

**RE: Reviews and Appeals –  
General****ITEM: C13-100.00**

## **BACKGROUND**

### **1. Explanatory Notes**

The *Workers Compensation Amendment Act (No. 2), 2002* (“*Amendment Act (No. 2), 2002*”) has made significant changes to the workers’ compensation appeal system.

Prior to the *Amendment Act (No. 2), 2002* being brought into force, the following avenues of appeal existed with respect to compensation and rehabilitation matters:

- initial decisions were appealable to the Workers’ Compensation Review Board;
- Review Board findings were appealable to the Board’s Appeal Division; and
- initial decisions, Review Board findings and Appeal Division decisions were all appealable on medical issues to Medical Review Panels. MRP decisions on medical issues were binding upon all levels of decision-making in the system.

Provisions of the *Amendment Act (No. 2), 2002* closing access to Medical Review Panels were brought into force effective November 30, 2002. The Medical Review Panels will continue to address appeals submitted prior to that time or in accordance with the transitional provisions of the *Amendment Act (No. 2), 2002*. Once those appeals have been dealt with, the Medical Review Panels will cease to exist.

Other provisions of the *Amendment Act (No. 2), 2002* were brought into force effective March 3, 2003. Except for purposes of addressing certain matters covered by the transitional provisions of the *Amendment Act (No. 2), 2002*, the Workers’ Compensation Review Board and the Board’s Appeal Division ceased to exist as of that date.

Effective March 3, 2003, the following avenues of review and appeal exist with respect to compensation and rehabilitation matters:

- initial decisions (except decisions on whether to reopen a previous matter) are reviewable by a review officer, who is an officer of the Board;
- most, but not all, review officer decisions are appealable to the independent Workers’ Compensation Appeal Tribunal (“WCAT”); and
- initial decisions on whether to reopen a previous matter are directly appealable to WCAT.

In addressing appeals, WCAT may seek independent advice or assistance from a health care professional who appears on a list developed by the WCAT Chair in accordance with the statutory requirements. However, the opinions of the health care professional are not binding upon WCAT.

The Board has established the Review Division comprised of review officers to deal with reviews. For the most part, there will be no policies in relation to the operations of the Review Division. Readers should consult the *Act*, the Review Division and the practices and procedures issued by the Review Division to determine their rights and responsibilities in relation to this review function.

WCAT is independent of the Board. Readers should consult the *Act* and contact WCAT to determine their rights and responsibilities in relation to this appeal function.

There is a section in this Chapter on Medical Review Panels. These policies are required to continue to administer the Medical Review Panel process in respect of appeals submitted prior to November 30, 2002 or in accordance with the transitional provisions of the *Amendment Act (No. 2), 2002*.

There is also a section in this Chapter on Transitional Matters Relating to the Review Board and the Appeal Division. These policies are required for the Review Board and Appeal Division to complete decision-making on certain matters after March 3, 2003 in accordance with the transitional provisions of the *Amendment Act (No. 2), 2002*.

## **2. The Act**

The provisions of the *Act* are too extensive to quote in this Chapter. Readers are referred to the following website for the *Amendment Act (No. 2), 2002* -

[http://www.legis.gov.bc.ca/37th3rd/3rd\\_read/gov63-3.htm](http://www.legis.gov.bc.ca/37th3rd/3rd_read/gov63-3.htm)

## **POLICY**

There is no POLICY for this Item.

## **PRACTICE**

Readers should consult the Review Division or WCAT to determine whether a pre-March 3, 2003 decision by the Board or by a previous appeal body is reviewable by the Review Division or appealable to WCAT.

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<b>EFFECTIVE DATE:</b>	March 3, 2003
<b>AUTHORITY:</b>	<i>Workers Compensation Amendment Act (No. 2), 2002</i>
<b>CROSS REFERENCES:</b>	Reviews and Appeals - Review Division - Practices and Procedures (C13-101.00), Reviews and Appeals - Workers' Compensation Appeal Tribunal (C13-102.00), Reviews and Appeals - Medical Review Panels (C13-103.00), Reviews and Appeals - Transitional Matters Relating to the Review Board and the Appeal Division (C13-104.00)
<b>HISTORY:</b>	New Item resulting from the <i>Workers Compensation Amendment Act (No. 2), 2002</i>
<b>APPLICATION:</b>	

**RE: Reviews and Appeals –  
Review Division –  
Practices and Procedures**

**ITEM: C13-101.00**

## **BACKGROUND**

### **1. Explanatory Notes**

The Board may establish practices and procedures for the conduct of reviews. Those practices and procedures are established under the direction of the President of the Board or the President's delegate.

### **2. The Act**

Section 96.4(2):

Subject to any Board practices and procedures for the conduct of a review, a review officer may conduct a review, as the officer considers appropriate to the nature and circumstances of the decision or order being reviewed.

Section 96(8):

The Board may establish practices and procedures for carrying out its responsibilities under the Act, including specifying time periods within which certain steps must be taken and the consequences for failing to comply with those time periods.

## **POLICY**

As with other practices or procedures established by the Board, the practices and procedures for the conduct of reviews by the Review Division will be established by the President or under the direction of the President or delegate.

## **PRACTICE**

For any relevant PRACTICE information, readers should consult the Review Division's Practices and Procedures available on the WCB website.

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<b>EFFECTIVE DATE:</b>	March 3, 2003
<b>AUTHORITY:</b>	ss. 96(8) and 96.4(2), <i>Workers Compensation Act</i>
<b>CROSS REFERENCES:</b>	Reviews and Appeals - General (C13-100.00)
<b>HISTORY:</b>	New Item resulting from the <i>Workers Compensation Act (No. 2)</i> , 2002
<b>APPLICATION:</b>	

**RE: Reviews and Appeals –  
Workers' Compensation Appeal Tribunal**

**ITEM: C13-102.00**

## **BACKGROUND**

### **1. Explanatory Notes**

Effective March 3, 2003, the *Workers Compensation Amendment Act (No. 2), 2002*, has established the Workers' Compensation Appeal Tribunal ("WCAT") as the final level of appeal on most matters in the workers' compensation system. WCAT is external to, and independent from, the Workers' Compensation Board. Its chair is appointed by the Lieutenant Governor in Council. Its vice-chairs and members are appointed by the chair, after consultation with the Minister.

With certain exceptions, a final decision made by a review officer in a review under sections 96.2 to 96.5 may be appealed to WCAT.

Those exceptions are:

- a decision respecting matters referred to in section 16 of the *Act*;
- a decision respecting the application under section 23(1) of the *Act* of rating schedules compiled under section 23(2) where the specified percentage of impairment has no range or has a range that does not exceed 5%;
- a decision respecting commutations under section 35;
- a decision respecting an order under Part 3, other than an order
  - relied upon to impose an administrative penalty under section 196(1);
  - imposing an administrative penalty under section 196(1); or
  - made under section 195 to cancel or suspend a certificate; and
- a decision in a class of decisions prescribed by the Lieutenant Governor in Council respecting the conduct of a review.

In the *Workers Compensation Act Appeal Regulation* (B.C. Reg. 320/2002), the Lieutenant Governor in Council prescribed the following decisions respecting the conduct of a review as not being appealable to WCAT:

- decisions applying time periods specified by the Board under section 96(8) of the *Act* (time periods specified in the Board's practices and procedures for taking certain steps);

- decisions made under the following provisions of the *Act*
  - section 96.2(4) (extensions of time to request a review);
  - section 96.2(7) (deeming an employers' adviser or an organized group of employers to be the employer);
  - section 96.4(2) (subject to any Board practices and procedures, conducting a review as the review officer considers appropriate);
  - section 96.4(3) (completing a review or determining a review has been abandoned if a party does not make a submission within the time required by the Board's practices and procedures);
  - section 96.4(4) (requiring the employer to post a notice in the workplace of reviews relating to certain occupational health and safety matters);
  - section 96.4(5) (suspending a review to allow a review officer to deal with related matters at the same time); and
  - section 96.4(7) (extending the time for a review officer to make a decision);
- an order by the chief review officer under section 96.2(5) that the request for review operates as a stay of proceedings or suspends operation of the decision under review;
- decisions about whether or not to refer a decision back to the Board under section 96.4(8)(b) of the *Act*; and
- decisions respecting the conduct of a review if the review is in respect of any matter that is not appealable to WCAT.

A decision to reopen or not to reopen a matter on an application under section 96(2) may be appealed directly to WCAT.

A determination, an order, a refusal to make an order or a cancellation of an order made by the Board under section 153 (in relation to discriminatory action) may also be appealed directly to WCAT.

## **2. The Act**

The provisions of the *Act* are too extensive to quote in this Chapter. Readers are referred to the following website for the *Amendment Act (No. 2), 2002* -

[http://www.legis.gov.bc.ca/37th3rd/3rd\\_read/gov63-3.htm](http://www.legis.gov.bc.ca/37th3rd/3rd_read/gov63-3.htm)

## **POLICY**

There is no POLICY for this Item.

## **PRACTICE**

For PRACTICE information about the operation of WCAT, readers should contact WCAT.

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<b>EFFECTIVE DATE:</b>	March 3, 2003
<b>AUTHORITY:</b>	ss. 231 to 261, <i>Workers Compensation Act</i> , s. 4, <i>Workers Compensation Act Appeal Regulation</i> (B.C. Reg. 320/2002)
<b>CROSS REFERENCES:</b>	Reviews and Appeals - General (C13-100.00)
<b>HISTORY:</b>	New Item resulting from the <i>Workers Compensation Amendment Act (No. 2), 2002</i>
<b>APPLICATION:</b>	

**RE: Reviews and Appeals –  
Medical Review Panels**

**ITEM: C13-103.00**

## **BACKGROUND**

### **1. Explanatory Notes**

Prior to November 30, 2002, sections 58 - 66 of the *Act* established rights of appeal on medical issues to Medical Review Panels comprised of independent physicians.

Section 58(3) and (4) of the *Act* established the right of appeal for a worker or employer to have the worker examined by a Medical Review Panel. The worker or employer was required to write to the Board expressing that the worker or employer was aggrieved by a finding of the Review Board or decision of the Board and also to send a certificate from a physician certifying that, in the physician's opinion, there was a bona fide medical dispute to be resolved, and stating sufficient particulars to define the question in issue.

Section 63(1) of the *Act* established the right of appeal for a dependant of a deceased worker. A dependant was entitled to have a Medical Review Panel inquire into and determine the cause of death of the worker if the dependant wrote to the Board expressing that the dependant was aggrieved by a finding of the Review Board or a decision of the Board concerning the cause of death.

