Services and Claims Manuals*. These manuals must be read in conjunction with their interpretation by the Appeal Division and the Review Board.

The first issue of the revitalized *Reporter* contains seven decisions of the Governors, five decisions of the Appeal Division, a finding of the Review Board, an explanation of the amendments to Sections 58(3), 58(4) and 63(1) of the Act, and the most recent consumer price index adjustments. It also contains a message from the Editors, Janice Hight and Sheila Simpson, introducing the new format of the *Reporter*.

I invite anyone who has suggestions on what should be published in the *Reporter* to contact me at the Board.

James E. Dorsey
Chairman
Board of Governors



Editors' Introduction

In Decision No. 1 of the original *Workers' Compensation Reporter*, former Chairman, Terry Ison, and former Commissioners George Kowbel and Bert Carpenter, decided that the Board should publish selected decisions in cases decided on appeal to the Commissioners and on other matters. This first *Reporter* decision was issued on July 6, 1973. There are now 423 decisions in the *Workers' Compensation Reporter*.

The last bound volume of the *Reporter*, Volume 5, contains Decisions 294 to 384. We are now binding Volume 6, which will contain Decisions 385 to 423 and cover all *Reporter* decisions issued up to May 31, 1991. Volume 6 will be available in the fall.

As of June 3, 1991, under the new structure of the Workers' Compensation Board, the *Reporter* will not only have a new look, it will also contain contributions from the Governors, the Appeal Division, the Review Board, the Courts, and other matters of interest to participants in the workers' compensation system.

Since there will now be a variety of contributors to the *Reporter*, the decisions will no longer be numbered in consecutive order. They will be referenced by source, subject, and page number. We have chosen a different colour of letterhead for each type of decision or matter that will be published in the *Reporter*.

We are still in the process of developing the editorial policy and procedures for the *Reporter*. This issue is Volume 7, Number 1. We will continue to bind volumes as we publish enough parts to make a volume.

We invite anyone who has any suggestions for the new format for the *Reporter* to call us at the Board.

Janice M. Hight
Counsel to the Chairman
Board of Governors

Sheila Simpson
Manager, Editorial & Design Services
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Governors of the Workers' Compensation Board

Chairman

James E. Dorsey

Worker Representatives

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Health Sciences Association

Leif Hansen
President
United Food and Commercial Workers
Local 2000

Angela Schira
Secretary-Treasurer
BC Federation of Labour

Stanley Shewaga
President
Pulp, Paper and Woodworkers of Canada

Len Werden
Secretary-Treasurer
Vancouver and New Westminster
Building Trades Council

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Chief Safety Officer
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Murray Farmer
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Commercial Crane Limited

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President
Goodwin Johnson Limited

James Matkin
President and CEO
Business Council of BC

John St. C. Ross
Executive Vice-President and
Chief Operating Officer
MacMillan Bloedel Limited

Public Interest Representatives

Bonnie Hayes, PhD
Department of Psychology
University Hospital

Mark Thompson, PhD
Faculty of Commerce and Business
Administration, UBC

Non-voting Members

Kenneth Dye, FCA
President and Chief Executive
Officer of the Board

Connie Munro
Chief Appeal Commissioner
Appeal Division of the Board



REPORTER

Decision of the Governors

Number: 1

Date: April 8, 1991

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.

And whereas the Governors publicly invited and received submissions on the administration, practice and procedure of the Appeal Division.

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

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 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 or another Appeal Commissioner to whom there has been a delegation under Section 85(8).

In cases where an oral hearing is to be held, the appellant shall have the right to choose whether the appeal will be determined by a one-member panel or a three-member panel. Where the appellant does not elect the type of panel that will determine the appeal, the choice will 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 in the appeal 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. In such a situation, the appellant shall not have the right to choose the type of panel that will determine the appeal but must accept the choice of 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

The Appeal Division may exercise the Board's discretion to refer a worker for examination by a Medical Review Panel pursuant to Section 58(5) 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 it considers it appropriate and will generally do so where it finds an error of law or contravention of published policy of the Governors in a referral from the President under Section 96(4).

The Appeal Division has a specific authority to reconsider a decision of the Appeal Division under Section 96.1. The Appeal Division shall not exercise the Board's plenary independent power to reopen, rehear and redetermine matters under Section 96(2) of the Act.

7.0 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.

8.0 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.

THIS POLICY IS EFFECTIVE JUNE 3, 1991.

Editors’ note: This decision was affirmed and remade by the Governors on June 3, 1991.



Decision of the Governors

Number: 2
Date: April 8, 1991
Subject: Policy for Selection of Appeal Commissioners

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

- A. In Section 85(1)(b) that there shall be an Appeal Division of the Board consisting of a Chief Appeal Commissioner and one or more Appeal Commissioners appointed by the Chief Appeal Commissioner who are selected in accordance with the policies established by the Governors.
- B. In Section 85(2) that, subject to the approval of the Governors, the Chief Appeal Commissioner may appoint part-time or temporary Appeal Commissioners.

The Governors make the following policy with respect to the appointment of Appeal Commissioners to the Appeal Division.

1.0 Part-time or Temporary Appeal Commissioners

The Chief Appeal Commissioner has the authority to appoint part-time or temporary Appeal Commissioners within a budget and on general conditions approved by the Governors.

2.0 Types of Appeal Commissioners

There shall be Commissioners of three different characters:

- 1. Non-representational Appeal Commissioners – These Appeal Commissioners will have no special perspective although they may have had either an employer or worker perspective in their background.
- 2. Worker Representatives – These Appeal Commissioners will have a worker interest perspective.

-
3. Employer Representatives – These Appeal Commissioners will have an employer interest perspective.

3.0 Qualifications of Appeal Commissioners

No candidate for the position of Appeal Commissioner is disqualified from consideration because of any present or past association with any corporation, organization, or interest group.

The following is a list of qualifications that a candidate for the position of Appeal Commissioner might possess. It is not expected that any one candidate would possess all of these qualifications.

1. A comprehensive understanding of the workers' compensation system obtained as an advocate, adjudicator, advisor or through some other direct involvement in the system.
2. University graduation in law and practice in the area of administrative law or university graduation in an appropriate related discipline.
3. Experience as an adjudicator in some type of quasi-judicial function.
4. Knowledge of the principles of injury insurance, occupational safety and health, and assessments.
5. Knowledge of the principles of natural justice.
6. Knowledge of the skills required to conduct quasi-judicial proceedings.
7. Demonstrated impartiality and neutrality with the capacity to make objective and non-partisan judgments.
8. Demonstrated worker or employer interest perspective, perhaps with ongoing involvement in the activities of worker or employer interests, and an ability to rise above those perspectives.
9. Practical knowledge of worksites and workplace environments.
10. Demonstrated adjudicative skills and capability of making consistent decisions.

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11. Demonstrated communication skills – articulate speaker, good listener, and excellent writing skills to effectively communicate in clear and concise language.
 12. Demonstrated analytical skills with the ability to comprehend technical issues and grasp and develop concepts.
 13. Demonstrated capability of making well-reasoned decisions within the parameters of the legislation and in accordance with the policies of the Governors.

THIS POLICY IS EFFECTIVE APRIL 8, 1991.

Editors' note: This decision was affirmed and remade by the Governors on June 3, 1991.



Decision of the Governors

Number: 3
Date: April 8, 1991
Subject: Published Policy of the Governors

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

- A. In Section 82 that the Governors shall approve and superintend the policies and direction of the Board, including policies respecting compensation, assessment, rehabilitation, and occupational safety and health.
- B. In Section 82(a)(vii)(B) that the Governors shall determine the manner in which their policies shall be published.
- C. In Section 96(4) that the President may refer a finding of the Review Board to the Appeal Division for redetermination on grounds of error of law or contravention of a published policy of the Governors.
- D. In Sections 96(6) and 96(6.1) for an employer appeal on the grounds of error of law or fact or contravention of a published policy of the Governors.

The Governors make the following determination, resolution and bylaw.

1.0 Published Policies – June 3, 1991

The published policies of the Governors, as of June 3, 1991, consist of the following:

- 1. *Assessment Policy Manual;*
- 2. *Occupational Safety and Health Division Policy and Procedure Manual;*
- 3. *Rehabilitation Services and Claims Manual;*
- 4. *Workers' Compensation Reporter – Decision Nos. 1 – 423.*

2.0 Published Policies – After June 3, 1991

After proclamation of the *Workers' Compensation Amendment Act, 1989*, the published policies of the Governors shall consist of the documents listed above, amendments to the three policy manuals, any new or replacement manuals issued by the Governors, and all decisions of the Governors declared to be policy decisions.

3.0 Conflicts

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 internal conflict in published policy of the Governors, the interpretation of the policy most consistent with the intention of the Act or Regulations is to be applied.

4.0 Manner of Publication

An original of each policy signed by the Chairman shall be filed with the Secretary of the Board.

The policies of the Governors shall be published in print in the three policy manuals or the *Workers' Compensation Reporter*. They may also be published through an accessible electronic medium or in some other fashion that allows the public easy access to the policies of the Governors.

