

2000  
ANNUAL REPORT  
OF THE  
APPEAL DIVISION

**For the period January 1 to December 31, 2000**

*WORKERS' COMPENSATION BOARD  
OF BRITISH COLUMBIA*

Submitted by:  
John Steeves  
Chief Appeal Commissioner  
March 6, 2001

## **TO: THE PANEL OF ADMINISTRATORS**

I am pleased to present this tenth annual report of the Appeal Division, for the year 2000.

The year 2000 was a significant one for the Appeal Division. For the first time, appeal decisions are, as a matter of course, available to the public. Beginning with decisions issued since January 1, 2000, all subsequent decisions of the appeal division will be available on the board's Worksafe Online website [<http://www.worksafebc.com>].

This implements a recommendation of the Royal Commission on Workers' Compensation in British Columbia which concluded that "granting the public full access to 'de-identified' decisions will help to promote consistency and predictability throughout the claims adjudication and appeal systems." All decisions published on the internet are written in a manner that does not identify the parties.

The Appeal Division issued 2,077 decisions in 2000, the most decisions issued in any year since the inception of the Appeal Division in 1991. In 1999 the Appeal Division issued 2,020 decisions, and 2,035 decisions in 1998. The average number of decisions issued by the Appeal Division annually from 1992 to 1999 was 1,843.

The largest single category of decisions in 2000 concerned appeals from Review Board findings (1,361 out of the 2,077 decisions), with the next largest category of decisions being in relation to employer appeals for relief of costs under section 39(1)(e) (209 decisions in 2000). This latter figure almost doubles the number of decisions in relief of cost appeals issued in 1999 (108 decisions). Employer relief of cost appeals remain, as they have since 1997, the single largest source of appeals initiated at the Appeal Division (although such appeals were down 17% in 2000 compared with those received in 1999). But, as noted later in this report, approximately 93% of such appeals since 1997 have been withdrawn before requiring adjudication by an Appeal Division panel.

The Appeal Division experienced a slight (just over 1%) decrease in appeals from Review Board findings in 2000 over 1999, and a 13% decrease in applications for section 11 determinations (97 compared with

112 received in 1999); but increases were experienced in other areas such as assessment appeals, criminal injury applications for leave, and applications for reconsideration of Appeal Division decisions.

When I became Chief Appeal Commissioner in March 2000 I began my duties with an established, well-regarded appeal tribunal. The challenges facing the Appeal Division at that time included delays in scheduling oral hearings and delays concerning the Appeal Division's commencement of employer relief of costs appeals, as well as the timeliness of authorizations for representatives of parties. All these matters have either been resolved or will be resolved in the coming months through processes now in place. We are currently undertaking a complete review of, and public consultation regarding, the Appeal Division's practice and procedure decisions and directives with the objective of having this review completed in late Spring 2001.

With regard to the future, the Workers' Compensation Review Board has recently experienced substantial growth in decision-making panels which we expect to result in a significant increase in the number of section 91(1) appeals to the Appeal Division. Over the past four years, Appeal Division decisions on appeals from Review Board findings has represented, on average, 68 percent of decisions issued by the Appeal Division each year.

We look forward to dealing with such challenges and continuing to provide the community with quality decisions on a timely basis. The Appeal Division is comprised of an accomplished group, from the administrative staff, to the secretarial staff and appeal officers, through to the appeal commissioners. Their significant efforts in the past year have served the community well and I wish to take this opportunity to thank each of them.

June 3, 2001 will mark the 10<sup>th</sup> anniversary of the Appeal Division as a quasi-judicial tribunal in workers' compensation matters. I feel fortunate to be involved with the Division at this moment when its history will be recognized. The significant contributions of all past Chief Appeal Commissioners – Connie Munro, Maureen Nicholls – and acting Chief Appeal Commissioners – Cassandra Kobayashi and Herb Morton – are acknowledged as we reflect on the significance of the over 17,500 decisions issued by this tribunal since its inception.

This report differs from previous annual reports in some respects. Since all Appeal Division decisions for the year covered by this report are now available on the internet, we have sought to keep summaries of noted decisions very brief. We have also included for the first time a table which states the number of decisions for each appeal type for each year since 1992 (page 22). A similar table is provided for the numbers of matters pending at the end of each year since 1992 (page 51). These tables compliment the table which has always been provided stating the number of new matters initiated at the Appeal Division since 1992 (page 16). These three tables together provide a graphic summary of the numbers of matters the Appeal Division has received, has dealt with, and has outstanding at year end. We hope you find the report and its new features informative.