Matters covered by the remaining provisions included:

- the right of referral of a worker by the Board to a Medical Review Panel (s. 58(5));
- appointing a Medical Review Panel (s. 59);
- the examination of the worker (s. 60);
- the matters with respect to which a Medical Review Panel was required to certify in giving its decision (s. 61);
- payment of the costs of the examination out of the accident fund (s. 62);
- the preparation of a statement of non-medical facts by the Board (s. 64);
- the conclusive nature of the Medical Review Panel certificate (s. 65); and
- the authority of the Lieutenant Governor in Council to make regulations with respect to the Medical Review Panel process (s. 66).

Effective November 30, 2002, the *Workers Compensation Amendment Act (No. 2), 2002*, (“*Amendment Act (No. 2), 2002*”) repealed the rights of appeal under section 58(3) and (4) and section 63(1). With one limited exception, there is no right of appeal under those provisions after that date. That exception covers unexercised appeal rights under section 58(3) and (4). The Transitional Provisions to the *Amendment Act (No. 2), 2002*, provide that if, before November 30, 2002:

- a person has not exercised a right under section 58(3) or (4) of the *Act*; and
- the time period within which that right must be exercised would not have expired but for the repeal of that right on the repeal date,

that person may exercise that right under section 58(3) or (4) before the time period has expired.

The Transitional Provisions to the *Amendment Act (No. 2), 2002* also provide that all proceedings pending under sections 58(3) and (4) and 63(1) of the *Act* on November 30, 2002 are to be continued and completed. The remaining provisions of the *Act* will therefore continue to apply to those proceedings, as well as to any proceedings initiated by the exercise of previously unexercised appeal rights as noted above.

Effective November 30, 2002, *Amendment Act (No. 2), 2002* repealed the Board’s right to refer a worker to a Medical Review Panel under section 58(5). Other than as necessary to implement the transitional provisions relating to proceedings under sections 58(3) and (4) and 63(1), the Board no longer has this authority.

Policy items #103.10 to #103.93 set out in the Appendix to Item C13-103.00 immediately following are required to enable the Medical Review Panel proceedings to be continued, completed and implemented in accordance with the transitional provisions.

Other than noted above, there is no longer a Medical Review Panel process under the *Workers Compensation Act*. Section 249 of the *Act* provides a mechanism for the Workers’ Compensation Appeal Tribunal (“WCAT”) to seek assistance or advice from a list of health care professionals compiled by the WCAT Chair. That advice or assistance is not, however, binding on WCAT.

## **2. The Act**

See Policy items #103.10 to #103.93 in the Appendix to Item C13-103.00 immediately following.

## **POLICY**

Policy items #103.10 to #103.93 in the Appendix to Item C13-103.00 immediately following are continued in relation to the Medical Review Panel process on and after March 3, 2003 insofar as they are consistent with the *Workers Compensation Amendment Act (No. 2), 2002*.

## **PRACTICE**

For any relevant PRACTICE in relation to Medical Review Panels, readers should consult the Medical Review Panel Department of the Workers' Compensation Board.

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<b>EFFECTIVE DATE:</b>	March 3, 2003
<b>AUTHORITY:</b>	<i>Workers Compensation Amendment Act (No. 2), 2002</i>
<b>CROSS REFERENCES:</b>	Reviews and Appeals - General (C13-100.00)
<b>HISTORY:</b>	New Item made necessary because of the <i>Workers Compensation Amendment Act (No. 2), 2002</i>
<b>APPLICATION:</b>	

## APPENDIX TO ITEM C13-103.00

### MEDICAL REVIEW PANELS

#### #103.10 Introduction

Section 58 of the *Act* authorizes a Medical Review Panel process which provides for resolution of bona fide medical disputes which arise in the adjudication of workers' claims.

The Panels are independent of the Board and are appointed on terms and conditions established by the *Act*. Each Panel is composed of three community-based physicians who come together for the purpose of resolving a medical dispute on a particular appeal. Having performed this service the particular Panel is then disbanded.

While each panel is independent of the Board, sections 58 to 64 of the *Act* specifically provide authority for the Board to perform certain duties in the Medical Review Panel process. Amongst other things, these sections authorize the Board to:

- Receive requests for appointment of a Medical Review Panel;
- Arrange the appointment of panelists;
- Submit questions to a panel relating to matters in section 61(1) of the *Act*;
- Prepare a statement of foundational non-medical facts where the Board or a panel considers that such is necessary to determine a medical dispute;
- Receive Medical Review Panel certificates, and send copies to the appropriate participants in the appeal process.

In addition the Board provides support staff who assist panel chairmen in preparing files for examination by the panel and arranging the examinations of workers by the panel. Finally, the cost of examinations is payable out of the accident fund as part of the administrative expenses of the Board.

Because of the fact that the *Act* provides for independent panels, while at the same time mandating that the Board provide services within the Medical Review Panel process, it is essential that policies be published which define how the Board will perform its role in the Medical Review Panel Appeal process.

## **#103.20 Medical Review Panel Registrar**

The performance of the administrative duties mandated by the *Act* is under the direction of a Medical Review Panel Registrar. While the Registrar is an officer of the Board, the Registrar does not report to the President and Chief Executive Officer but reports directly to the Board of Directors through the Chair of the Board of Directors. The Registrar manages a staff, which is known as the Medical Review Panel Department, and is in general responsible for the carrying out of the duties which the *Act* provides that the Board must carry out within the Medical Review Panel Appeal process. In addition the Registrar has responsibility for:

- advising the Board of Directors and implementing the policies of the board of directors on the administration of the Medical Review Panel process;
- coordinating the interaction and the distribution of information between the Board, the Chairmen and Specialist members and workers and employers, including the development and implementation of educational programs, quality assurance feedback, and complaints procedures;
- interacting with the Medical Committee appointed pursuant to section 58(2) of the *Act* regarding the maintenance of specialist lists, additions of new specialties, and other areas of mutual concern;
- preparing a Medical Review Panel annual report.

## **#103.21 Assistant Registrar/Medical Appeals Officers**

The Medical Review Panel Department is staffed by an Assistant Registrar and Medical Appeals Officers. Medical Appeals Officers or the Assistant Registrar have authority to make initial decisions on preliminary matters. This includes decisions on:

- whether there is a medical decision or finding that can be appealed;
- whether the appeal is within time;
- whether a valid physician's certificate has been provided in support of the appeal;
- the contents of the Statement of Issues setting forth the questions for determination by the Medical Review Panel;
- the contents of statements of foundational non-medical facts when there is a need for such statements.

The Registrar may delegate other functions to the Assistant Registrar or Medical Appeals Officers.

## #103.30 Access to the Medical Review Panel Process

### a) Workers

Section 58(3) states:

"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."

### b) Employers

Section 58(4) states:

"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."

### c) Dependants of Deceased Workers

Section 63 of the *Act* states:

- "(1) 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 a finding of the review board or a decision of the board concerning the cause of death."

An inquiry under section 63 can deal only with the cause of death. There is no ninety day time limit for requesting an inquiry under section 63 as there is for appeals under

section 58(3) or 58(4). A request for inquiry under section 63 need not be supported by a physician's certificate.

A Medical Review Panel Certificate issued pursuant to section 63 is conclusive as to the cause of death of the worker and is binding on the Board. This may create a conflict between the findings in a Medical Review Panel Certificate prepared while the worker was still alive (e.g. a Medical Review Panel may certify pursuant to section 58(3) that a worker does not have silicosis, and a Medical Review Panel may certify pursuant to section 63 that the same worker died of silicosis.) A Medical Review Panel Certificate issued pursuant to section 58(3) with regard to the claim by the worker is not binding with respect to a decision on a dependant's claim in respect of a worker's death, if following the death of the worker new medical evidence as certified to in the section 63 Medical Review Panel certificate is available.

d) The Workers' Compensation Board

Section 58(5) of the *Act* provides that "the board may decide that the worker must be examined by a medical review panel, in which case the worker must be so examined in the manner provided in this section."

This section enables the Board, at its discretion, to refer a worker to a Medical Review Panel. There is no time limit for the referral and the Board is not required to certify that there is a bona fide medical dispute to be resolved. The purpose of this section is to enable the Board to refer a worker to a Medical Review Panel where there are unusually difficult or complex medical questions which arise for decision as part of the normal decision making process.

The Board may also use its powers under section 58(5) to ensure that procedural difficulties related to the commencement of a Medical Review Panel appeal by workers or employers do not preclude access to the Medical Review Panel process for purely technical reasons. This is explained more fully in policy items #103.40 and #103.41 below.

The Board's authority under section 58(5) is not to be used to refer a worker to another Medical Review Panel because the Board or the worker or the employer disagree with the findings of a previous Medical Review Panel.

## #103.40 Commencement of Appeal

An appeal to a Medical Review Panel may be brought from an initial decision in the Claims Department, a finding by the Review Board, or from an Appeal Division decision. Under sections 58(3) and 58(4), a request for an appeal to a Medical Review Panel by a worker or an employer must be made in writing and must be made not later than ninety clear days after the making of a medical finding by the Review Board or a medical decision by the Board.

To allow for mail delivery, the ninety day period under sections 58(3) and 58(4) does not commence until the tenth day following the date of the decision or finding (or the mailing date if that is separately stamped on the decision) under appeal. The Board will accept transmission of the written notice and the physician's certificate by fax machine.

Sections 58(3) and 58(4) require that both the appellant's application and a valid physician's certificate must be received within ninety days of the medical decision being appealed. The *Act* does not specifically permit the Medical Review Panel or the Board to extend the ninety day period for receipt of the documents. However, section 58(5) of the *Act* does not place any time limit on the Board to bring a matter before a Medical Review Panel. The Board is prepared in some situations to use its powers under section 58(5) to ensure that procedural difficulties related to the commencement of a Medical Review Panel by workers or employers do not preclude access to the Medical Review Panel process for purely technical reasons.

The Board's policy is that the Medical Review Panel Registrar will exercise the Board's authority under section 58(5) to have the worker examined by a Medical Review Panel where an appeal does not meet the strict requirements of sections 58(3) and 58(4) but there has been substantial compliance with the requirements. The policy is that substantial compliance occurs when:

- (a) one document is received within the ninety day period allowed by sections 58(3) and 58(4) and the other, usually the physician's certificate, within ninety days of the expiry of that period; or
- (b) after a decision has been made within the initial ninety day period that the physician's certificate does not contain a bona fide medical dispute, a valid certificate is received within the balance of the initial period or within a period of ninety days from the end of the initial period; or
- (c) after a decision has been made following the initial ninety days that the physician's certificate does not contain a bona fide medical dispute, a valid certificate is received within ninety days of the date of that decision.

## #103.41 *Certificate of Bona Fide Medical Dispute*

Section 58(3) of the *Act* says that an appeal by a worker must be supported by a certificate issued by 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) of the *Act* says that on an appeal by an employer, the physician is required to certify only that there "is or may be" a bona fide medical dispute to be resolved.

The certifying physician has to provide sufficient particulars to define the question in issue. The physician does not have to provide further information to show, for example, that the physician's opinion is conclusively supported by general medical opinion.