The Chairman shall supervise the continuation of the *Workers' Compensation Reporter*. It will include decisions of the Governors and selected decisions of the Appeal Division. It may include key decisions of the Review Board and Courts on matters affecting the interpretation and administration of the Act or other matters of interest to the community.

THIS POLICY IS EFFECTIVE JUNE 3, 1991.

Editors' note: This decision was affirmed and remade by the Governors on June 3, 1991.

Decision of the Governors

Number: 4
Date: April 8, 1991
Subject: Designation and Assignment to Appeal Division and Chief Appeal Commissioner

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

- A. In Section 82 that the Governors shall superintend the policies and direction of the Board and select and define the functions of the Chief Appeal Commissioner.
- B. In Section 96(6.1) that the Governors may designate that an employer who has received a notice relating to an assessment, classification, monetary penalty or apportionment of or shifting of costs between classes, not referred to in Section 96(1) but designated in the policies of the Governors, may appeal to the Appeal Division.

The Governors make the following designations of appeals to the Appeal Division and assignment of authority within the Board.

1.0 Designations under Section 96(6.1)

The Governors designate that an employer who has received a notice relating to an assessment, classification, monetary penalty or apportionment or shifting of cost between classes for which no appeal to the Appeal Division is specifically provided in Section 96(6), may appeal to the Appeal Division.

This designation includes, but is not limited to, the following:

- 1. First Aid penalties levied under Section 70;
- 2. charging of claims costs under Section 47(2).

2.0 Assignment to the Chief Appeal Commissioner and Appeal Division

The Governors assign to the Chief Appeal Commissioner and the Appeal Division:

1. the Board's obligation to issue certificates under Section 11;
2. the Board's authority to reallocate claims costs between employers under Section 10(8).

The Chief Appeal Commissioner may determine the practice and procedure for the conduct and disposition of these matters, including the character of panels assigned.

THIS POLICY IS EFFECTIVE JUNE 3, 1991.

Editors' note: This decision was affirmed and remade by the Governors on June 3, 1991.

Decision of the Governors

Number: 5
Date: May 6, 1991
Subject: Interest

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

- A. In Section 92(3) that interest is to be calculated in accordance with the policies of the Governors and beginning 31 days after the date on which the Review Board made its finding or beginning on an earlier day determined in accordance with the policies of the Governors.
- B. In Section 96(7) 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 shall be accompanied by interest, calculated in accordance with the policies of the Governors.

The Governors make the following policy with respect to the payment of interest under these sections of the Act.

1.0 Section 92(3)

The interest payable under Section 92(3) shall be paid from the date determined in accordance with the Board's general policy with respect to the payment of interest on retroactive benefits as set out in #50.00 of the *Rehabilitation Services and Claims Manual*.

Notwithstanding the preceding paragraph, where no interest is payable under #50.00 because the commencement date of the retroactive benefits is less than one year prior to the date the retroactive benefits are being processed, interest will be paid beginning 31 days after the date on which the Review Board made its finding.

The amount of interest to be paid is to be calculated in accordance with the interest rates set out in #50.00 of the *Rehabilitation Services and Claims Manual*.

2.0 Section 96(7)

The interest payable under Section 96(7) shall be calculated and paid in accordance with Policy No. 40:70:40 in the *Assessment Policy Manual* on “Interest Rebates.”

The amount of interest to be paid is to be calculated in accordance with the interest rates set out in 40:70:40 of the *Assessment Policy Manual*.

THIS POLICY IS EFFECTIVE JUNE 3, 1991.

Editors' note: This decision was affirmed and remade by the Governors on June 3, 1991.

Decision of the Governors

Number: 6

Date: June 21, 1991

Subject: Functions of the President and Chief Executive Officer

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

In Section 82(a)(i) that the Governors shall select and define the functions of the President and Chief Executive Officer.

The Governors select and define the following functions for the President and Chief Executive Officer.

Summary

The President is accountable to the Governors for planning, organizing, directing and controlling the overall operation (except Appeals, which is the responsibility of the Chief Appeal Commissioner) of the Workers' Compensation Board in accordance with the policies, standards and objectives established by the Governors.

Specific Responsibilities

1.0 Strategic Planning

Supports the Governors in the development of a long-range Strategic Plan for the Workers' Compensation Board of British Columbia. This plan will include the identification of the needs of the community the Workers' Compensation Board of British Columbia serves and a future vision of the role the Board will play in meeting those needs. In addition, the plan will identify the critical issues that must be addressed in order to realize the future vision and will set short-, medium- and long-term objectives, strategies, and budgets in order to address those issues.

Submits to the Governors a quarterly analysis of progress in achieving objectives, sets out rationale for variances and recommends modifications of the plan for the remainder of year.

2.0 Objectives for President and Chief Executive Officer

At the beginning of each year, and in conjunction with the Governors, establishes an annual list of objectives to be achieved in the forthcoming year.

3.0 Leadership of Human Resources

Provides strong and effective leadership to the employees of the Workers' Compensation Board of British Columbia in order to capitalize on the full potential of this critical resource. Will stimulate, motivate, guide and direct all those on staff to contribute their maximum to the realization of the WCB's goals and objectives.

4.0 Organization and Management of Staff

Develops and maintains an effective organization structure that reflects operational needs and prescribes the authority and responsibilities of staff as they relate to the accomplishment of specific objectives and priorities.

Ensures the establishment of a clear definition of the responsibility of each employee, the ongoing management, direction and motivation of the staff, and a system of measurement of employee performance, each being carried out in a manner that will ensure that the objectives established in the Strategic Plan are accomplished.

Consults with the Governors relative to decisions on the selection, promotion, utilization and retention of executive staff.

5.0 Policies and Programs

Within the context of the Workers' Compensation Board's Strategic Plan, recommends new and revised policies and programs to the Governors in order to meet the changing needs of the community and to recognize new developments in workplace safety and injury prevention.

Accountable to the Governors for meeting the operational objectives established for the Workers' Compensation Board of British Columbia and for ensuring the quality of programs meets standards established by the Governors.

6.0 Communications

Establishes and maintains an effective communications process to ensure the decisions of the Governors are conveyed to Board staff, workers, employers, client groups and other interested parties, and prepares the annual report on behalf of the Governors.

7.0 Board of Governors

Ensures that Governors have all the information necessary to exercise properly their responsibilities including reviewing Board policies and programs. Upon the appointment of each new Governor, coordinates a program which will provide new members with background information on the Workers' Compensation Board of British Columbia, the role of a Governor and the general issues facing the Workers' Compensation Board at that time.

Reports to the Governors on all activities of the Workers' Compensation Board's operations including financial, policy, programs and personnel issues. Develops and presents recommended courses of action and alternatives to the Governors for their consideration.

8.0 Financial and Administrative Management

Develops and presents to the Governors an annual budget and implements effective administrative systems to ensure the efficient utilization of the financial resources of the Workers' Compensation Board, within the objectives, policies, plans and budgets established by the Governors.

Develops and recommends to the Governors a long-term financial plan and provides advice and guidance on the financial implications and program benefits of all policy decisions.

9.0 Appeals

Develops a good working relationship with the Chief Appeal Commissioner to ensure the overall objectives of the Board are fulfilled in an efficient manner.

10.0 Review Board

Monitors the decisions of the Review Board to ensure decisions conform with the law and with Board policy.

Refers Review Board decisions to the Appeal Division in the event that decisions contravene the law or Board policy.



REPORTER

Decision of the Governors

Number: 7

Date: June 21, 1991

Subject: Functions of the Chief Appeal Commissioner

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

In Section 82(a)(i) that the Governors shall select and define the functions of the Chief Appeal Commissioner.

The Governors select and define the following functions for the Chief Appeal Commissioner.

Summary

The Chief Appeal Commissioner is responsible to the Governors for the general operation of the Appeal Division and shall 1) attend and participate as a non-voting member at meetings of the Governors, 2) implement the policies of the Governors with respect to administration of the Appeal Division, 3) preside at hearings or meetings of the Appeal Division. The Chief Appeal Commissioner will establish a credible, effective appeal process while working with the Board and within the parameters of the legislation.

Specific Responsibilities

1.0 Reporting to the Board

Keeps Governors apprised of critical developments in terms of decisions on claims and trends in claims decisions.

Provides periodic reviews of practices, procedures and analysis of the decisions of the Appeal Division to the Governors.

Carries out all duties and functions assigned by the Governors in accordance with policies and established by the Governors.

The Chief Appeal Commissioner exercises independent judgment in the adjudication of individual claims. At the same time, it is expected these decisions will be made consistent with the policies of the Governors.

2.0 Planning and Policy

Participates in the development of policy as a non-voting Governor.

Develops and maintains an effective organization structure in order to carry out the work of the Appeal Division.

Develops and seeks approval from the Governors of the annual budget.

3.0 Management and Administration of the Division

Implements the policies of the Governors with respect to the administration of the Appeal Division.

Provides visible leadership in promoting the image of the Division to the public.

Responsible for the overall direction of the Division and its staff.

