Practice & Procedure Decision of the Appeal Division

Number: No. 27
Date: October 1, 1999
Panel: Herb Morton, Acting Chief Appeal Commissioner
Subject: Appeal Practice and Procedure – Occupational Health and Safety Matters

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Introduction

Bill 14, the *Workers Compensation (Occupational Health and Safety) Amendment Act* comes into effect on October 1, 1999. The amendments create a new Part 3 of the *Workers Compensation Act* relating to occupational health and safety matters. Part 3 includes a separate purpose section and Board mandate as well as a definition section. The amendments also include appeal provisions for occupational health and safety matters in Division 14 which differ in some respects from those in the rest of the *Act*.

Section 211 of the amendments provides that the chief appeal commissioner may, under Section 85.1, and subject to any policies of the governors (panel of administrators) and any bylaws enacted or resolutions passed under Section 82, determine the practice and procedure for the conduct of appeals by the Appeal Division (referred to as the Appeal Tribunal in the amendments). Set out below is the practice and procedure to be followed by the Appeal Division in deciding occupational health and safety matters. These guidelines have been developed with input from both worker and employer stakeholders and are an attempt to balance the Appeal Division's need to provide timely and fair adjudication with the stakeholders' concerns.

Practice and procedure concerning levies under Section 73 of the *Act* as well as assessment and claims matters are dealt with in other decisions of the governors and the Appeal Division.

This decision addresses the following topics:

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1.0 Jurisdiction of the Appeal Division

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

(i) Appeals from reviewing officer decisions on discriminatory actions (see Sections 150 and 151) and unpaid wage claims (see Section 152). This includes orders, the refusal to make an order, or the cancellation of an order under Section 153.

(ii) Appeals in relation to administrative penalties under Section 196. This includes the imposition of a penalty order, the cancellation of an order and a decision not to impose an administrative penalty.

(iii) Appeals in relation to an order under Section 195 canceling or suspending a certificate issued under Part 3, or placing a condition on the use of the certificate.

(iv) Any other decision prescribed by the Lieutenant Governor in Council by regulation to be an appealable decision.

2.0 Hearing Panels

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

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

(a) a panel of one person (either the chief appeal commissioner or a non-representational appeal commissioner), or

(b) a three-member panel consisting of one non-representational appeal commissioner (or the chief appeal commissioner) together with one appeal

commissioner chosen from worker representatives and one appeal commissioner chosen from employer representatives, or

(c) a three-member panel of non-representational appeal commissioners.

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

3.0 Applying for an Appeal

3.1 Application for Appeal

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

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

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

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

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

3.2 When does the 30 Day Period Commence?

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

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

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

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

3.3 Other Notice Requirements

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

(i) post a notice of the appeal at the workplace to which the decision under appeal applies,

(ii) provide notice of the appeal to the joint committee or worker representative, as applicable, and

(iii) send notice of the application to the union at that workplace, if workers of the employer at that workplace are represented by a union.

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

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

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

3.4 Cross Appeals

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

3.5 Disclosure

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

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

4.0 The Appeal Process

4.1 Who May Bring an Appeal?

(a) Administrative Penalties

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

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

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

(b) Discriminatory Action Matters and Unpaid Wage Claims

Section 208 states that the following may bring an appeal:

- the worker,

- the employer, or
- the union

affected by the decision.

(c) Certificate Matters

Section 208 states that the following may bring an appeal:

- the person subject to the order.

4.2 What may be Appealed?

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

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

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

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

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

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

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

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

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

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

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

(1) an assessment of the merits of the appeal to ensure the appeal is not frivolous; that is, there is a serious question to be heard,
(2) whether the appellant would suffer irreparable harm if the stay is not granted (for example, loss of a business), and
(3) an assessment as to which party would suffer greater harm or prejudice from granting or denying a stay or suspension.

Procedure: An application for a stay or suspension will be dealt with as a preliminary matter on an expedited basis. A party who wishes a stay or suspension will normally be required to provide written submissions in support of the request to the Appeal Division within 7 days of making the request. The Appeal Division will send the submissions to the other parties who will be given 7 days to provide submissions in response to the request. The requesting party will then have 5 days to provide reply submissions. An Appeal Division panel will issue a written decision on the stay/suspension request on the basis of the parties' submissions as soon as possible once submissions are complete.