The certificate must reflect the opinion of the certifying physician that there is a bona fide medical dispute. A certificate certifying the opinion of the worker, employer or any other person is not valid.

The certificate must be consistent with the non-medical findings of fact in the decision in which the medical finding is found which is being disputed.

Section 58 says that the certificate must be from a "physician" and section 1 of the *Act* defines physician to be "a person registered under the Medical Practitioners' Act." Because of the hardship this can cause if a worker has moved outside the province and is receiving care from a physician in another jurisdiction, this is another instance where the Board may use its authority under section 58(5) of the *Act* to refer a matter to a Medical Review Panel. The Board may refer a matter to a Medical Review Panel when the physician who signs the certificate is not registered under the Medical Practitioners' Act of British Columbia. The policies which govern the exercise of this discretion are as follows:

- a) The worker or employer has met all the requirements for an appeal to a Medical Review Panel except that the certificate is signed by a physician from another jurisdiction;
- b) The appellant has made a reasonable attempt to obtain a certificate from a physician licensed to practice in the Province of British Columbia;

- c) The out of province physician is registered under the equivalent of the B.C. Medical Practitioners' Act for the jurisdiction in which he or she and the appellant both reside.

Any document signed by a physician that contains the necessary information may be accepted as a valid certificate. However, the Board does provide a form of certificate and it is recommended this form be used to minimize the chance of disputes over the adequacy of the certificate.

The Medical Review Panel Department has the responsibility to determine whether the certificate from the physician is adequate and that it certifies both that a bona fide medical dispute exists and states sufficient particulars to define the medical question in issue.

The initial decision regarding the adequacy of the certificate is usually made by a Medical Appeals officer in the Medical Review Department. If there is a dispute, the Registrar will, on a request being made in writing, review the decision of the Medical Appeals officer. If the Registrar affirms the Medical Appeals officer's decision this is a decision that can be appealed to the Internal Review Division.

### *#103.42 Assuming Jurisdiction*

Workers' and employers' appeals must be from the "making of a medical finding by the Review Board or a medical decision by the Board" and it must be certified to by a physician that a "bona fide medical dispute" requires resolution.

The question of whether a decision is, or is not, a medical decision can be contentious. Policy cannot anticipate all the circumstances which would, or would not, constitute a medical decision, and no attempt will be made to do so.

However, one illustration will be made. The severity of a physical impairment and the impact it has on bodily function, including the ability to work, is a medical decision and can be appealed to a Medical Review Panel. However, the extent to which a particular impairment and the restriction of bodily function which results will impair the earning capacity of a worker is not a medical decision, and cannot be appealed to a Medical Review Panel.

The Board has specifically determined that an appeal to a Medical Review Panel is not available to employers who wish to appeal a decision made under section 39(1)(e) of the *Act*. The Board has determined that appeals to Medical Review Panels are confined to situations which affect the rights of workers to compensation, and such an appeal does not meet this test. The Board's position is fully explained in Decision 93 - 0389 of the *Workers' Compensation Reporter*.

Where there is a dispute about whether a proposed appeal deals with a medical decision, or whether a valid physician's certificate has been provided, it will be the responsibility of the staff of the Medical Review Panel Department to decide such issues. As these are decisions which have the effect of allowing or refusing to allow a worker or employer to have an issue resolved by a Medical Review Panel, if the dispute cannot be resolved between the worker or employer appellant and the Department these are decisions that can be appealed to the Internal Review Division.

## **#103.50 Selection of Medical Review Panels**

Each Medical Review Panel consists of a Chairman and two Specialist members.

Section 58(1) provides:

"The Lieutenant Governor in Council may appoint, on the terms and conditions the Lieutenant Governor in Council establishes, one or more chairs of medical review panels, and an acting chair, who may act as chair whenever a chair is unable to act."

Section 58(2) provides that "The Lieutenant Governor in Council must appoint a medical committee which must prepare a list of specialists in particular classes of injuries and disabilities in respect of which workers have claimed compensation, which list may be amended from time to time, . . ."

The committee consists of representatives of the College of Physicians and Surgeons and the B.C. Medical Association.

## **#103.51 *Nomination and Appointment of Specialist Members***

Section 59(1) provides:

"On receipt of the expression in writing made under sections 58(3) or (4) or on a decision being made under section 58(5) the board must, within a reasonable period of time, by notice by registered mail, require the worker and the worker's employer each to nominate from the list mentioned above within eight days after receipt of the notice, one specialist in the particular class of injury or ailment in respect of which the worker has claimed compensation, . . ."

The appropriate specialty for each appeal is designated by the Registrar. A copy of the list of specialists in that specialty including a short biographical note on each specialist member, is then mailed to the worker and employer.

If the party who commenced the appeal fails to nominate a specialist within eight days after receipt of the notice, no further proceedings are taken on that appeal.

If the party other than the one who commenced the appeal fails or neglects to nominate a specialist within eight days after the receipt of the notice, the Minister must appoint a specialist as a member of the Panel, and that member is deemed to be appointed on the recommendation of that party.

In the event that the worker is:

- (a) self-employed;
- (b) the child, parent, brother, sister, husband or wife of the employer;  
or
- (c) a partner in or member of the firm that is the employer

or the employer has ceased to carry on business in the industry in which the injury or disability occurred, the Board shall not require the employer to nominate a specialist but must itself nominate a specialist as if it were the employer. This nomination will be made by the Registrar on behalf of the Board.

The Board shall, within 18 days from the receipt of the nominations, if the specialists are prepared to accept the nominations, appoint the specialists members of a Medical Review Panel to examine the worker. The two specialists so appointed together with a Chairman are a Medical Review Panel.

### *#103.52 Medical Dispute Concerns Multiple Specialties*

Both the worker and the employer must receive the same list of Specialist members. A Medical Review Panel cannot include different specialties.

Where the medical question in dispute is in a borderline area between specialties, the Registrar may:

- choose the specialty that is of primary relevance to the matter in dispute and send out the list for that specialty; or
- set up a separate Panel for each specialty under a common Chairman.

The alternative will be selected that provides the best method of resolving the medical dispute.

Where there is overlapping between physical and psychological complaints, there may be an issue whether, for example, orthopaedic surgeons or psychiatrists should be on the Panel. In determining this issue, the Registrar will consider whether:

- there is a significant dispute regarding the worker's physical condition to be resolved;
- the psychological aspects appear to be within the range of the ordinary consequences of injury normally dealt with by orthopaedic surgeons;
- there is a separate complex psychiatric problem that requires the expertise of psychiatrists.

Where only one Panel is selected, the Panel may be advised that it may obtain a consultation report from a specialist in the other area. Before the Panel reaches a decision, the Chairman may recommend that the Registrar set up a second Panel in a different specialty.

If a Panel is properly constituted, the validity of its certificate cannot be challenged on the basis that it dealt with a medical issue outside the specialty of the Panel members.

### *#103.53 Disqualification of Specialist*

Section 59(1) provides that ".....no specialist may be a member of a medical review panel who

- (a) examines workers on behalf of the employer;
- (b) has treated the worker;
- (c) has acted as a consultant in the treatment of the worker; or
- (d) is a partner of, or practises medicine together with such specialist,

and there must not be on the same panel specialists who are partners or who practise medicine together."

The exclusion under clause (d) of a Specialist member who "is a partner of, or practices medicine together with such specialist, . . ." does not apply where the partnership or association no longer exists.

The exclusions in section 59(1) operate in addition to the common law rules of bias. This means that Specialist members are not permitted to sit on a Panel where they have a relationship with a person concerned in the claim which gives rise to a reasonable apprehension of bias. This includes relationships with other members of the Panel, and any other officer of the Board who may have been involved with the claim.

#### **#103.54**    *Failure of Specialist to Accept Nomination or Complete Duties*

If a specialist does not accept the nomination or if for any reason he or she is unable to complete the duties as a member of the Panel, another specialist is nominated and appointed in the manner set out in policy item #103.51 for the appointment of the specialists.

If the specialist's inability to complete the duties occurs after the worker has been examined by the Panel but before the issuance of the certificate, or before a necessary clarification or reconsideration of the certificate is required, a new examination will be conducted.

#### **#103.60**    **Defining the Issues**

The purpose of the Medical Review Panel process is to definitively resolve disputes and answer questions related to medical findings made by the Review Board or officers of the Board, including the Appeal Division.

The *Act* requires in section 61(1) that in each case brought to the Panel pursuant to section 58(3), 58(4), or 58(5), the Panel shall certify to the Board as to:

- the condition of the worker;
- the existence or non-existence of a disability;
- if there is a disability, its nature and extent, its cause, and if there is more than one cause, how much of the disability is related to each cause.

In addition, if a worker, though no longer disabled, claims to have had a longer period of disability than that previously allowed by the Board, the Panel shall certify whether the worker was disabled for a longer period than that allowed by the Board. If the Panel does certify that the worker was disabled for a longer period than that allowed by the Board, the Panel shall also certify for what longer period the worker was disabled and the nature and extent of the disability during the period beyond that previously allowed by the Board.

By virtue of their enumeration in section 61(1) and the fact that the *Act* requires the Panel to certify to the issues listed there, it is clear that decisions related to the matters identified in section 61(1) are medical decisions.

In an appeal brought pursuant to section 63, the Panel shall certify as to the cause of death of the deceased worker, and the cause of death is clearly a medical decision.

In addition to certifying to the issues enumerated in section 61(1), section 61(3) permits the Board to submit questions to the Panel relating to the matters enumerated in section 61(1), and states that the certificate of the Panel shall include answers to those questions.

To constitute a valid certificate whose findings are binding on the Board these questions and answers must relate to medical findings only. A Panel is not authorized by the statute to certify to anything other than medical findings. To the extent that a Medical Review Panel purports to certify to findings other than medical findings, those non-medical findings will be severed from the Panel's certificate, and will not be binding on the Board.

Problems related to whether a decision is a medical decision or not can be avoided by formulating precise questions for the Panel which state exactly the issues on which the medical decision of the Panel is sought. It is the responsibility of the Medical Review Panel Department to prepare these questions so that the Medical Review Panel can conduct its independent examination and provide a valid certificate.

For appeals which proceed under sections 58(3), 58(4) (and section 58(5) where the Board has exercised its discretion to overcome technical difficulties related to section 58(3) and section 58(4) appeals), the Medical Review Department will have in its possession an acceptable physician's certificate which has certified to the existence of a bona fide medical dispute and which has also provided sufficient particulars to define the question in issue. In such cases the usual practice of the Medical Review Panel Department will be to prepare a Statement of Issues asking the medical questions that the Board wants the Medical Review Panel to answer. Appended to the Statement of Issues will be the physician's certificate and a copy of the decision of the Review Board, Appeal Division, or Board officer, in which the disputed medical decision is found.