Coordinates the activities of the Appeal Commissioners and panels.

Evaluates the performance of the Appeal Commissioners and Division staff, and recommends appropriate action to the Board of Governors.

4.0 Appointments

Selects and appoints Appeal Commissioners in accordance within the policies established by the Governors for an agreed term.

Subject to the approval of the Governors, appoints part-time or temporary Appeal Commissioners.

Establishes panels of the Appeal Division.

May terminate a designation to a panel and may fill any vacancy on a panel.

May recommend the removal of an Appeal Commissioner for cause to the Governors.

5.0 Quasi-judicial

Exercises jurisdiction under the *Workers' Compensation Act* and *Criminal Injury Compensation Act*.

Subject to the policies of the Governors and By-Laws enacted or the Resolutions passed, the Chief Appeal Commissioner will determine the practice and procedure for the conduct of appeals by the Appeal Division.

Chairs appeals, especially those of major importance – that is, acts as chairman, conducts hearings, determines issues, determines procedure, resolves disputes and encourages participation.

Renders his/her decision in writing in a clear, concise fashion explaining the reasons for the decision and citing legislation, regulation, policy, precedent, or extenuating circumstances.

Reviews and analyzes appeal decisions for: quality, adherence to policies, procedures and practices, consistency and timeliness; and takes corrective action as necessary.

Monitors the time within which decisions must be made and ensures the timeliness of decisions.

6.0 Legislation

Recommends changes or comments on proposed changes in legislation, as they may affect injured workers and the Appeal Division process.

7.0 Communications

Ongoing communications with the Board of Governors, the President of the Workers' Compensation Board, senior executives of the WCB, Review Board, labour representatives, employers, etc.

Regular meetings with the Appeal Commissioners and other staff.

Ongoing communications with other jurisdictions.

8.0 Results/Accountabilities

Results will be measured in the following ways:

Public confidence in and the credibility of the Appeal Commission, e.g., feedback from the Ombudsman's Office.

Quantitative measures of volume of work produced on a timely basis, including the number of appeals.

The quality of decisions made as a quasi-judicial tribunal.

Quality of advice given to the Board of Governors.

Appeal decisions made on a timely basis.

9.0 Activities

Activities of this individual carried out on a day-to-day basis determine the nature of the job and hence the implications on the qualifications that are sought.

Hearings – chairs hearings, reviews material and precedents in preparation for appeal hearings, makes or participates in making the decision.

Board of Governors relations – takes direction from the Governors and provides feedback and reports to the Governors.

Leadership and public relations – promotes the image of the Commission to the public.

Management/supervision – manages the day-to-day operations of the Division, the Commissioners, and staff. Builds collegiality among commissioners and a team. Assigns files and monitors the case load.

Assesses the future demands of the Division, develops short- and long-range plans to meet these demands and prepares budgets for the presentation to the Governors.

Communications – communicates with a wide range of groups and individuals, including workers, employers, the Ombudsman's Office, executive of the WCB, the Board, etc.

Liaises with the President and Chief Executive Officer on a regular basis.

10.0 Independence of Action

Decisions made without reference to superiors:

Quasi-judicial decisions as provided for in the Legislation.

Interprets and implements policies and plans.

Day-to-day management decisions.

Decisions which require consultation with or approval of the Board of Governors:

Determination of the practice and procedures for the conduct of the appeals, by the Appeal Division.

Employment of part-time or temporary Appeal Commissioners.

Annual budgets and plans.

The removal of Appeal Commissioners.



Decision of the Appeal Division

Number: 1
Date: May 29, 1991
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Practice and Procedure

Introduction

The Appeal Division is a new appeal body which will be created when Bill 27, the *Workers' Compensation Amendment Act, 1989*, comes into force on June 3, 1991. Information concerning the structure of the Appeal Division, and the general practice and procedure to be followed by the Appeal Division, is set out below. This is based in large part on the legal requirements set out in Bill 27, and Decisions 1 to 5 by the Board of Governors. Additional matters have been determined by the Chief Appeal Commissioner in accordance with Section 85.1 of Bill 27 which provides:

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.

1.0 Jurisdiction of the Appeal Division

The Appeal Division has authority to hear the following matters:

1. appeals from Review Board findings, under Section 91;
2. referrals by the President of Review Board findings, under Section 96(4);
3. reconsideration of previous Appeal Division decisions, under Section 96.1, or previous Commissioners' decisions, under Section 17(5) of the *Workers' Compensation Amendment Act, 1989* (Bill 27);
4. Section 39 Relief of Claim Costs appeals, under Section 96(6)(a);

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5. Section 73 Occupational Safety and Health penalty appeals, under Section 96(6)(c);
 6. Section 40, 41 and 42 Assessment appeals, under Section 96(6)(a) and (b);
 7. appeals of decisions or findings under Section 22 of the *Criminal Injury Compensation Act*.

Pursuant to Section 96(6.1), the Governors have designated:

- (a) First Aid penalties levied under Section 70,
- (b) charging of claims costs under Section 47(2), and
- (c) any notice relating to an assessment, classification, monetary penalty or apportionment or shifting of cost between classes for which no appeal to the Appeal Division is specifically provided in Section 96(6),

as matters which may be appealed to the Appeal Division.

The Governors have also assigned to the Appeal Division:

- (a) the Board's obligation to issue Certificates to the Court under Section 11;
- (b) the Board's authority to reallocate claims costs between employers under Section 10(8).

2.0 Composition of the Appeal Division

The Appeal Division consists of a Chief Appeal Commissioner appointed by the Governors, and Appeal Commissioners appointed by the Chief Appeal Commissioner, who are selected in accordance with the policies established by the Governors.

2.1 Chief Appeal Commissioner

The Chief Appeal Commissioner is responsible to the Governors for the general operation of the Appeal Division and:

- (a) shall attend and participate as a non-voting member at meetings of the Governors,

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- (b) shall implement the policies of the Governors with respect to the administration of the Appeal Division,
 - (c) shall preside at hearings or meetings of the Appeal Division, and
 - (d) may under Section 85(8) delegate in writing any of her powers and duties to an Appeal Commissioner subject to any terms and conditions set out in the delegation.

2.2 Registrar

One Appeal Commissioner will be appointed by the Chief Appeal Commissioner to serve as the Registrar, and will from time to time have certain powers and duties of the Chief Appeal Commissioner delegated to them under Section 85(8). Those duties shall include, but will not be limited to:

- (a) chairing meetings of the Appeal Division, in the absence of the Chief Appeal Commissioner, and
- (b) 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 Registrar shall be published by the Appeal Division.

2.3 Appeal Commissioners

There are Appeal Commissioners of three different characters:

1. Non-representational Appeal Commissioners – These Appeal Commissioners have no special perspective although they may have had either an employer or worker perspective in their background.
2. Worker Representatives – These Appeal Commissioners have a worker interest perspective.
3. Employer Representatives – These Appeal Commissioners have an employer interest perspective.

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 a proceeding in which they participated, until the proceeding is completed.

2.4 Panels of the Appeal Division

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 the Appeal Division or 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).

The assignment of one or more Appeal Commissioners to a panel in a particular case will be made by the 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.

In cases where an oral hearing is to be held, the appellant normally has the right to choose whether the appeal will be determined by a one-member panel or a three-member panel. Where the appellant does not elect the type of panel that will determine the appeal, the choice will 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. In such a situation, the parties shall not have the right to choose the type of panel that will determine the matter but must accept the choice of the Chief Appeal Commissioner.

3.0 Appeal from a Workers' Compensation Review Board Finding

Section 91(1) 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.

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 on a procedural or preliminary determination by the Review Board. The Review Board controls its own procedures which are not therefore a matter for the Appeal Division to deal with. Complaints regarding such matters should be addressed to the Review Board. Objections to procedural or preliminary determinations may be taken into account by the Appeal Division on an appeal from a Review Board finding.

The Appeal Division will, however, 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. Where the Appeal Division allows an appeal on the issue of an extension of time, the matter will be returned to the Review Board to hear the appeal.

3.1 Commencement of Appeal

(a) Notification of Intent to Appeal

For the purpose of meeting the time limits for initiating an appeal, it is sufficient that notification of intent to appeal to the Appeal Division be received within 30 days of the date of the mailing of the Review Board finding. Written notification, delivered by mail or by hand, received at any office of the Board within 30 days of the date of mailing of the Review Board finding, will constitute notification of intent to appeal to the Appeal Division. Notification by FAX (276-3349) will be accepted. Oral notification (by telephone at 279-7510) received by the Registrar's office within 30 days of the date of mailing of the Review Board finding will also be accepted. If

oral notification is provided, an acknowledgment will be sent in writing by the Appeal Division and the appellant will be asked to complete a “Notice of Appeal” form.

(b) Disclosure

After notification of intent to appeal is received, 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.

(c) Commencement of Appeal

A policy of the Board of Governors requires an appellant to outline in writing the reasons for the appeal, explaining how the Review Board finding is in error. The appeal will be considered to be “commenced” for purposes of Section 91(3) when the Registrar’s office determines that the requirement for the provision of reasons has been met. The respondent will be advised in writing that the appeal has been commenced and provided a copy of the Notice of Appeal with reasons for the appeal.