5.0 Conduct of an Appeal

5.1 Type of Appeal

Part 3 of the *Act* does not specify the type of hearing the Appeal Division must hold. An appeal may be conducted by way of written submissions, an oral hearing or a combination of both. A party can provide reasons for requesting a particular type of hearing in the "Application for Appeal". A

request for an oral hearing will be considered as a preliminary matter and a decision will normally be made by the chief appeal commissioner or a delegate (see Oral Hearing Procedure #5.5).

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

Oral Hearing	Written Submissions
- the factual underpinnings of the order are in dispute or significant new evidence is available - there is a significant issue of credibility of witnesses involved - the case raises an issue of general significance or a significant policy issue - the complexity of the case - an oral hearing was not held by the Board - there are 2 parties (or more) to the appeal and 1 party requests a hearing - the amount of the penalty is significant	- no reasons are given for an oral hearing - there is only 1 party - the appeal turns simply on the interpretation or legal analysis of a word, phrase or provision in the *Act* or Regulations where witnesses would not be required to resolve the matter - the credibility of witnesses is not in issue - an oral hearing was held by the Board

5.2 Scope of Review

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

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

5.3 The Authority of the Appeal Division

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

5.4 Written Hearing Procedure

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

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

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

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

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

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

5.5 Oral Hearing Procedure

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

Where the chief appeal commissioner or the hearing panel decides that an appeal will be conducted by way of an oral hearing, the Appeal Division will set the date, time and location of the hearing and notify the parties. The parties' availability will be taken into consideration in setting the date and place of hearing but the Appeal Division will make the final decision if the parties cannot agree or if a matter is being unduly delayed.

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

(a) Pre-Hearing Processes

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

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

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

Mediation is a voluntary settlement negotiation facilitated by a neutral third party who has no decision-making power. If the Appeal Division schedules a **mediation session**, each party (or their representative) should come with authorization to make decisions on the matters in dispute. The Appeal Division may ask the appropriate Board officer to attend. The mediation session will be conducted by an individual who will not preside at the hearing if the matter proceeds to a hearing. Any discussions between parties during mediation will not be part of the evidence at the hearing if the matter does not settle.

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

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

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

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

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

(b) Postponement of a Hearing

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

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

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

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

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

(c) Consolidation of Appeals

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

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

(d) Expedited Hearings

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

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

(e) Obtaining a Subpoena

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

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

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

(i) the name and address of the witness, and

(ii) the reasons why the person's attendance is required at the hearing.

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

(i) a description of the document that would enable a reasonable person to know what document or information is being sought;

(ii) the reasons why the document or information is relevant to the appeal.

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

(f) Evidence at the Hearing

The rules of evidence that apply to a hearing before the Appeal Division are less formal than those applied by a court. Relevance is the primary consideration for a hearing panel when deciding whether to admit evidence. This means, for example, that a hearing panel may admit hearsay and circumstantial evidence if it is considered relevant. Relevant evidence can be described as evidence (written or oral) that will shed some light on a disputed matter or tends to prove or disprove a fact in issue.

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

Decision No. 6 of the Appeal Division (8 WCR 245) sets out the procedures to be followed to admit expert evidence at a hearing.

(g) Interpreters

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

(h) Procedures at the Hearing

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

(i) the parties may be asked if they wish to make opening statements
(ii) the general order of presentation of evidence is:

1. appellant
2. respondent
3. third party
4. reply by appellant

(iii) submissions (argument) by the parties, subsequent to the presentation of evidence, will generally follow the same order.

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

(i) Expenses and Costs

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

The *Act* requires that any expenses claimed be "incidental to" a contested matter. The general policy of the Board limits the claims

to witness expenses and expenses incurred in producing evidence but does not include expenses of lawyers or other advocates. In rare cases, an order may be made for the payment of costs by one party to another.

6.0 Decisions

6.1 Generally

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

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

A decision to refer a matter back to the Board will be made on a case-by-case basis by the hearing panel.
Generally, the responsibility or "onus" for proving a fact is on the person who asserts it. However, Section 153 of the *Act* provides that there is a "reverse onus" on an employer or union when a discriminatory action is alleged. The standard of proof on appeals at the Appeal Division is the civil standard of "balance of probabilities".

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

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

6.2 Written Reasons for Decisions

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

6.3 Reconsiderations

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

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

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

7.0 Transition Provisions

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

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

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

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

1. The decision was appealable under Part 1.
2. The decision is appealable to the Appeal Division under Part 3.

3. No application for appeal has been made at the time Part 3 comes into force.

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