Where the Board considers that a statement of foundational non-medical facts is necessary to determine the medical dispute, the Medical Review Panel Department will prepare such a statement for the Panel. It is expected that only in unusual cases or where the request is under section 58(5) and there is no physician's certificate would such a statement be necessary.

When the Panel, after receiving the statement of issues, with appendices, considers a statement of foundational non-medical facts is necessary to determine the medical dispute, the Panel shall advise the Medical Review Panel Department what non-medical facts require determination in order for it to determine the medical dispute, and the Medical Review Panel Department will prepare such a statement.

The Statement of Issues, and the statement of foundational non-medical facts when one is required, will be sent to the parties participating in the appeal for comment prior to being sent to the Medical Review Panel Chairman.

When there is a dispute regarding the contents of either document a Medical Appeals Officer will attempt to resolve the dispute. If the dispute is not satisfactorily resolved the Registrar will, upon written request, review the Statement of Issues and/or the statement of foundational non-medical facts and make a final determination as to the contents of these documents. The appeal will then proceed to the Medical Review Panel.

Because the decision of the Registrar as to the contents of these documents has no bearing on whether the matter proceeds to the Medical Review Panel, the Board considers this decision to be an administrative decision and it cannot be appealed to the Internal Review Division.

The administrative nature of the decision refers only to the Medical Review Panel Department's authority to include or exclude already decided facts in the statement of foundational non-medical facts.

If the Medical Review Panel Registrar or Medical Review Panel identify, in order to determine the medical dispute before the Panel, the need for a decision on a non-medical fact that has not been decided by the Board, the Registrar will refer the issue to the Compensation Services Division of the Board for adjudication by the appropriate Board officer (e.g. Claims Adjudicator, Claims Adjudicator Disability Awards, etc.).

A decision will be communicated to the interested parties in the normal way, and being a new decision with respect to a worker, if there is a dispute there will be a right to request a review of the decision under section 96.1 of the *Act*. The Medical Review Panel process will await resolution of the dispute before proceeding further.

Given that under sections 58(3) and 58(4) the Medical Review Panel process requires a physician's certificate that certifies to the existence of a bona fide medical dispute and that provides sufficient particulars to identify the issue before the Medical Review Panel process can proceed, and that most Medical Review Panel appeals have already been through the Review Board and Appeal Division appeal process, it is expected that the need to make new findings of non-medical fact after the Medical Review Panel process has begun, will occur on only rare occasions.

## **#103.70 Examination by the Panel**

Once the Medical Review Panel Department has completed its required preliminary duties the appeal is referred to the Chairman of the Medical Review Panel that will be conducting the examination in the case.

Section 60 of the *Act* provides that the Chairman of the Panel shall arrange for the examination of the worker, and for review of the records of the Board, by the Chairman and the other members of the Panel. While the Medical Review Panel Department staff may provide some administrative assistance in regard to these matters, this assistance will be at the direction of the Panel Chairman.

In conducting the examination the Medical Review Panel operates independently of the Board and its Medical Review Panel Department. The Board, including the Medical Review Panel Department, has no authority to instruct the Panel about the way it reviews the medical evidence or conducts its examination of the worker.

If additional medical information is needed the Panel will make whatever arrangements it considers necessary to obtain the information. This includes having the worker examined by specialists in different areas of medical or other expertise than that of the Panel members. The Medical Review Panel Department will provide any administrative assistance requested by the Panel in making necessary arrangements.

Section 61 authorizes the Panel to determine its own procedure and to receive and accept the evidence that in its discretion it considers fit and proper and essential to resolving the medical issues before it. To enable the Panel to fully exercise this authority section 61 provides that the Chairman and other members of a Panel have the powers conferred on the Board by section 87 of the *Act*. These powers include the authority to compel the attendance of witnesses for examination under oath, and to compel the production and inspection of relevant documentary evidence.

While the Panel is independent of the Board, the Panel must comply with the provisions of the *Act*. For example, except in fatal cases, the *Act* requires that the Panel shall proceed by examination of the worker. The requirement that there be an examination of the worker means that an appeal cannot proceed if the worker dies before an examination takes place. If the worker dies before the examination takes place, the appeal to the Medical Review Panel will be discontinued. This does not affect the right of a dependent of a worker to appeal to a Medical Review Panel pursuant to section 63 with respect to the cause of the worker's death.

The requirement that an examination must take place applies equally to proceedings initiated by the worker, the employer, or the Board. The worker is therefore obliged to attend the examination when the proceeding is initiated by the employer or the Board. If the worker does not do so, any benefits being paid to the worker at the time which are relevant to the claim in dispute will be suspended. If the worker is not receiving benefits at the time the Medical Review Panel examination is requested, the worker will be

required to be examined by the Medical Review Panel before any reopening of the claim which relates to the medical issue in dispute can be considered.

## **#103.80 Certificate of the Panel**

The ultimate responsibility following examination of the worker by the Panel is for the Panel to certify to the Board as to the matters referred to in section 61 of the *Act*. In order to achieve the aim of the Medical Review Panel process some ongoing dialogue between the Medical Review Panel Department and the Medical Review Panel may be necessary. For example, a Panel may find that it needs additional information before it can reach a decision. If additional conclusions of non-medical fact, or clarification of the questions being put to the Panel are needed, the Panel may refer the matter back to the Medical Review Panel Department.

On the other hand, if upon receipt of a certificate from the Panel the Medical Review Panel Department considers the certificate to be incomplete or ambiguous, the Medical Review Panel Registrar may refer the certificate back to the Medical Review Panel for clarification. This matter is discussed more fully in policy item #103.88 below.

The decision of a majority of the Panel is the decision of the Panel, and within a reasonable time after the examination of the worker the Chairman of the Panel shall certify to the Board in accordance with the requirements of section 61(1) of the *Act*.

Upon receipt of a Medical Review Panel certificate by the Board it will be the responsibility of the Board's officers to make adjudicative decisions based on the findings certified to in the certificate. The following determinations are set forth in policy in an attempt to avoid disputes about whether a Panel certificate certifies to medical findings, in which case it is binding on the Board, and to non-medical facts which are not properly part of a certificate.

## *#103.81 Condition of the Worker*

The Board interprets the reference to the "condition of the worker" in section 61(1)(a) of the *Act* to refer to the physical or psychiatric condition related to the medical issue in dispute. It is not a reference, for example, to the economic condition of the worker. Where possible, when describing the condition of the worker, the Panel will state the medical diagnosis which accounts for the worker's condition.

## *#103.82 The Existence or Non-Existence of a Disability*

There are two main issues that can arise under this heading. The first is the definition of disability. The second arises when, at the time of examination, the Panel finds that there is no disability.

The *Act* requires the Panel to certify as to the existence or non-existence of a disability. The *Act* does not define the meaning of the word disability. Disability is a word that can and does have many meanings, depending on the context in which it is used. In some contexts disability might refer simply to a physical or psychological impairment. In another context disability might refer simply to an economic impairment, for example impaired earning capacity. In most cases disability refers to the interaction between physical or psychological impairment, and external requirements, the most relevant in the workers' compensation context being the physical and mental requirements of a worker's occupation.

There is nothing in the *Act* to suggest that a Medical Review Panel should not describe the nature and extent of a disability in terms of its effect on a worker's capability to perform certain tasks, including work related tasks. Thus, although it would be an error for a Medical Review Panel to certify that a worker's disability caused a specified impairment of earning capacity it would not be an error for a Medical Review Panel to certify that a worker, based on the medical findings, appeared to be incapable of performing any "manual labour or sedentary labour."

Such a finding of a Medical Review Panel would still leave the responsibility for assessing the impaired earning capacity flowing from the Medical Review Panel finding of an inability to perform manual or sedentary labour to the appropriate Board officer. This would allow the Board officer to assess the extent to which alternate employment, alternate ways of doing the same employment, etc. would impact on the impaired earning capacity of the worker.

As regards the second issue, there will be times when the Panel does not find a disability upon examination. This may arise when the medical issue to be determined relates to an alleged disability from which recovery has occurred. To some extent this issue arises under section 61(1)(e) of the *Act*. But section 61(1)(e) refers only to the situation where the worker claims to have had, in the past, a longer period of disability than that recognized by the Board. There are times when it is not simply the worker's allegation of a longer disability than that recognized by the Board that will require the

Panel to be asked, if the disability does not exist at the time of examination, whether a disability ever did exist, and if so, what was its nature and degree.

In answering this question the Panel may arrive at a different medical conclusion than had previously been arrived at by Board adjudicators. If that occurs, because the Medical Review Panel certificate is binding on the Board, this will require adjustment of the previous decisions of the Board. Policy item #41.11 of this Manual provides an example of how the Board responds where a Medical Review Panel concludes that a disability that the Board had previously found to be non-compensable is caused by work related activity. Policy item #41.11 notes that such a certificate has retroactive effect.

The opposite situation can also arise, i.e. the Board's previous decision may have been that the condition was compensable and the decision of the Medical Review Panel is that the disability was not caused by work related activities. For example, a worker may appeal the question of whether a permanent disability has resulted from what the Board had determined to be a compensable injury. In answering questions relating to the existence, nature and extent, and cause of the disability, the Medical Review Panel may certify that the disability, which the Board had previously accepted as compensable, was not caused by work related activities. This is a medical decision, and one certified to, and is binding on the Board. Where this occurs the Board must terminate benefits, although, being a decisional error, there would be no retroactive application of the decision and an overpayment would not be declared (see policy item #48.41 of this *Manual*).

### **#103.83**     *Nature and Extent of a Disability*

The problems that arise under this section are essentially the same as those which have been discussed in policy item #103.82 regarding the meaning of disability. However there is one further matter that requires comment. Section 61(1)(c) says that the Panel shall not state the nature and extent of a disability "in terms of percentage of disability of the body." A Panel certificate should therefore not certify that a worker has, for example, "a 100% of total" disability. Such a finding would be in conflict with the wording in section 61(1)(c). However a certification by the Panel that a worker has a "total" disability does not violate the letter of the law expressed in section 61(1)(c). While it could be argued that the phrase "total disability" means the same as the words "100% of total" and therefore certification that a worker had a total disability would be contrary to the intent, if not the letter, of section 61(1)(c), the policy of the Board is that in some circumstances, and if the cause of the "total disability" is determined to be caused by purely medical factors, it is acceptable for a Medical Review Panel to certify that "total disability" exists. This interpretation is the only one which would not interfere with the requirement of the *Act* that a Panel certify to the nature and extent of a disability.

Even a finding of "total disability" based on medical findings would still require consideration by the appropriate Board officer to determine whether there was a 100% impairment of earning capacity resulting from the disability. It is not within the

jurisdiction of a Medical Review Panel to certify directly that a permanent disability award is payable. The decision whether to award a permanent disability award requires consideration of employability factors other than the existence and degree of a disability.