Completion of a “Notice of Appeal From Review Board Finding” form will generally satisfy the requirement to provide reasons. Where the appellant provides the information required to commence an appeal in a letter to the Appeal Division, the requirement to complete a Notice of Appeal form may be waived by the Registrar. Where oral notification is provided of an intent to appeal, written reasons must subsequently be provided. If reasons for the appeal are not provided within 21 days following a request for these from the Appeal Division, the notice of intent to appeal shall be considered to have been abandoned.

Parties to the appeal will be advised that a copy of the tape containing the voice recording of the Review Board hearing will be provided upon request. As oral hearings will be available to the Appeal Division, however, where it is important to hear oral evidence this will normally be done by way of an oral hearing.

(d) Extension of Time to Appeal

The Act 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 . . .

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:

- (i) substantial and material new evidence has arisen or has been discovered subsequent to the Review Board hearing;
- (ii) exceptional circumstances prevented the party from initiating an appeal in time.

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

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

3.2 Conduct of 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, it is necessary that 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. Where the appellant requires additional time to provide information, evidence, or argument in support of an appeal, the appellant will be allowed a further period of time. However, a request by the appellant for such further time will delay the 90-day period for rendering a decision.

Section 91(3)(c) 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.

3.3 Submissions by Parties

(a) Written Submissions

To enable a decision to be reached within 90 days of the date on which the appeal is commenced, written submissions which the appellant wishes to make must be received by the Appeal Division no later than 14 calendar days following the commencement of the appeal.

The respondent(s) will be provided with a copy of the Notice of Appeal and any submissions, and given 14 days to reply. The appellant will then be given 7 days to provide any rebuttal argument.

Where the appellant requests additional time for submissions or otherwise requests a delay in the proceedings, a longer period for the making of the decision on the appeal will be designated by the Chief Appeal Commissioner. This longer period will usually be 90 days from the completion of submissions.

The Chief Appeal Commissioner may also 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.

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 must be provided within 14 days of the decision granting an extension of time to appeal, and so forth.

(b) Oral Hearing Request

Any request for an oral hearing should be submitted at the time the appeal is initiated. A request for an oral hearing will be considered as a preliminary matter on the basis set out below under "Hearings." The decision in respect of an oral hearing will normally be made by the Chief Appeal Commissioner within 10 days of the commencement of the appeal. An oral hearing will be held and a decision made within the time frames specified in Section 91(3)(a), (b) or (c). In order to prevent delays, parties are requested to provide to the Appeal Division, in advance of an oral hearing, copies of any new documentary evidence they intend to submit.

If an oral hearing is refused, the appellant will be required to provide any written submissions within 14 days of this refusal and the matter will proceed as set out above.

3.4 Representation Before the Appeal Division

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

The Appeal Division operates on an inquiry basis and may obtain information from sources other than a party to an appeal. Where the participation of other persons or groups in the procedure will assist inquiry into the merits of the issues, the Chief Appeal Commissioner may give notice to or allow intervention by them. Their participation will be invited to assist the Appeal Division in the consideration of the

appeal, through the provision of further evidence or submissions. For example, where an employer is no longer registered with the Board, the Chief Appeal Commissioner may give notice of an appeal commenced by a worker to the relevant industry association and the Employers' Advisers. Such notification may be given by the Chief Appeal Commissioner prior to the matter being assigned to a panel of the Appeal Division, or at a later date upon request to the Chief Appeal Commissioner by the panel considering the matter. On an appeal from a Review Board finding, notice will normally be sent to any organized group of employers which participated in the appeal to the Review Board under Section 90(2).

All matters raised in the decision letter which was appealed to the Review Board, and in the Review Board finding, may be considered issues in the appeal. The Appeal Division will ensure that 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.

3.5 Hearings

A party in any case has 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. A preliminary decision as to whether an oral hearing will be granted will be made by the Chief Appeal Commissioner. If an oral hearing is not granted, the parties will then be given an opportunity to provide written submissions, and the matter will be assigned to a panel for the making of a decision. The panel will also have the discretion to hold an oral hearing, should it conclude after considering the written submissions that an oral hearing is necessary.

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 which warrant holding an oral hearing, for example, it may be granted notwithstanding the fact that no oral hearing was requested at the Review Board.

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. The Appeal Division will primarily hold its oral hearings at the Richmond location of the Board until the existing backlog of appeals is eliminated.

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 upon request if required for an oral hearing.

3.6 Authority of Appeal Division

The role of the Appeal Division is to inquire into the merits of matters properly before it. The Appeal Division has the discretion to initiate and to conduct a full inquiry into all of the issues arising out of an appeal. 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.

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 reconsideration.

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

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.

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

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

3.8 Board Policy

The Appeal Division will apply and interpret the Act, Regulations and existing Board policy. The Appeal Division does not have the authority to create new policy.

The Appeal Division is not bound to follow legal precedent and will make its decisions according to the merits and justice of each case. 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.

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.

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 internal conflict in published policy of the Governors, the interpretation of the policy most consistent with the intention of the Act or Regulations is to be applied.

The Chief Appeal Commissioner will forward copies of significant decisions of the Appeal Division to the Chairman of the Board of Governors and the President.

3.9 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.

Selected decisions of the Appeal Division will be published under the direction of the Chairman of the Board of Governors with the assistance of the Chief Appeal Commissioner to ensure that all key decisions are reported.

4.0 Referrals 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.

Upon receipt of this referral, the Appeal Division will disclose the referral documentation from the President to the parties. The Chief Appeal Commissioner will 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 3.4).

An oral hearing will be granted upon request (without the necessity to state reasons for seeking same) from a party to a referral who would be adversely affected by the reconsideration being allowed.

The Appeal Division will generally exercise its discretion under Section 91(2) to direct the Review Board to reconsider where it finds an error of law or contravention of published policy of the Governors in a referral from the President under Section 96(4), as set out in 3.7.

5.0 Appeals Prior To June 3, 1991

The date set for the establishment of the Appeal Division is June 3, 1991. Prior to that date, an appeal lay to the Commissioners of the Board under Section 91 from a Review Board finding made after February 20, 1986, or a Board of Review decision made prior to that date.

Section 17(2) of the *Workers' Compensation Amendment Act, 1989* provides that if an appeal or a rehearing under Section 91 or 96 of the Act, as it was prior to June 3, 1991, has been commenced but has not been completed on that date, that appeal or rehearing shall be continued by the Appeal Division under and in conformity with the Act as it is after June 3, 1991, so far as it may be done consistently with the new Act.

5.1 Backlog of Appeals

It is anticipated that when the Appeal Division comes into being on June 3, 1991, there will be approximately 1,500 appeals to the Commissioners already in existence. A schedule has been proposed to deal with this backlog of appeals within a 12-month period. The intention is to accomplish this while at the same time complying with the statutory requirement that the new appeals filed after June 3, 1991 be decided within 90 days (or the further period designated under Section 91[3]).

Section 17(3) of the *Workers' Compensation Amendment Act, 1989*, states:

Notwithstanding section 91(3) of the new Workers' Compensation Act, the chief appeal commissioner may designate the time within which a decision with respect to an appeal or rehearing under section 91 or 96 of the former Workers' Compensation Act shall be made.

Appellants will be advised at monthly intervals of the designated time period in which they will receive a decision. The designations in respect of backlog appeals will be in the order of the earliest date on which all submissions were completed. The designations will be stated in terms of a decision being rendered within 90 days.

During the initial period following June 3, 1991, the Appeal Division will focus exclusively on the backlog appeals. As submissions are completed on the appeals filed after June 3, 1991, these will be considered by the Appeal Division and decisions will be rendered within the time frames specified by Section 91(3).

6.0 Reconsiderations by Appeal Division

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.

Section 96.1(3) provides as follows:

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 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.*

Section 17(5) of Bill 27 provides that 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 Sections 91 or 96 of the former *Workers' Compensation Act* on the same grounds and in the same manner as that set out above.

7.0 Other Employer Appeals

This category primarily covers assessment and occupational health and safety matters. Most questions arising on claims are appealable to the Review Board but some are not; for example, the question whether an employer should be charged with or relieved from the costs of a claim. An appeal lies to the Appeal Division under Section 96(6) or 96(6.1) from a decision concerning the following, on the grounds of error of law or fact or contravention of a published policy of the Governors:

- (a) relief of costs under Section 39;
- (b) assessments;
- (c) a penalty under Section 70 or Section 73;
- (d) the charging of claim costs under Section 47(2).

The provisions set out above under 3.0 to 3.9 concerning practice and procedure in connection with appeals from Review Board findings are generally applicable to other employer appeals under Section 96(6) and 96(6.1). In particular, the same provisions apply in connection with the "Conduct of Appeal," "Submissions by Parties," "Representation," "Hearings," and "Reconsiderations by Appeal Division."

Some of the general requirements as to practice and procedure which apply to these appeals are set out below, followed by some additional requirements which apply to Occupational Safety and Health and Assessment appeals.