### *#103.84 Cause of the Disability*

Section 61(1)(d) of the *Act* requires the Panel to certify as to the cause of the disability. Cause is a word much like disability in that it has different meanings, depending on the context in which it is used. Sometimes it can refer to matters of natural science, sometimes to moral value judgements, and sometimes to questions of law. The purpose of the Medical Review Panel is to provide an appeal from "a medical decision of the Board" and it is in that context that the word "cause" must be interpreted. The Board interprets the word cause in section 61(1) of the *Act* to refer to the etiology of a physical or psychological disability. It means cause insofar as it is a matter of medical science, but not cause insofar as it is a matter of moral value judgements, or law, or non-medical fact.

Analysis of the issues that can arise in the adjudication of whether a work caused disease is compensable illustrate the distinction between a medical cause and a legal cause.

Whether a disease is an occupational disease as contemplated by the *Act* is a question of law. An occupational disease is either a disease listed in Schedule B of the *Act*, or such other disease that the Board, by regulation of general application, or by order dealing with a specific case, may recognize as being an occupational disease.

The diagnosis of a disease and the conclusion that the disease was due to the nature of any employment in which the worker was employed is a medical question.

Compensation is payable, pursuant to section 6(1) of the *Act*, only for occupational disease. Therefore a Medical Review Panel finding that a disease was due to the nature of the worker's employment would not create entitlement or benefits unless the disease was already one mentioned in Schedule B or had been recognized by regulation or order as an occupational disease.

It would be proper for the Medical Review Panel to certify that as a question of medical science, a disease was caused by the worker's employment. However, such a finding would say nothing about entitlement to benefits and the Panel would be going beyond its jurisdiction if it certified that such a disability was an "occupational disease" because that would be a conclusion of law.

However the policy of the Board is that where a Medical Review Panel certifies that a disease is due to the nature of the worker's employment, and that disease has not previously been designated as an occupational disease, the Board will designate, for

the purpose of that worker's claim, that that disease is an occupational disease and compensation benefits will then be paid as warranted.

### **#103.85**    *Duration of Disability*

The problems that can arise in the interpretation of section 61(1)(e) of the *Act* have previously been discussed in policy items #103.82 and #103.83 of this *Manual*.

### **#103.86**    *Certificate Binding on the Board*

Section 65 provides that a properly constituted certificate which certifies to a medical decision of a Medical Review Panel is conclusive as to the matters certified to and is binding on the Board. Any subsequent decision of the Board at any point in time, must be consistent with the certificate. For example, a Board officer in the Compensation Services Division could not decide, e.g. even 10 years after a Panel certificate was issued stating there was no disability, that the worker had a disability, if there was no change in the medical evidence upon which the Medical Review Panel certificate was based. However, a Medical Review Panel certificate is binding on the Board only to matters as they stand at and prior to the date of the certificate. A decision by a Medical Review Panel that a worker has no disability could be followed by a decision of the Board officer made a week after the Medical Review Panel decision that the worker had a disability if there was evidence that a new disability had arisen on the same claim after the Medical Review Panel had issued its certificate. Similarly it is open to the Board to make a decision as to the nature and extent of disability of a worker after a certificate is issued without being bound by the terms of that certificate if there is evidence that the worker's condition has changed, so long as that decision is not inconsistent with the original Medical Review Panel certificate.

### *#103.87 Narrative Report of the Panel*

Section 61(2) of the *Act* provides that the Panel may, in addition to and separately from the certification required under section 61(1), make a report and recommendations to the Board on any matter arising out of the examination of the worker and the review of the medical records. The recommendations, even if they deal with medical issues alone, are not binding on the Board. Where the Panel does make such a report the Board shall promptly send a copy of the report to the physician whose certificate was sent to the Board under section 58(3) or 58(4).

Given the context in which section 61(2) appears, it is the Board's opinion that the primary purpose of a narrative report is to bring to the attention of the physician who provided the certificate under sections 58(3) or 58(4) matters of medical interest which "go beyond that required to be certified to in the certificate." The purpose of the narrative report, when one is prepared, is not to justify the conclusions that the Panel has in its certificate.

### *#103.88 Disputes Over Medical Review Panel Certificates*

There are two levels at which disputes may arise about the Medical Review Panel certificate. The first level relates to whether the certificate is complete and whether it answers the questions placed before the panel and complies with the requirements of section 61(1) of the *Act*. The second level occurs when the Board officer is required to readjudicate the claim in light of the findings of the Medical Review Panel certificate.

The purpose of the Medical Review Panel Appeal process is to bring finality to disputed medical issues. The *Act* has provided for independent panels, but has also provided a role for the Board in the process. Both the Panels and the Board have the same interest - to ensure that Panels provide clear answers to questions related to medical findings and decisions made by the Review Board or Board officers. This mutual interest continues upon receipt of the Panel certificate.

If, in the opinion of the Medical Review Panel Registrar, the certificate has failed to answer the questions put to it, or has answered the questions in a way that is so unclear or inconsistent that the Panel decision cannot be ascertained, the Registrar may refer the certificate back to the Panel for clarification. The Registrar may not express opinions which would suggest disagreement with the findings, but only express opinions as regards the comprehensibility of the certificate. The Board considers that this role for the Medical Review Panel Registrar is justifiable given the responsibility that will ultimately rest on the Board to readjudicate the claim in accordance with the medical findings in the certificate. The Panel has an unfettered authority to respond to the requests for clarification in the way it sees fit. It may make changes in response to the request for clarification or it may consider that no clarification is necessary or desirable.

Section 61(7) of the *Act* provides that within eighteen days of receipt of the certificate or such further time that the Board considers necessary, the Board shall review the claim

and send a true and complete copy of the certificate to the worker, to the physician whose certificate accompanied the request under section 58(3) or (4), and to the employer.

Disputes related to the certificate which arise in the course of the Board's readjudication of the claim in light of the certificate's findings will be resolved through the normal appeal process.

## **#103.90    Miscellany**

### **#103.91    *Fishing Industry***

The *Fishing Industry Regulations* provide special rules for claims by fishers.

Regulation 10(3) provides that, for the purpose of appealing to a Medical Review Panel, the employer in respect of a fishing vessel owned or chartered by a commercial buyer or other commercial recipient of fish is the vessel owner or charterer. The employer in respect of a fishing vessel not owned or chartered by a commercial buyer or other commercial recipient of fish is

- (a) the vessel master; or
- (b) the vessel owner; or
- (c) any commercial buyer or other commercial recipient of fish; or
- (d) any other person required to pay assessment under Regulation 5;  
or
- (e) such other person or association of employers; as may be designated by the Board for these purposes.

### **#103.92    *Disclosure and the Freedom of Information and Protection of Privacy Act***

Policy items #99.00 to #99.90 of this *Manual* set forth the general policy of the Board concerning the disclosure of information on a worker's file.

Requests for information that do not fall within the general disclosure policy are dealt with pursuant to the *Freedom of Information and Protection of Privacy Act*. For the purpose of that Act, Medical Review Panel records are under the authority of the British Columbia Ministry of Skills Development and Labour. The Ministry of Skills Development and Labour and the Workers' Compensation Board have entered into a formal protocol respecting disclosure of Medical Review Panel records. The protocol stipulates that the purpose of the protocol is to enable the Ministry and the Board to

fulfill their respective obligations concerning Medical Review Panels pursuant to the *Freedom of Information and Protection of Privacy Act ("FIPP")*. The significant relevant parts of the protocol are as follows:

- The records created by Medical Review Panels are the responsibility of the Ministry for purposes of FIPP. Such records include the certificate, narrative reports, submissions to the Medical Review Panel, notes pertaining to the examination of the worker, and notes pertaining to the writing of the narrative. All other Medical Review Panel related records are administrative in nature and fall within the Board's purview for the purposes of FIPP.
- In the event of a request by the individual to whom the certificate pertains, the certificate will always be disclosed.
- In the event of requests by the individual to whom the narrative report pertains, the Ministry has delegated authority to the Medical Review Panel Department of the Board to release that report except in cases where the narrative report contains medical information, the release of which, in the opinion of the Medical Review Panel Department, could harm the individual to whom the report pertains.
- In the event that the Medical Review Panel Department does conclude that harm might result from release of the narrative report, the Medical Review Panel Department shall refuse access and inform the requester that he or she has a right to make a formal Freedom of Information request through the offices of the Information and Privacy Manager of the Ministry.
- Requests for notes pertaining to the examination of the worker and the writing of the narrative report shall not be dealt with in accordance with the Board's disclosure policy. They shall always be dealt with under formal Freedom of Information requests which should be submitted to the Information and Privacy Manager of the Ministry.
- The Medical Review Panel Department will assist the Information and Privacy Manager of the Ministry by helping individuals fill out Information and Privacy request forms and by expeditiously providing information and records to the Information and Privacy Manager of the Ministry as directed.
- All other requests by individuals for administrative records of the Medical Review Panel Department which pertain to those individuals will be disclosed to them in accordance with the normal disclosure policies of the Board by the Medical Review Panel Department.
- All requests for Medical Review Panel information by third parties shall be refused in the normal course of business. All Freedom of Information requests by third parties for Medical Review Panel created information shall be directed to the Information and Privacy Manager of the Ministry. The

Medical Review Panel Department will assist those parties in making such requests.

- All Freedom of Information requests by third parties for Medical Review Panel administrative records shall be directed to the FIPP coordinator of the Board.

The protocol specifically says that nothing in the protocol precludes disclosure where such disclosure is required by law, i.e. under the authority exercised by courts or tribunals.

### **#103.93**    *Expenses*

The Medical Review Panel Department may award expenses to persons attending Medical Review Panels in accordance with policy items #100.00 to #100.70 of this *Manual*.

**RE: Reviews and Appeals –  
Transitional Matters Relating to  
the Review Board and Appeal Division**

**ITEM: C13-104.00**

## **BACKGROUND**

### **1. Explanatory Notes**

The Explanatory Notes to Item C13-100.00 set out the general changes to the workers' compensation appeal system made by the *Workers Compensation Amendment Act (No. 2), 2002* ("Amendment Act (No. 2), 2002") effective March 3, 2003. Except for purposes of addressing certain matters covered by the transitional provisions of the *Amendment Act (No. 2), 2002*, the Workers' Compensation Review Board and the Board's Appeal Division ceased to exist as of that date.

The transitional provisions continue the appointments of members of the Workers' Compensation Review Board past March 3, 2003, for purposes of making decisions in certain cases. Those cases are proceedings where the Review Board has completed an oral hearing, or has received final written submissions and begun its deliberations. The members who have been involved in those cases are authorized, sitting as the Review Board, to complete their decisions.

The transitional provisions also continue the appointments of Appeal Commissioners of the Appeal Division past March 3, 2003, for purposes of making decisions in certain cases. Those cases are proceedings where the Appeal Division has completed an oral hearing, or has received final written submissions and begun its deliberations. The Appeal Commissioners who have been involved in those cases are authorized, sitting as the Appeal Division, to complete their decisions.

Policy items #102.00 to #102.51 and #104.00 to #105.40 set out in the Appendix to Item C13-104.00 immediately following are required to enable proceedings of the Review Board and the Appeal Division under the transitional provisions of the *Amendment Act (No. 2), 2002* to be continued, completed and implemented in accordance with the transitional provisions.

### **2. The Act**

Section 38 of *Amendment Act (No. 2), 2002*, in part:

- (3) If, in a proceeding pending before the review board on the transition date, the review board has
  - (a) completed an oral hearing, or



- (b) received final written submissions and begun its deliberations,

the review board must continue and complete those proceedings, acting with the same power and authority that the review board had under the Act before the provisions of the Act granting that power and authority were repealed by the amending Act.

- (4) The appointments of the members of the review board who are sitting on proceedings described in subsection (3) are continued until those proceedings are completed.

Section 39 of the *Amendment Act (No. 2), 2002*, in part:

- (4) If, in a proceeding pending before the appeal division on the transition date, the appeal division has

- (a) completed an oral hearing, or
- (b) received final written submissions and begun its deliberations,

the appeal division must continue and complete those proceedings, acting with the same power and authority that the review board had under the Act before the provisions of the Act granting that power and authority were repealed by the amending Act.

- (5) The appointments of the appeal commissioners who are sitting on proceedings described in subsection (4) are continued until those proceedings are completed.

## **POLICY**

Policy items #102.00 to #102.51 and #104.00 to #105.40 set out in the Appendix to Item C13-104.00 immediately following are continued in relation to proceedings of the Review Board and the Appeal Division on and after March 3, 2003, insofar as they are consistent with the *Workers Compensation Amendment Act (No. 2), 2002*.

## **PRACTICE**

For any relevant PRACTICE in relation to proceedings of the Review Board and the Appeal Division on and after March 3, 2003, readers should consult the Workers' Compensation Appeal Tribunal.

<b>EFFECTIVE DATE:</b>	March 3, 2003
<b>AUTHORITY:</b>	<i>Workers Compensation Amendment Act (No. 2), 2002</i>
<b>CROSS REFERENCES:</b>	Reviews and Appeals - General (C13-100.00)
<b>HISTORY:</b>	New Item made necessary because of the <i>Workers Compensation Amendment Act (No. 2), 2002</i>
<b>APPLICATION:</b>	

## APPENDIX TO ITEM C13-104.00

### WORKERS' COMPENSATION REVIEW BOARD, WCB APPEAL DIVISION AND ANCILLARY IMPLEMENTATION ISSUES

#### #102.00 THE WORKERS' COMPENSATION REVIEW BOARD

Section 90(1) provides that:

"Where an officer of the Workers' Compensation Board makes a decision under this *Act* with respect to a worker, the worker, or, if deceased, the worker's dependants, or the worker's employer, or a person acting on behalf of the worker, the dependants or employer, may, not more than 90 days from the day the decision is communicated to the worker, dependants or employer, or within another time the review board allows, appeal the decision to the review board in the manner prescribed by the regulations."

The application of this section to commercial fishers is dealt with in *Fishing Industry Regulations 10 and 5* (found in *Workers' Compensation Reporter* Decision No. 223 as amended by Decision 225).

Regulations governing the procedure of the review board are found in B.C. Reg. 32/86.

The Workers' Compensation Review Board was formerly known as the board of review.

#### #102.10 Composition of Review Board

Section 89(2) provides that:

"The review board must consist of

- (a) a chair,
- (b) one or more vice chairs, and
- (c) members the Lieutenant Governor in Council considers necessary who must be selected in equal numbers from persons having backgrounds associated with employer interests and persons having backgrounds associated with worker interests,

all of whom must be appointed by the Lieutenant Governor in Council.”

### **#102.11** *Chairman*

Regulation 2 provides:

- “(1.) The chairman has responsibility for the general administration of the review board and may
- (a) appoint a registrar, and if he deems necessary a deputy registrar, from among its members,
  - (b) assign duties he considers advisable to the members, designate the matters in which they shall act, the place where they shall act and supervise the carrying out of their duties,
  - (c) subject to any agreement made under section 93(4) of the *Act*, employ such staff and make such provision for facilities and equipment as he considers necessary for the efficient operation of the review board,
  - (d) assign the duties he considers advisable to the staff of the review board and supervise the carrying out of their duties, and
  - (e) determine the type of records to be kept of the proceedings of the review board.
- (2.) The chairman may designate a vice chairman to be acting chairman during his absence and the acting chairman will have all the powers and authority of the chairman.”

### **#102.12** *Panels*

Regulation 3 provides in part as follows:

- “(1.) The chairman shall
- (a) establish panels of the review board;
  - (b) appoint members to the panels to ensure composition in the manner set out in subsection (2),
  - (c) terminate appointments made and fill vacancies, and

- (d) assign appeals to the panels.
- (2.) A panel shall be composed of
- (a) the chairman or a vice chairman as presiding member and 2 other members, one of whom shall have a background associated with employer interests and one of whom shall have a background associated with worker interests,
  - (b) the chairman as presiding member and 2 vice chairmen; or
  - (c) the chairman or a vice chairman sitting alone.
- (3.) The chairman may reassign any appeal from one panel to another before evidence is taken on the appeal by the panel to which it was originally assigned.”

Section 89(7) of the *Act* states:

“The finding of a majority of a panel of the review board is a finding of the review board, but if there is no majority, the finding of the person presiding over the panel is a finding of the review board.”

### *#102.13 Person Ceasing to be a Member*

Regulation 3 also provides:

- “(4.) Where a person ceases to be a member, he may, with the approval of the chairman, carry out and complete any duties or responsibilities and continue to exercise any powers that he may have had if he had not ceased to be a member in relation to a specific proceeding in which he participated.
- (5.) Where a member is unable to complete his duties or responsibilities on a panel, the chairman may
- (a) appoint a member, including himself, to replace that person,
  - (b) direct that the remaining persons comprising the panel constitute a quorum for the determination of an appeal, and that the findings of the quorum shall be the decision of the panel, or
  - (c) exercise his authority under subsection (3)” above.

## #102.14 Registrar

Regulation 4 provides:

- “(1.) At the direction of the chairman, the registrar shall be responsible for determining all administrative matters pertaining to the filing of and completion of an appeal before the review board and shall carry out the following duties:
- (a) supervise staff assigned to him by the chairman;
  - (b) review all appeals filed with the review board to determine their compliance with section 90 of the *Act* and these regulations;
  - (c) correspond with parties to an appeal to ensure compliance with the requirements for pursuing a valid appeal and to suspend appeals where these requirements are not met after due notice to the affected party;
  - (d) ensure that all issues raised by an appeal have been disposed of before the claim file is returned to the board;
  - (e) refer claim files to an officer of the board where a matter under appeal has not been considered in the first instance.”

Regulation 5, Subsection (5) provides:

“The registrar shall acknowledge receipt of every appeal made to the review board and provide a copy to the respondent together with a notice of appearance.”

## #102.20 Decisions Which May Be Appealed

The review board has jurisdiction where an officer of the Board makes a decision under the *Act* with respect to a worker.

Thus, the first requirement is that there must be a decision to appeal from. Sometimes complaints are received that no decision has been made. In other words, the complaint concerns delay. A complaint of this kind would not normally be a matter for the review board. If the Adjudicator does not respond to the complaint, it should be referred to the Unit or Area Office Manager.

## #102.21 *Administrative Matters*

Decisions of a purely administrative nature are not subject to the appeal system. Any complaint on a matter of administration should be addressed to the departmental Director.

As an example, "C" had been awarded compensation in 1956 as a foster-mother in respect of her three children. In 1973, the youngest child attained the age of 18 years, and the remaining benefits attributable to the children were terminated. Subsequently, the compensation payable to "C" was also terminated. "C" complained, and the complaint was processed as an appeal to a board of review. It is clear, however, that the board of review had no jurisdiction. There was no complaint about any claims decision made within the preceding 90 days. The only new decision made by the Pensions Clerk was that the youngest child had reached the age of 18 years, and there was no dispute about that. The consequential termination of benefits to "C" on that event was not a "decision" made by the Pensions Clerk but simply an administrative act implementing a decision made in 1956.

While the review board has jurisdiction over the question whether a worker has been overpaid by the Board and the amount of any overpayment, it has no jurisdiction over whether the Board should collect that overpayment from the worker or over the manner of collection.

## #102.22 *Jurisdictional Matters*

A question on the application of Part 1 or other jurisdictional questions that may have implications beyond the particular claim should be referred to the Vice-President, Compensation Services Division, as soon as it is recognized, whether before or after the initial claims decision. This would apply if, for example, the issue is whether the employer for which the worker worked was covered under Part 1, or whether the worker was a worker.

Where a decision on the claim has already been made by an Adjudicator and the worker is appealing to the review board, there is a statutory right to appeal to the review board, and the appeal cannot at that stage be diverted by reference to the Vice-President. The value of a reference before the initial claims decision is to have the Vice-President consider whether some general directive is required on the jurisdictional question that would relate to claims generally.

## #102.23 *Claims by Dependants*

The *Act* refers to appeals by dependants with regard to a decision made with respect to a worker. This includes decisions made with respect to a deceased worker.

## #102.24 *Discretionary Matters*

Various sections of the *Act* confer on the Board discretionary powers with regard to compensation, for example, sections 17(14), 17(16), 32(1), 32(3), 35(1) and 35(2).

These discretionary powers are exercised in various ways. If the situation is one that rarely occurs, the matter is sometimes referred to the Vice-President, Compensation Services Division, for a decision. An example of this category is the recognition of an occupational disease in a particular case.

For situations that arise more frequently, the normal practice is for there to be established guidelines, and for the decisions to be made by the Adjudicators. Here again, if a new situation arises on which no guidelines have been established, the matter can be referred to the Vice-President, Compensation Services Division, for direction.

The question now being considered is whether an appeal lies to the review board from the decision of an Adjudicator on one of these discretionary matters.

In this connection, there are two views commonly taken of the role of an appellate tribunal.

1. The substitutional role. On this view, the role of the appeal tribunal is to substitute its judgment for that of the person making the initial decision. This is the role of the review board on issues of right. Subject to the terms of the *Act* and the decisions and practice established by the Governors, the review board may, on a question of right, substitute its own judgment for that of the Adjudicator.
2. The supervisory role. On this view, the role of the appellate tribunal is not to substitute its judgment for that of the initial Adjudicator; but rather to ensure simply that a decision has been properly made. In other words, the role of the review board is to intervene when a decision is wrong, but not to substitute a different judgment when there is no error. That is the role of the review board on a discretionary issue. The *Act* does not delegate to the review board all the functions of the Board, nor does it confer on the review board an authority to exercise a discretion that is conferred upon the Board. Rather it confers upon the review board a supervisory appellate jurisdiction to ensure that when the discretion is exercised by an officer of the Board, it is properly exercised.