An appeal must be initiated in writing within 30 days after the employer receives the notice. The 30-day time limit for appeals applies to decisions rendered both prior to, or after, June 3, 1991. An extension of time to appeal may be granted by the Chief Appeal Commissioner.

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.

In appeals commenced under Sections 96(6) and 96(6.1), the Chief Appeal Commissioner 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 commencement of an appeal under Section 96(6) or 96(6.1) does not relieve the 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 will be accompanied by interest.

(a) Occupational Safety and Health Appeals

An employer may appeal a decision to levy an additional assessment under Section 73, or a decision to levy a First Aid penalty under Section 70. A “show-cause” letter to an employer from the Occupational Safety and Health Division, advising that an additional assessment is being considered, is not appealable to the Appeal Division.

On an appeal from a decision of the Occupational Safety and Health Division, a copy of the notice of appeal will normally be sent to the individual whose name appears on the Inspection Report as the worker’s representative. A copy will also be mailed to the attention of the “Chair, Industrial Health and Safety Committee” at the employer’s address. For administrative convenience, this will be sent without a determination as to whether the employer is obliged to establish an Industrial Health and Safety Committee under Section 4 of the *Industrial Health and Safety Regulations*.

A written response may be obtained from the Occupational Safety and Health Division, where written submissions are provided by an 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.

The Board officer who performed the inspection on which the decision was based may be requested to attend the oral hearing.

(b) Assessments

An appeal may be initiated within 30 days after a decision by a Manager or Director. An employer should exhaust all internal avenues of review within the Assessment Department prior to bringing an appeal to the Appeal Division.

Where written submissions are provided, a response may be obtained from the Assessment Department. This will be done in all cases where the employer has not exhausted the avenues of review within the Assessment Department. 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.

A representative of the Assessment Department may be requested to attend an oral hearing in connection with an Assessment appeal.

8.0 Section 11 Certificates

In Decision No. 4, dated April 8, 1991, 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 Chief Appeal Commissioner.

The parties to the legal action will be notified and given an opportunity to participate. In addition, 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 an individual who is alleged to have been a worker at the time of his injury. Written reasons will normally be provided for the decision.

The time frames set out under 3.2 and 3.3 above do not apply to the provision of Section 11 Certificates. Regard will be had to the requirements of the legal action and, in particular, to any trial date which has been scheduled.

9.0 Section 10(8) Transfer of Costs From One Class of Employers To Another

In Decision No. 4, dated April 8, 1991, the Governors assigned to the Chief Appeal Commissioner and the Appeal Division the Board's authority to reallocate claims costs between employers under Section 10(8).

The Governors' policies concerning Section 10(8) are set out in #114.00 of the *Rehabilitation Services and Claims Manual*, and Decision No. 65 of the *Workers' Compensation Reporter* entitled "Re Cost Shifting Between Classes." Applications under Section 10(8) shall be initiated by the employer in writing directed to the Chief Appeal Commissioner.

The procedures set out in 3.3 for “Submissions by Parties” will be followed, although there is no legal requirement that a decision be made on the application within any specified time frame. An oral hearing may be requested as set out in 3.5.

10.0 Criminal Injury Compensation Act Appeals

An appeal to the Appeal Division from the findings and report of an Appeal Committee requires leave from the Appeal Committee or the Chief Appeal Commissioner. Applications to the Chief Appeal Commissioner for leave to appeal shall be made in writing.

If leave to appeal is granted, the Appeal Division may 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 procedures set out in 3.3 for “Submissions by Parties” will be followed although there is no legal requirement that a decision be made on the appeal within any specified time frame. An oral hearing may be requested as set out in 3.5.

Concluding Comments

In setting out the above information concerning the practice and procedure of the Appeal Division, I have attempted to balance various competing interests which include:

- (a) the needs of those who will be affected to have as much information as possible (this includes workers, employers, and Board officers, as well as others);
- (b) my belief that to some extent issues as to practice and procedure should be left to the discretion of the panel of the Appeal Division which is hearing a matter;
- (c) my wish to benefit from the experience of the Appeal Commissioners and other participants.

I have therefore not attempted to codify all matters of practice and procedure for the Appeal Division, prior to June 3, 1991. Issues which are not addressed above will be dealt with by me, by the Registrar, and by the panels of the Appeal Division dealing with particular appeals or reconsideration requests. As our collective experience with the operation of the Appeal Division accumulates, I expect to develop and publish further procedural guidelines.

Due to the time constraints imposed by the need to issue this material prior to June 3, 1991, there was insufficient time to obtain the degree of input from various parties which I would have desired. I did receive comments on short notice from a number of worker and employer representatives and Board officers which were helpful in the preparation of this document. I would welcome further comments and suggestions concerning the Appeal Division's practices and procedures on an ongoing basis.

Decision of the Appeal Division

Number: 2
Date: May 29, 1991
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Delegation by the Chief Appeal Commissioner

Section 85(8) of the *Workers' Compensation Amendment Act, 1989*, provides that:

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

Pursuant to Section 85(8), I now delegate certain powers and duties to the Appeal Commissioner appointed by me, from time to time, to serve as the Registrar. I retain the powers and duties delegated by me to the Registrar and will exercise these concurrently with the Registrar, except in the event of my determining that I am/would be exposed to a possible or actual conflict of interest or appearance of bias with respect to a given case. In these latter instances, I delegate all necessary powers to the Registrar to act in my place. I also delegate to the Registrar the power to act in my absence.

The following powers are delegated to the Registrar:

1. Under Section 91(1), the power to grant an extension of time for an appeal from a Review Board finding.
2. Under Section 96(6), the power to grant an extension of time to an employer for an appeal from an assessment, classification, special rate, differential or additional assessment, levy or contribution.
3. Under Section 96(6.1), the power to grant an extension of time to an employer for an appeal from a decision to levy a First Aid penalty under Section 70, or to charge an employer with claim costs under Section 47(2).
4. Under Section 91(3), the power to designate a longer period for the making of a decision by the Appeal Division where the appellant requests a delay in the proceedings.

In matters where I am unable to act due to:

- (a) my absence, or
- (b) a possible or actual conflict of interest or appearance of bias,

I also delegate to the Registrar the following additional powers:

5. Under Section 85(7)(c), the power to preside at hearings or meetings of the Appeal Division.
6. Under Section 91(3), the power to designate a longer period for the making of a decision by the Appeal Division where the Registrar considers the longer period necessary because of an act or omission of the appellant or because of the complexity of the matter under appeal.
7. Under Section 85.2, the power to establish one or more panels of the Appeal Division, to refer a matter that is before the Appeal Division to a panel or a matter that is before a panel to the Appeal Division or another panel, to terminate a designation to a panel, or to fill any vacancy on a panel.
8. Under Section 96.1(3) or Section 17(5) of the *Workers' Compensation Amendment Act, 1989*, 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 the matter.
9. Under Section 22(3) of the *Criminal Injury Compensation Act*, the power 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.
10. Under Section 22.1 of the *Criminal Injury Compensation Act*, 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 the matter.
11. Under Section 96(6.1), the power to grant an extension of time for an appeal from a notice relating to an assessment, classification, monetary penalty or apportionment or shifting of cost between classes for which no appeal to the Appeal Division is specifically provided in Section 96(6).

In exercising these delegated powers, the Registrar shall implement the policies of the Governors with respect to the administration of the Appeal Division pursuant to Section 85(7).

I appoint Paul Petrie, Appeal Commissioner, to serve as Registrar of the Appeal Division on the basis set out above for one year from June 3, 1991 until June 2, 1992.



Decision of the Appeal Division

Number: 91-0014
Date: June 12, 1991
Panel: Connie Munro, Chief Appeal Commissioner
Subject: A Claim for Epicondylitis

This is an appeal from the finding of the Review Board dated June 6, 1989, which confirmed the decision of the Claims Adjudicator of May 2, 1988. The adjudicator's decision had disallowed the worker's claim for a right elbow epicondylitis. The issue is whether the worker's disability arose out of, and in the course of, her employment as a retail food cashier.

There is some equivocation in the Review Board decision as to the diagnosis in this case and whether the problem was tendonitis or epicondylitis. The attending physician's letter of October 11, 1988, however, gives a clear statement of the diagnosis as an "acute medial epicondylitis of her right elbow." That diagnosis was also made by the WCB Medical Officer in Memo #3.

The worker suffered a gradual onset of symptoms in her right arm during late March, 1988. At the time she had been a cashier for 12 years.

The Review Board decision referred to the worker's testimony at the hearing that 3-1/2 months prior to the onset of her symptoms she was transferred to a new store. She had been in a "superstore" and decided it would be better to return to a smaller store. The comment is made that one of the reasons for the move was that in the smaller store "the wishbone tri-belt system was not used." The Review Board decision does not elaborate as to whether the use of that type of belt system was causing physical difficulties for the worker.

It is noted that the worker had a 1986 claim for compensable epicondylitis of the left elbow. It involved three days of time loss.