Thus, a decision of an officer of the Board on a discretionary matter relating to compensation may be appealed to the review board. But where there is such an appeal, the question for the review board is whether the decision was wrong, and it is not wrong simply because, if the review board were responsible for deciding

the matter, it would have exercised the discretion differently. In other words, the decision of the Adjudicator should be returned for reconsideration of the discretion where the review board concludes that:

1. The conclusions of fact on which the discretion was exercised were not correct,

or

2. The Adjudicator had departed from the terms of the *Act*, or from previous directives or decisions of the Governors relating to the exercise of discretion.

But where there is no such objection to the decision, there is no error for correction.

### **#102.25    *Disability Awards***

Though disability awards do require the exercise of some discretion in making assessments, a worker's permanent disability award entitlement to a permanent disability award is fundamentally a question of right. The limitations on the appellate role which apply in the case of discretionary matters are not appropriate to disability awards. Therefore, as with any other appeal on a matter of right, the review board has full jurisdiction over permanent disability awards.

Where the review board has expressed dissatisfaction with the manner of assessment for a disability award and has recommended reassessment and re-evaluation, the Board will implement that decision to the extent of carrying out that re-evaluation as is discussed in policy item #102.51. However, should the result be no increase in the disability award, the worker's avenue of appeal is back to the review board or to a Medical Review Panel. A decision of a Board officer with respect to a worker cannot be appealed directly to the Appeal Division.

### **#102.26    *Rehabilitation Matters***

Rehabilitation is a discretionary matter for the Board. There is no legal right to rehabilitation. However, appeals are permitted on other discretionary matters. Therefore, subject to the principles set out in policy item #102.24 regarding appeals on discretionary matters, the review board has jurisdiction to consider appeals on rehabilitation matters.

Not everything a Rehabilitation Consultant does is appealable to the review board. That right only exists in respect of "decisions". Routine actions of communicating in writing, by telephone or in person with workers, union representatives, employers, or other persons for the purpose of finding suitable

employment for a worker do not normally involve an appealable decision. If a worker is dissatisfied with this aspect of a Rehabilitation Consultant's work, there will normally be an allegation concerning a lack of action or delay on the part of the Consultant or be complaining that the Consultant is not in some other way doing the job. This is a complaint of an administrative nature which should be directed to the Consultant's Manager or departmental Director.

Generally speaking, a Rehabilitation Consultant will only make a decision appealable to the review board when making a decision to grant, terminate or refuse some specific rehabilitation service. Some examples are decisions to:

1. Grant or not grant retraining, or as to the type of retraining for which the Board should be responsible;
2. Pay or not pay personal care allowances, independence and home maintenance allowances and homemakers' services;
3. Modify or not modify a worker's automobile, home, or workplace;
4. Make or not make grants to assist the worker in establishing a business;
5. To pay or not pay job search allowances.

In addition to those specific matters, there would also be an appeal to the review board against a decision to refuse to provide or discontinue rehabilitation assistance in general.

There is another area where, though the Rehabilitation Consultant may be considered to be making a decision, no separate appeal to the review board lies. This is where the Rehabilitation Consultant is making an assessment or investigation for the Claims Adjudicator, Disability Awards Officer or Adjudicator in Disability Awards and makes a recommendation to them which will assist them in making a decision. Examples are the assessments carried out when a decision has to be made on:

1. A worker's entitlement to wage-loss benefits under section 30 of the *Act* for a temporary partial disability;
2. A worker's entitlement to a permanent disability award on a projected loss of earnings basis;
3. An application for a commutation.

In each of those situations, the final decision is made by a Claims Adjudicator, Disability Awards Officer or Adjudicator in Disability Awards and their decision, not the recommendation of the Rehabilitation Consultant which led to it, is appealable to the review board. Of course, the review board may consider the

merits of the Consultant's recommendation when considering the appeal against the decision of the Claims Adjudicator, Disability Awards Officer or Adjudicator in Disability Awards.

Before proceeding with an appeal, the worker may ask that the matter in dispute be discussed with the appropriate Rehabilitation Manager.

### *#102.27 Decisions Affecting the Worker Financially*

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

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

It may be helpful to illustrate the point with some examples.

1. If the dispute is whether the present disability results from an injury occurring in one year with employer "A", or in another year with employer "B", the result may affect the worker financially, and the review board therefore has jurisdiction.
2. If the issue is whether the present disability is attributable to an injury occurring in one year with the particular employer or in another year with the same employer, it may affect the worker financially, and so the review board has jurisdiction.
3. If there is no dispute that the disability is attributable to an injury occurring on a particular date, but there is an issue on whether "A" or "B" was the employer of the worker on that date, the result makes no difference to the worker financially if both employers were covered by the *Act*. Thus, if the issue is simply to which sector fund the cost of the claim should be assigned, the review board would have no jurisdiction.
4. If an employer is making an application under section 39(1)(d) or (e) for the sector or rate group fund to be relieved of part of the cost of a particular injury; that is not a matter that makes any difference to the worker, and is not a matter within review board jurisdiction.
5. If an employer has been charged with compensation costs under section 54(8) and is applying for relief under section 54(9) then that is not an issue that makes any financial difference to the worker, and as such it is an issue on which the review board have no jurisdiction.

If the issue is of a class or kind which affects the worker financially, review board jurisdiction is not excluded because that may not be the employer's motive, or because another result will be to shift the cost of a claim or part of it from one employer to another or from one sector or rate group to another.

### **#102.28**    *Decisions of Medical Appeals Officers*

A decision of a Medical Appeals Officer allowing or refusing to allow a worker or employer to appeal to a Medical Review Panel is appealable to the review board.

## **#102.30**    **Commencement of Appeal**

### **#102.31**    *Time Limits*

Section 90(1) provides in part that the appeal must be made “. . . not more than 90 days from the day the decision is communicated to the worker, dependants or employer, or within another time the review board allows, . . .”

Any request for an extension of time for appealing to the review board should be referred to the review board. The worker or employer wishing to appeal should be invited to state the reasons for delay, or the reasons for extending the time. The reasons can be mentioned in the notice of appeal, or in a separate letter, or if the person enquiring so wishes, the reasons can be recorded by the Adjudicator receiving the enquiry.

### **#102.32**    *Initiation of Appeal*

Regulation 5 provides as follows:

- “(1.) An appeal to the review board shall be filed at its office or at an office of the board.
- (2.) An appeal shall
  - (a) be in writing signed by the appellant or his agent,
  - (b) specify the decision being appealed and state why, in the opinion of the appellant, the decision is incorrect, and
  - (c) set out the remedy sought.
- (3.) Where the grounds of appeal relate to evidence that was apparently not considered by or disclosed to the officer of the board, the written appeal must contain

- (a) the names and addresses of any witnesses to be produced,
  - (b) a description of any documentary evidence to be offered, and
  - (c) if the evidence is additional medical evidence, a short statement as to how the evidence will affect the decision under appeal.
- (4.) If subsections (2) and (3) are not fully complied with, the review board may require the appellant to file with it a completed notice of appeal in the form determined by the review board.
- (5.) The registrar shall acknowledge receipt of every appeal made to the review board and provide a copy to the respondent together with a notice of appearance.
- (6.) A respondent, who wishes to participate in the appeal, shall file the notice of appearance with the registrar within 21 days from the date of dispatch of the notice under subsection (5)."

Section 90(2) of the *Act* provides that:

"Where the employer of a worker referred to in subsection (1) has ceased to be an employer within the meaning of Part 1, the review board may, for the purposes of an appeal under subsection (1), deem an organized group of employers which includes as members employers in the subclass of industry to which the employer belonged to be the employer of the worker."

## **#102.40 Conduct of Appeal**

Section 89(6) of the *Act* provides that:

"Subject to any regulations made under subsection (5), the review board may conduct an appeal in the manner it considers necessary, and it is not required to hold an oral hearing."

Regulation 6, Subsection (2) provides:

"The review board shall consider relevant information and argument submitted to it by or on behalf of a worker, employer or dependant, whether made orally or in writing."

Regulation 8, Subsection (2) provides:

“Subject to the *Act*, all reasonable time limits set by a panel for the due conduct of an appeal shall be complied with unless waived by the chairman or the panel.”

### **#102.41**    *Board Files*

Regulation 6, Subsection (6) provides:

“The review board has the right to examine an original or copy of a record in the board’s possession that relates to a matter under appeal.”

Regulation 8, Subsection (1) provides:

“All records of the review board, other than personal notes kept by a member, shall be delivered to the board following the finding of the review board.”

### **#102.42**    *Oral Hearings*

Section 89(6) provides that:

“Subject to any regulations made under subsection (5), the review board may conduct an appeal in the manner it considers necessary, and it is not required to hold an oral hearing.”

Regulation 6, Subsection (1) provides:

“Where the review board does not conduct an oral hearing, it shall permit parties to the appeal to make written submissions.”

Where the review board decides to hold an enquiry, it may arrange travel schedules to conduct enquiries in various cities and towns of the province.

Transcripts of tape recordings of review board hearings are not provided. After the review board has rendered its finding, copies of the tape recordings may be obtained from the Disclosure Section, through the normal disclosure process. Requests for copies of a tape prior to that time must be directed to the review board.

### **#102.43**    *Powers of Investigation*

The review board has all the powers conferred on the Board by section 87.

Regulation 6, Subsections (3) and (4) provide:

- “(3.) The review board may require and receive medical or other evidence and information on oath, affidavit or otherwise as in its discretion it considers proper to make a fair decision.
- (4.) The review board may require a worker to attend for examination by a physician chosen by the review board.”

Payment for services rendered under Regulation 6, Subsections (3) and (4) are made at the rates paid by the Board for similar services.

### **#102.45**    *Disclosure of Information*

Regulation 6, Subsection (5) provides:

“The review board shall, in determining whether or not a record in its possession, including a medical report, should be disclosed to a worker, employer or other person, follow the practice of the board.”

### **#102.46**    *Expenses*

For the Board’s general rules on expenses incurred by workers or employers, reference should be made to policy item #100.00.

Regulation 7, Subsections (1) and (2) provide:

- “(1.) The review board may order the board to reimburse a person for the cost incurred in
  - (a) attending an oral hearing,
  - (b) obtaining a medical report submitted to the review board, or
  - (c) attending an examination required under section 6(4).
- (2.) The amount of costs authorized under subsection (1) shall not exceed the rates paid by the board for similar services.”

### **#102.50**    **Referral of Review Board Findings**

Every finding of the review board, together with its reasons, shall be recorded in writing and promptly sent to the appellant and the employer or worker or the dependants as the case may be and to the Workers’ Compensation Board.