In her current position, when no customers are at the checkstand, the worker must remove and replace outdated magazines. The new magazines come in bundles, each weighing approximately 15 pounds and are wrapped in plastic which must be pulled off by hand. On March 21, 1988, the worker carried out these duties with five or

six bundles of magazines and at the time suffered no symptoms. She returned to the checkstand. A little more than an hour later her right arm, the dominant arm with which she carries out all strenuous duties, became so sore that she had to use her left arm to carry the weight of the grocery bags.

The *Claims Policy Manual* #13.11 states:

Claims for epicondylitis (tennis elbow) and carpal tunnel syndrome are treated as claims for "personal injury," whether they follow one specific trauma or repeated trauma. In the case where the condition results from repeated trauma, the date of injury will be the final trauma in the series.

Much of the Review Board discussion of this case revolved around the importance of a "specific incident" in considering a claim for epicondylitis. In dwelling on that point, the Review Board panel failed to recognize an error in the original decision. The Claims Adjudicator stated in Memo #4 "epicondylitis is also not acceptable as there was no specific, traumatic injury." That is a misinterpretation of Claims Policy #13.11.

Neither the Claims Adjudicator nor the Review Board considered the role of repeated trauma as a cause of epicondylitis.

Epicondylitis is treated, for claims purposes, as a "personal injury." That is not inconsistent, however, with an acknowledgment that, in addition to being caused by a single traumatic event, epicondylitis may also be the result of repetitive stress or cumulative trauma.

The Claims Adjudicator may have been further misled in adjudication of this claim by the medical advice received in Memo #3. The doctor stated:

I don't think that the repetitive activities of cashiering would be such as to cause epicondylitis in someone who is well accustomed to the job.

The reference to "unaccustomed" is a term that was apparently drawn from the Schedule B requirement in respect of "tenosynovitis, tendonitis." It does not apply to adjudication of a claim for epicondylitis.

A document prepared by Dr. Nichini, now the Vice-President of WCB Medical Services Division, was submitted in evidence at the Review Board by the worker's representative. It is a compendium of references regarding epicondylitis and refers to the precipitating causes of epicondylitis:

A direct blow; activities associated with plumbing, luggage handling; prolonged writing by longhand and sports seem to be significant. Overload factors may occur and when they do, are either intrinsic, i.e. a sudden act of muscular contraction, or extrinsic, i.e. an outside force producing a stretch injury. These overload factors seem to be most significant when the forearm is either pronated or somewhere in the region between pronation and the neutral position. It seems the aforementioned considerations can be accumulative in nature.

That description encompasses the occurrence of repeated trauma as described in *Claims Manual* #13.11.

It is undisputed that this worker performs forcible, frequent and repetitive movements of her forearm and wrist in the course of her employment. There has not been any non-occupational activity by this worker implicated as a likely cause of epicondylitis.

I find no difficulty, therefore, in concluding that the diagnosed epicondylitis arose out of, and in the course of, this woman's employment.

THE APPEAL IS ALLOWED.



REPORTER

Decision of the Appeal Division

Number: 91-0020
Date: June 13, 1991
Panel: Connie Munro, Chief Appeal Commissioner
Subject: A Fisherman's Wage Rate

This appeal is from part of the findings of the Review Board dated June 21, 1989. The Review Board had confirmed the decision of the Claims Adjudicator dated October 31, 1988 insofar as it related to the setting of the worker's wage rate. The issue on the appeal is whether or not the worker's wage rate was properly calculated.

Evidence and Argument

On May 18, 1988, the worker, a fisherman, sustained first, second, and third degree burns when a melting pot exploded, showering him with molten zinc. At the time of the accident, the worker was just commencing the fishing season. He was employed by his brother-in-law.

In an interview with a Rehabilitation Consultant on August 12, 1988, recorded in Memo #7, the worker told the Rehabilitation Consultant that he had a job to return to with his brother-in-law as soon as he was medically cleared to do so. The Rehabilitation Consultant indicated that he attempted to contact the brother-in-law/employer but that he was out fishing. In any event, there does not appear to be any dispute that had the worker not been injured in preparing the boat for fishing in May, he would have had work available to him for the entire fishing season.

On the employer's Report of Injury, the worker's rate of pay is stated to be "15% of gross sales." On the back of Form 6, the worker stated:

My rate of pay is 15% of the season, based on what the boat does. The season starts with preparing the boat for the work, doing the actual work of fishing and to close the season, part of the duties is to prep the boat for winter storage. For all this, my rate would be 15% of the gross sales of the boat, plus costs of room and board.

The Adjudicator stated in the decision letter of October 31, 1988:

The wage loss rate under this claim was calculated as per provisions of Section 66.13 of the Workers' Compensation Rehabilitation Services and Claims Manual that indicates that fishermen are to be treated as workers engaged in casual employment and that the wage loss rate shall be based on the worker's average earnings for the one year period or longer prior to the date of injury.

The Review Board stated:

At the hearing, the worker provided information to the effect that his actual loss by virtue of not being able to go out on the boat during salmon season, between May 15, 1988 and September 15, 1988, was between \$14,800.00 and \$15,000.00. He advised that his employment agreement, which was verbal, allowed for readying the vessel prior to the season, which he was doing at the time of injury, and laying up the vessel following the season, as well as actually fishing between July and August.

Wage loss was paid on this claim to November 1, 1988.

The worker has argued that he ought to be treated as a seasonal worker rather than a casual worker.

Law and Policy

Item 66.13 of the *Claims Adjudication Manual* states:

Fishermen are treated as workers engaged in casual employment. However, this rule cannot be rigidly applied without regard to the particular circumstances of the case. For instance, it is conceivable that a particular fisherman could be employed 52 weeks a year, 5 days a week. He would then have to be treated as a regular full-time worker rather than a casual worker. Similarly, it is possible that some types of fishermen might be regarded as seasonal workers. Where a job is to last more than three months, the worker is generally regarded as a seasonal or full-time worker rather than a casual worker.

Section 33 of the *Workers' Compensation Act* sets out a number of methods the Board might utilize to determine a worker's average earnings. There is a broad discretion on the part of the Board as to the choice of calculation, but they must use the method which would produce a figure such

. . . as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury

The Board's policy in respect to payment of seasonal workers is described in item #66.14 of the *Claims Manual*:

Workers injured, while engaged in a seasonal occupation, are normally paid wage loss on the basis of their rate of pay at the date of injury.

Findings and Reasons

There does not appear to have been any consideration given by the Claims Adjudicator as to whether this particular fisherman ought to have been categorized as a seasonal rather than a casual worker. As the season was to last from May until the beginning of September, i.e. more than three months, Board policy indicates that he should have been regarded as a seasonal worker.

The worker argued before the Review Board that he ought to have been viewed as a seasonal worker. Their response was as follows:

The worker has argued that he should be viewed as a seasonal worker, but the panel finds that in such circumstances as these, the distinction becomes moot. The earnings information provided on the worker's Application for Compensation, and on the employer's Report of Injury, state that the worker's earning at the time of injury would be 15% of the value of the catch during the season. Obviously, it would be impossible for the Board to calculate 15% of an unknown value in order to establish a wage rate. The panel therefore finds that the decision not to base the wage rate on actual earnings at the time of injury was reasonable, and correct.

The reasoning of the Review Board cannot be upheld. Whether or not this individual was to be categorized as a seasonal worker has nothing to do with the administrative difficulties that might be encountered in determining his wages at the date of injury. That is an entirely separate consideration. I find that the worker in this case should have been categorized as a seasonal worker.

The Review Board concluded that the worker could not have been paid on his wage rate on actual earnings at the date of injury because the wage rate was a percentage of earnings for the season. Undoubtedly, that type of contractual arrangement involves some administrative difficulties for the WCB. It is, however, a common wage agreement in the fishing industry. There is nothing to suggest that the WCB cannot calculate an appropriate figure.

Item # 66.12, for example, of the *Claims Manual* provides for the setting of a provisional rate if there is a delay in obtaining information as to the claimant's actual earnings. The policy provides for an interim decision to be made and specifies:

If, after payments have been made on a provisional basis, sufficient earnings information is received, the rate may be changed and an adjustment made in respect of prior payments.

In the present case, the worker apparently provided evidence to the Review Board that his earnings between May 15, 1988 and September 15, 1988 would, if he had not been injured, been between \$14,800.00 and \$15,000.00. A submission by the worker on this appeal alludes to that figure representing the earnings of the person who replaced him on the employer's boat. There is no evidence on file, however, to substantiate the figure or confirm its source. The worker should supply that information.

I find that the worker is entitled to have his wage rate recalculated based on the wages he was earning at the time of injury. In this case that means the wages he would have earned during the fishing season had he not been injured. This can be objectively measured and best represents the actual loss of earnings suffered by the worker by reason of the injury.

THE APPEAL IS ALLOWED.

Decision of the Appeal Division

Number: 3
Date: July 3, 1991
Panel: Connie Munro, Chief Appeal Commissioner
Subject: Withdrawal of Appeals to the Appeal Division:
Medical Review Panel Examinations

Prior to June 28, 1991, a Medical Review Panel appeal could only be brought following a medical decision by the Board. A Review Board finding could not be appealed to a Medical Review Panel.

Amendments to Sections 58 and 63 of the *Workers' Compensation Act* came into force on June 28, 1991. These changes are contained in Sections 18, 19 and 20 of Bill 15, the *Miscellaneous Statutes Amendment Act (No. 2), 1991*.

A worker or employer may now appeal directly to a Medical Review Panel following a medical finding by the Review Board. A dependant of a deceased worker may also request a Medical Review Panel inquiry into the cause of death of a worker, following a Review Board finding.

As a transitional measure, a worker or employer who had an existing appeal to the Appeal Division as of June 28, 1991 may withdraw the appeal and appeal directly to a Medical Review Panel. This may be done at any time before the appeal to the Appeal Division is heard. Similarly, the dependant of a deceased worker who had an existing appeal to the Appeal Division concerning the cause of death of a worker may withdraw the appeal and appeal directly to a Medical Review Panel.

The requirements for initiating a Medical Review Panel appeal must still be met. There must be:

- (a) a request in writing stating that the appellant is aggrieved by the medical finding of the Review Board, and
- (b) a certificate of bona fide medical dispute from a physician, which states sufficient particulars to define the question in issue.

A medical certificate is not required if the dependant of a deceased worker is requesting a Medical Review Panel inquiry into the cause of death of a worker.

An appellant with an existing appeal to the Appeal Division who wishes to request a Medical Review Panel examination will not be required to make an election concerning the appeal route they wish to follow prior to a decision being made that they have met the requirements for initiating a Medical Review Panel appeal.

Editors' note: For the full text and further explanation of the amendments to Sections 58(3), 58(4) and 63(1) of the Act, see page 73.

Finding of the Review Board

Date: November 30, 1989
Panel: P.M. Steele, Vice-Chairman
N.S. Keithly, Member
R.B. Heinekey, Member
Subject: A Widow's Entitlement Under Section 17 and the Canadian Charter of Rights and Freedoms

Introduction

The widow of the deceased worker has appealed a decision of a Claims Adjudicator of the Workers' Compensation Board set out in a letter to her dated November 12, 1987. In that letter she was advised of the particulars of the pension she would receive under the provisions of the *Workers' Compensation Act* (the "Act") following the death of her husband on August 25, 1987. The widow was also advised of the funeral expenses, incidental expenses, and emergency lump sum payment to which she was entitled. A note was included in that letter that she may be entitled to further benefits if her son chose to return to school prior to his 21st birthday.

Issue

The issue in this appeal is whether or not the widow's pension under Section 17 of the Act should be less than pensions paid to other widows of a younger age. The widow considered that this treatment was age discrimination contrary to Section 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The widow also submitted that she should be entitled to support for her two children, aged 20 years and 25 years, who were both still at home. She contended that there was discriminatory treatment of children under the Act based on the age of the children. This discrimination also offended the Charter.

After the hearing, the panel determined that no notice had been given to the Attorney General of British Columbia nor to the Attorney General of Canada as required by the *Constitutional Question Act*, RSBC 1979, c.63, s.8, when bringing a Charter argument before an administrative tribunal. The panel gave the required notices to these departments.

Outcome

This appeal is denied on the basis that the Review Board does not have the jurisdiction to grant the remedy requested by the widow, nor are her children eligible for compensation benefits under the Act.

Evidence

On August 25, 1987, the worker was involved in a fatal accident at work. The circumstances of this accident were clearly within the parameters of the Act. The only question is the applicable survivors benefits under the Act for the widow and her children.

Law and Policy

The issues put before the panel in this appeal concern the rights which the widow has under the provisions of Section 17 of the Act and also concerning the definition of “child” as set out in Section 17(1) of the Act. [Sections 17(1) and (3) were set out in their entirety in the body of the finding.]

Reasons and Findings

The widow at the date of her husband’s death was a woman with no dependent children as defined in the Act who had reached the age of 40 years but not the age of 50 years. The panel notes that “dependent” is defined in Section 1 of this Act. The definition of dependent in Section 1 is as follows:

‘dependent’ means a member of the family of a worker who was wholly or partly dependent on his earnings at the time of his death, or who but for the incapacity due to the accident would have been so dependent, and, except in section 17(3)(a) to (h), (9) and (13), includes a spouse, parent or child who satisfies the board that he had a reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker;

This definition means that for the purposes of Section 17(3)(a) to (h), a dependent does not include a spouse, parent or child who is required to satisfy the Board that he or she had reasonable expectation of pecuniary benefit from the continuation of the life of the deceased worker. Taking that definition one step at a time, it would appear that “dependent” still means a member of the family of the worker who was wholly or partially dependent on his earnings at the time of the worker’s death. What it further means is that under Section 17(3)(a) to (h) a “dependent” does not require that further test of being a spouse, parent, or child who is required to satisfy the Board that that

person has a reasonable expectation of pecuniary benefit of the continuation of the life of the deceased worker. In other words, the panel must conclude that the test of so satisfying the Board is not one which needs to be carried out in respect to Sections 17(3)(a) to (h).

Children's Benefits

In the interpretation of the benefits to which the widow is entitled, the Board determined that she would receive benefits under Section 17(3)(e) on the basis of her age together with the fact that her two children at the date of the worker's death were not invalids, were aged 20 years and 25 years, and the 20-year-old child was not regularly attending an academic, technical, or vocational place of education. In the context of the definition of "children" in Section 17(1) there were thereby no children entitled to benefits at the date of the worker's death.

Therefore, there were no children of the worker who were entitled to compensation benefits under the provisions of the Act at the time of his death.

Having found that Section 17(1) is not applicable to the worker's children, there is no basis in this appeal to further consider the constitutionality of Section 17(1) respecting possible age discrimination.

Widow's Entitlement

In respect to the widow's entitlement under the Act, her submission is that the provisions set out in Section 17(3)(c), 17(3)(d), and 17(3)(e) provide a different level of benefits to different widows based only on a widow's age. This situation is age discrimination and contrary to Section 15 of the Charter.

The widow's representative then directed the panel to Section 97 of the Act which states:

The board may exercise any power or duty confirmed or imposed on it by or under a statute of Canada or agreement between Canada and the Province.

This representative submitted that this provision gives jurisdiction to the Board and also the Workers' Compensation Review Board under the Act to consider and rule on matters within the parameters of the Charter. That provision also begs the question whether decisions on individual appeals create binding rulings which would cover other similar cases. The panel finds the law is clear that it does not.

Nonetheless, even if a tribunal is found not to be able to make a finding of general application, one school of thought is that the tribunal is still required to determine, in that given case or appeal, the applicable law concerning the case before it. In short, the finding of the tribunal is still applicable to the specific case or appeal before it, even if the tribunal may not thereby determine the constitutional validity of the legislation in question.

To address the issue of age discrimination the question also raised is whether the Review Board is an administrative tribunal which is a court of competent jurisdiction for the purposes of Section 24(1) of the Charter. Section 24(1) of the Charter provides:

24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

On review the panel finds that, if the Review Board is a court of competent jurisdiction for the purposes of this appeal, it must have jurisdiction over the parties, the subject matter, and the remedy requested, *Douglas/Kwantlen College Faculty Association v. Douglas College* (1984) 49 DLR (4th) 749. In this case the only remedy which the Review Board could provide is to determine whether Section 17 is of full force and effect. That is not the remedy the widow requests. The panel finds that the Review Board does not have the jurisdiction to rewrite Section 17 of the Act. The Review Board does not therefore have jurisdiction over the remedy requested. As a result the Review Board is not a court of competent jurisdiction in this case. Section 24(1) is therefore not found to be applicable in this appeal.

In an appeal based on the Charter, the provisions of the *Constitution Act, 1982* are applicable, particularly Section 52. Section 52(1) of the *Constitution Act, 1982* provides:

52(1) The Constitution is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

The panel has found on a preliminary matter that if there is action to be taken under the Charter the applicable section of the *Constitution Act, 1982* is Section 52 and not Section 24(1). As mentioned above, Section 24(1) is not applicable.

The issue then is to what extent, if at all, does Section 17(3) of the Act offend Section 52(1) of the Constitution and the jurisdiction of the Review Board in this determination. The question of course is, if this section does offend the Charter, and thereby brings into effect Section 52(1) of the *Constitution Act, 1982*, what follows from that finding in respect to the benefits which the widow is entitled to receive or the remedy the Review Board can grant?

It is accepted by the panel that the amount of money which the widow would receive under Section 17(3)(a) and the amount which she might receive under Sections 17(3)(b), 17(3)(c), 17(3)(d), or 17(3)(e) is different. However, only Sections 17(3)(c), 17(3)(d) and Section 17(3)(e) have a different level of benefit which is determined by the age of the widow and only these latter three sections are the focus of this appeal.