The review board finding will initially be reviewed by a Board officer. The Board officer will, without delay or further investigation, implement the review board finding in accordance with policy item #105.30.

If the Board officer feels that one or both of the following two grounds of referral exist, he or she will discuss the review board finding with his or her Manager:

1. The finding contains an error of law.
2. The finding contains a contravention of a published policy of the Governors.

If the Manager agrees with the Board officer, the Board officer will prepare a memo to the Vice-President, Compensation Services Division, outlining how the referral grounds are met.

By way of explanation, the first ground means that the finding is contrary to the provisions of the *Act* or based upon some other clear error of law. The second ground means that the finding contradicts the published policy of the Governors. The published policy of the Governors is set out in policy item #96.10 of this manual.

If the referral is to be made on the first ground, the referral memo should contain a reference to the section of the *Act* or provision of law that the finding contradicts. If the referral is to be made on the second ground, the referral memo should contain a reference to the section of the *Rehabilitation Services and Claims Manual* or other published policy of the Governors that the finding contradicts. A referral on either ground should provide full particulars and an explanation as to how the referral ground is met.

A copy of the referral memo and a copy of the review board finding which is the subject of the referral is to be sent to the Vice-President. If the Vice-President considers it necessary to review the entire claim he or she will request it.

The referral memo to the Vice-President must be sent without further investigation and within two weeks of the date the review board finding was received by the Board. If the Vice-President considers that the grounds of referral are met and that the matter should be referred to the Appeal Division for redetermination, he or she will refer the matter to the President. The President will make the final decision as to whether to refer the review board finding to the Appeal Division under section 96(4).

If the President determines that the grounds of referral are met, and that the matter should be referred to the Appeal Division under section 96(4), the worker, employer, and any other interested party will be notified by letter that the finding has been referred to the Appeal Division for redetermination under section 96(4). This letter of notification will include copies of the referral memo written by the

Board officer. After the notification letter is sent out, the claim will be referred to the Appeal Division.

The issue of the implementation of a review board finding where a referral is made by the President is dealt with in policy item #105.30.

Where the Medical Review Panel Registrar identifies a decision that relates to the administration of the Medical Review Panel Department, and where the decision is based on an error of law or is made in contravention of published policy of the Governors, the Registrar may refer the Review Board finding directly to the President without the necessity of first referring the matter to the Vice-President, Compensation Services Division.

### *#102.51 Implementation of the Workers Compensation Review Board's Finding Directing Reassessment or Reconsideration*

It commonly happens that, instead of reaching a specific finding on a matter, the review board will direct that the Compensation Services Division reassess or reconsider something, for example, a permanent partial disability award. The review board finding is properly implemented if the reassessment or reconsideration is carried out even if the conclusion reached is the same as the one which was previously appealed to the review board. However, if the Claims Adjudicator, Disability Awards Officer, Adjudicator in Disability Awards or Rehabilitation Consultant implementing the review board finding is the same one who made the original decision against which the appeal was made, and if that person's decision is still negative, the matter is to be referred to a second Claims Adjudicator, Disability Awards Officer, Adjudicator in Disability Awards or Rehabilitation Consultant for a second look. If a difference of opinion results from the second look, the decision of the second Claims Adjudicator, Disability Awards Officer, Adjudicator in Disability Awards or Rehabilitation Consultant will prevail.

Where, in addition to directing the reassessment or reconsideration, the review board makes some specific findings of fact, for example, that the worker was unable to carry out certain jobs, the Compensation Services Division is bound by those findings.

Where the reassessment or reconsideration results in no change in the original Compensation Services Division decision, an appeal lies back to the review board or, if the decision involves a medical issue, to a Medical Review Panel.

## **#104.00 THE APPEAL DIVISION**

The jurisdiction of the Appeal Division is set out in specific sections of the *Workers Compensation Amendment Act*, 1989, as outlined below. In addition, the Governors have designated certain other matters as appealable to the Appeal Division under section 96(6.1) and delegated the authority of the Board in certain matters to the Chief Appeal Commissioner and the Appeal Division.

### **#104.10 Appeals from Review Board Findings**

Section 91 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.

The employer of a fisher for purposes of an appeal to the Appeal Division is discussed in *Fishing Industry Regulations* 10 and 5 (found in *Workers' Compensation Reporter* Decision 223 as amended by Decision 225).

### **#104.20 Referrals of Review Board Findings**

Section 96(4) provides that 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 published policy of the Governors.

### **#104.30 Reconsideration of Appeal Division Decisions**

Section 96.1 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 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.

Where the Chief Appeal Commissioner considers that the evidence is substantial and material to the decision and 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, the Chief Appeal Commissioner may direct that the Appeal Division reconsider the matter or that the applicant may make a new claim to the Board with respect to the matter.

Section 17 of the *Workers Compensation Amendment Act* 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 section 91 or 96 of the former *Act* on the same grounds and in the same manner as that set out in section 96.1 of the new *Act*. This means that the Appeal Division also has the jurisdiction to reconsider decisions of the former Commissioners in accordance with the reconsideration provisions of section 96.1.

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

## **#104.40 Employer Appeals**

Section 96(6) provides that an employer who has received notice of an assessment under section 39 or 40, a classification, special rate, differential or assessment under section 42, or an additional assessment, levy or contribution under section 73 may, not more than 30 days after receiving the notice or within a longer period the Chief Appeal Commissioner may allow, appeal the assessment, classification, special rate, differential or additional assessment, levy or contribution to the Appeal Division on the grounds of error of law or fact or contravention of a published policy of the Governors. The published policy of the Governors is set out in policy item #96.10.

In Decision #4 of the Governors, under section 96(6.1), the Governors have designated that an employer who has received notice relating to an assessment, classification, monetary penalty or apportionment or shifting cost between classes for which no appeal to the Appeal Division is specifically provided in section 96(6) may appeal to the Appeal Division.

Under these sections, the Appeal Division has jurisdiction to consider appeals from the following decisions:

1. a decision to impose an additional assessment with respect to occupational safety and health matters under section 73;
2. a decision to impose an additional assessment with respect to first aid matters under section 70;
3. a decision on any assessment matter;
4. a decision with respect to the application of section 39(1)(d) or 39(1)(e);

5. a decision with respect to the charging of claims costs under section 47(2);

There may be other decisions made under the *Act* which might fall under the provisions of section 96(6) or 96(6.1). If an employer considers that a decision has been received for which an appeal is provided by section 96(6) or designated by the Governors under section 96(6.1) which is not listed above, the employer should raise the matter with the Appeal Division who will determine whether the Appeal Division has jurisdiction to hear the matter.

### **#104.50 Criminal Injuries**

Section 12(a) of the *Workers Compensation Amendment Act* amends section 22(3) of the *Criminal Injury Compensation Act* such that by leave of a criminal injury appeal committee or the Chief Appeal Commissioner, the Appeal Division has jurisdiction over an appeal from a decision of a criminal injury appeal committee.

### **#104.60 Delegations to the Appeal Division**

In Decision #4 of the Governors, the following authority of the Board is assigned to the Appeal Division by the Governors:

“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);”

### **#105.00 PAYMENT OF CLAIMS PENDING APPEALS**

#### **#105.10 Appeals to the Workers Compensation Review Board – New Claims**

The general practice is that no payment is made on a new claim until there has been an adjudication that the claim is valid.

When a decision is made to allow a claim that has been protested by an employer, the employer will be advised of the decision and reasons, where possible by telephone, and given an opportunity to provide any additional information. This is similar to the requirement in policy item #99.10 that a worker be advised if the indication on a claim is that it may be disallowed. If the decision

remains that the claim should be allowed, payments will be commenced immediately and a letter explaining the decision and reasons will be sent to the employer. The letter will advise the employer of their rights of appeal.

An employer can appeal up to 90 days from the decision allowing a claim.

If the review board reverses the decision of the Claims Department to allow the claim, payments are immediately terminated but no attempt is made to recover payment incorrectly made to the worker, unless there was evidence of fraud or misrepresentation. The employer's sector or rate group will be relieved of the claim costs pursuant to policy item #113.10.

### **#105.20 Appeals to the Workers Compensation Review Board – Reopening of Old Claims**

If a decision is made to reopen an old claim, the employer is advised in writing. If the employer objects to this decision, they will be advised of their rights of appeal.

If the review board reverses the decision of the Claims Department to reopen the claim, payments are immediately terminated. No attempt is made to recover payments incorrectly made to the worker unless there was evidence of fraud or misrepresentation. The employer's sector or rate group will be relieved of the claim costs pursuant to policy item #113.10.

### **#105.30 Implementation of Review Board Findings**

Section 92 provides as follows:

- “(1) Where a claim is allowed by the review board, periodic payments must commence, and a lump sum under section 17(13) must be paid; and an amount so paid is not, in the absence of fraud or misrepresentation, recoverable from the worker or dependants.
- (2) Notwithstanding subsection (1), where a finding of the review board is appealed under section 91 or reopened or reheard under section 96, payment of any compensation that has not yet been paid with respect to the period prior to the finding of the review board must be deferred until the date on which the appeal division makes its decision or redetermination under section 91 or 96, as the case may be.
- (3) If the appeal division decision is in favour of the worker or his dependants, interest

- (a) calculated in accordance with the policies of the governors, and
- (b) 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 must be paid on compensation that has been deferred under subsection (2).”

The procedures for implementing all review board findings are as follows:

1. Any benefits payable from the date of the review board finding forward will be paid without delay.
2. Any benefits payable for the period of time prior to the date of the review board finding (retroactive benefits) will be paid after 30 days have elapsed following the date of the review board finding unless:
  - (a) the President has referred the review board finding to the Appeal Division under section 96(4); or
  - (b) an appeal has commenced from the finding under section 91.
3. If there is a referral to the Appeal Division by the President under section 96(4) or an appeal of the finding under section 91 retroactive benefits will not be paid until the Appeal Division has completed its consideration of the matter.
4. The decision of the Appeal Division will be implemented upon its receipt by the Board officer. The worker’s entitlement to retroactive benefits which were deferred according to #3 above will then be determined in accordance with the decision of the Appeal Division.
5. Where retroactive benefits are payable, after the decision of the Appeal Division, interest is to be paid in accordance with the Board’s general policy on the payment of interest on retroactive benefits as set out in policy item #50.00. However, where no interest is payable under policy item #50.00 because it is determined that the retroactive benefit was not necessitated by a blatant Board error, 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 policy item #50.00.

The implementation of review board findings which result in a lump-sum payment or commutation is discussed at policy item #45.61.

## **#105.40 Appeals to a Medical Review Panel**

Where the Appeal Division allows a worker's appeal, payment of benefits is commenced even if the employer appeals that decision to a Medical Review Panel or requests the Appeal Division to reconsider their decision.