The question then more specifically is whether the provisions in Section 17(3)(c), 17(3)(d), and 17(3)(e) offend Section 15(1) of the Charter. Section 15(1) of the Charter reads:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Although the argument can be presented that when all members of a certain category are treated equally, there is within that category no discrimination. An argument on that basis would be that all persons who fall under the provisions of Sections 17(3)(c), 17(3)(d) or 17(3)(e) are, within that category, treated equally. The panel finds it cannot accept that position as determinative and finds that by reason of the fact that the three above-referenced sections distinguish a different level of benefits by reason of age of the recipient clearly results in a different level of benefits being provided under this legislation by reason of age alone. This result on a *prima facie* basis offends the provision of Section 15(1) of the Charter which requires a person to receive “equal benefit of the law without discrimination” and, in particular, without discrimination based on age.

The issue which then is needed to be considered is whether once it has been determined that a provision offends the Charter, can that discrimination be “demonstrably justified.” This phrase is from Section 1 of the Charter which provides:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In *Hunter vs. Southam* [1984] 2 SCR 145 on page 169 Dickson, C.J.C. said:

The phrase ‘demonstrably justified’ puts the onus of justifying a limitation on a right or freedom set out in the Charter on the party seeking to limit.

The problem which the panel would then have to consider is whether the provisions of Sections 17(3)(c), 17(3)(d), and 17(3)(e) of the Act, which if found to be contrary to the Charter by reason of age discrimination, can be considered to be demonstrably justified. The Board was not represented at the hearing and chose not to make any submission in regards to this appeal. The Panel did not thereby have the benefit of any submission being made concerning the retention of these sections in the face of a finding that these provisions are contrary to the Charter.

The panel finds that, if it found sections 17(3)(c), 17(3)(d), and 17(3)(e) of the Act are of no force or effect, the effect would be that there is no provision for the payment of any benefits to the widow. The payment of benefits to a widow with no dependent children under the Act is presently contained in the three sections being questioned, all of which set out an age categorization and which collectively cover the full possible spectrum of possibilities. Section 17(3)(d) covers widows up to the age of 40, Section 17(3)(e) covers widows between the age of 40 and 50, and Section 17(3)(c) covers widows age 50 and over. To find that the widow would not be entitled to any benefits by reason that the sections in question are of no force and effect is clearly not the result intended by this appeal. The widow has requested that she receive the most benefits available under any of Sections 17(3)(c), 17(3)(d), or 17(3)(e). The Review Board if it finds these sections not to be of full force and effect does not have the authority to rewrite these sections to provide the widow with the benefits she seeks. The panel therefore finds it does not have the jurisdiction to grant the widow the remedy she seeks. Not having the jurisdiction, the panel accordingly finds it does not have the jurisdiction to deal with this appeal and the appeal must be denied.

Editors' note: While this Review Board finding dates back to November 30, 1989, it was submitted and selected for publication because of its consideration of the statute and the Charter of Rights and Freedoms by the Review Board.

Amendments to the Workers' Compensation Act

Date: June 28, 1991

Subject: Appealing to a Medical Review Panel from a Review Board Finding

Sections 58(3), 58(4) and 63(1) of the *Workers' Compensation Act* have been amended by the *Miscellaneous Statutes Amendment Act (No. 2), 1991*. The amendment act also contains a transitional section which applies to all Section 91 appeals started prior to June 28, 1991. The full text of these sections is set out below.

The result of these amendments is that a worker or employer may now appeal a medical finding of the Review Board directly to a Medical Review Panel. Similarly, a dependant of a deceased worker may request a Medical Review Panel inquiry into the cause of death of a worker following a Review Board finding. There is no longer any requirement that a medical finding of the Review Board be appealed to the Appeal Division first before the matter can be appealed to a Medical Review Panel.

The Chief Appeal Commissioner has issued a notice to all people with existing appeals under Section 91 who are affected by the transitional section. The Appeal Division has also issued Decision No. 3 which sets out the procedure to be followed to exercise rights under the transitional section.

Section 58(3) (as amended by Section 18 of the *Miscellaneous Statutes Amendment Act [No. 2] 1991*) now provides as follows:

A worker is entitled to be examined by a medical review panel if not later than 90 clear days after the making of a medical finding by the review board or a medical decision by the board, the worker

- (a) *writes to the board expressing that the worker is aggrieved by the medical finding or decision, and*
- (b) *sends with the writing a certificate from a physician certifying that, in the physician's opinion, there is a bona fide medical dispute to be resolved, and stating sufficient particulars to define the question in issue.*

Section 58(4) (as amended by Section 18 of the *Miscellaneous Statutes Amendment Act [No. 2] 1991*) now provides as follows:

An employer or former employer of a worker is entitled to have the worker examined by a medical review panel if, not later than 90 clear days after the making of a medical finding by the review board or a medical decision by the board, the employer or former employer

- (a) *writes to the board expressing that the employer or former employer is aggrieved by the medical finding or decision, and*
- (b) *sends with the writing a certificate from a physician certifying that, in the physician's opinion, there is or may be a bona fide medical dispute to be resolved, and stating sufficient particulars to define the question in issue.*

Section 63(1) (as amended by Section 19 of the *Miscellaneous Statutes Amendment Act [No. 2] 1991*) now provides as follows:

A dependant of a deceased worker is entitled to have a medical review panel inquire into and determine the cause of death of the worker if the dependant writes to the board expressing that the dependant is aggrieved by the finding of the review board or a decision of the board concerning the cause of death.

The transitional provisions (Section 20 of the *Miscellaneous Statutes Amendment Act [No. 2], 1991*) are as follows:

- (1) *A worker who, under section 91 of the Workers' Compensation Act, commenced an appeal of a medical finding of the review board before section 18 of this Act came into force is entitled to withdraw the appeal respecting the medical finding and be examined by a medical review panel under section 58(3) of the Workers' Compensation Act regarding that finding if the worker complies with the section 58(3) (a) and (b) of that Act before the appeal is heard.*
- (2) *An employer who, under section 91 of the Workers' Compensation Act, commenced an appeal of a medical finding of the review board before section 18 of this Act came into force is entitled to withdraw the appeal respecting the medical finding and have the worker examined by a medical review panel under section 58(4) of the Workers' Compensation Act regarding that finding if the employer complies with section 58(4) (a) and (b) of that Act before the appeal is heard.*

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- (3) *A dependant of a deceased worker who, under section 91 of the Workers' Compensation Act, commenced an appeal of a finding of the review board concerning the cause of death of the worker before section 19 of this Act came into force is entitled to withdraw the appeal respecting the finding and have the cause of death inquired into and determined by a medical review panel under section 63 (1) of the Workers' Compensation Act if the dependant complies with that section before the appeal is heard.*



REPORTER

Consumer Price Index Adjustments

Date: June 14, 1991

WHEREAS Section 25 of the *Workers' Compensation Act* requires the Board to determine as of July 1, 1991, a ratio by comparing the Consumer Price Index for April 1991 with the Consumer Price Index for October 1990, and by applying that ratio to adjust those periodical payments of compensation referred to in Subsection (2), and to adjust each dollar amount mentioned in the Act, except those referred to in Subsection (5);

AND WHEREAS the Board is advised that the Consumer Price Index for April 1991 was 125.5 and for October 1990 was 121.2, giving a ratio of 1.03547855;

THE BOARD HEREBY DETERMINES that the ratio applicable under Section 25(1) is 1.03547855;

AND THAT all periodical payments of compensation described in Section 25(2) shall be adjusted by applying that ratio as of the 1st day of July 1991;

AND THAT the British Columbia Regulation numbered 463/90 be repealed;

AND THAT all dollar amounts referred to in all sections of the Act described in Section 25(4) shall be adjusted as follows:

Section No.	January 1, 1991 Dollar Amount	Change To	July 1, 1991 New Dollar Amount
3(5)(c)	82.18		85.10
13(2)	16,439.63		17,022.88
	3,287.96		3,404.61
17(2)	1,972.69		2,042.68
	657.57		680.90
	657.57		680.90
17(3)(a)(ii)	213.64		221.22
17(3)(c)	690.34		714.83

Section No.	January 1, 1991 Dollar Amount	Change To	July 1, 1991 New Dollar Amount
17(3)(d)	32,879.09		34,045.59
	3,287.96		3,404.61
	29,591.13		30,640.98
17(3)(e)	690.34		714.83
17(3)(f)(iii)(B)	213.64		221.22
17(3)(g)	23,015.40		23,831.95
17(3)(h)(i)	378.09		391.50
17(3)(h)(ii)	378.09		391.50
17(3)(i)(ii)	378.09		391.50
17(13)	1,644.03		1,702.36
18(1)	286.08		296.23
	88.78		91.93
22(2)	1,068.63		1,106.54
29(2)	246.59		255.34
33(5)	1,068.63		1,106.54
35(5)	147.34		152.57
71(8)	16,439.63		17,022.88
73(2)	32,879.09		34,045.59
74(3)	164,395.57		170,228.09
75(2)	32,879.09		34,045.59
75(3)	3,287.96		3,404.61
77(2)	3,287.96		3,404.61
Schedule C	690.34		714.83

And pursuant to Section 25(4), all sections containing such dollar amounts are deemed to be amended accordingly.