John Steeves  
Chief Appeal Commissioner

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## 1. APPOINTMENTS AND REMUNERATION

There were several changes concerning appeal commissioners in 2000:

### **New appointments:**

- **John Steeves** was appointed Chief Appeal Commissioner for a five year term by the Panel of Administrators, effective March 6, 2000. John is a lawyer with extensive experience in workers' compensation law, having appeared before all tribunals and courts, including the Supreme Court of Canada, having jurisdiction in matters related to labour law, long-term disability and workers' compensation. John's career has included teaching in the Labour Studies Programme at Capilano College and acting as chief negotiator for the Yukon territory government in the transfer of health services from the federal government to the Yukon government and aboriginal organizations. More recently, he participated in the Royal Commission on Workers' Compensation in British Columbia.
- **Herb Morton** completed a two-year term as Deputy Chief Appeal Commissioner, serving from December 1, 1998 until November 30, 2000. During this period, he served as Acting Chief Appeal Commissioner for seven months from August 3, 1999 to March 3, 2000. Herb has returned to his prior role as a non-representational appeal commissioner.
- **James Sheppard** was appointed as a non-representational appeal commissioner effective August 1, 2000. Immediately prior to his appointment, Jim was the Senior Adviser in the Office of the Employers' Advisers. Jim had been an Adviser since 1989, having articulated and worked before that with the Ontario Workers' Compensation Board's General Counsel's Office. Jim has a Bachelor of Law degree from the University of British Columbia (1986). He also has a Bachelor of Commerce (Honours) in Industrial Relations Management from the University of British Columbia (1981) with several years of experience in this field.
- **Susan Marten** was appointed August 1, 2000 as a non-representational appeal commissioner. Until her appointment as an appeal commissioner, Susan had been an adviser at the Workers'

Advisers Office since 1985. During that time, Susan served as Acting Director of the office and Chair of the Advisers' Policy Committee. Susan was also involved in the presentations made by the Workers' Advisers Office before the Royal Commission on Workers' Compensation in British Columbia. Prior to her work as an Adviser, Susan worked in the womens' office in the Ministry of Labour. She also worked in the Ministry's employment programs branch where she developed job creation and industrial training opportunities for employers and their employees. Susan has her B.A. Degree (Honours) in psychology from Queen's University in Kingston, Ontario.

- **Paul Petrie** was appointed as Deputy Chief Appeal Commissioner, effective December 1, 2000 for a one-year term. Paul has been a non-representational appeal commissioner with the Appeal Division since its inception on June 3, 1991 at which time he was appointed as the Appeal Division's Registrar (the position which evolved into the position of Deputy Chief Appeal Commissioner). Paul continued as Registrar until 1995. In 1996 Paul was instrumental in the development of the provincial British Columbia Council of Administrative Tribunals (BCCAT) and has been very active in that organization's educational program for members of administrative tribunals. He has also been a director of the Council of Canadian Administrative Tribunals (CCAT).
- **Jill Callan** was appointed as the Appeal Division's first Assistant Chief Appeal Commissioner, effective December 1, 2000 for a one-year term. This is a new senior position within the Appeal Division to formalize what has been a general back-up role for the Deputy Chief Appeal Commissioner. The Assistant Chief Appeal Commissioner performs administrative projects from time to time, while maintaining an appeal decision-making caseload. Jill has been a non-representational appeal commissioner since 1995 after having been a management member of the Workers' Compensation Review Board for two years. Jill is a lawyer who, prior to that, held various positions with the Hongkong Bank of Canada (now called HSBC Bank Canada), including legal counsel, vice-president of strategic development, general counsel and corporate secretary.

## Departures:

- Non-representational appeal commissioner **Patrick L. Byrne** decided to leave the Appeal Division, effective November 10, 2000. Patrick served the Appeal Division with distinction since his appointment shortly after the inception of the Appeal Division in 1991. Prior to that, Patrick was an Occupational Hygiene Officer at the Board for over 11 years. In 1999 Patrick was elected national president of the Canadian Registration Board of Occupational Hygienists. That same year he was appointed as Canada's representative on the Board of the International Occupational Hygiene Association, a non-governmental arm of the World Health Organization.
- Non-representational appeal commissioner **Anne-Marie Drosso**, who was on a one-year leave of absence from September 1999, decided to leave her position, effective September 2000. Anne-Marie had been an appeal commissioner since 1996, after having been the Appeal Division's legal researcher from 1991. Anne-Marie made a very significant contribution to the Appeal Division, both as a legal researcher and as an appeal commissioner.

As of January 1, 2001 the Appeal Division consisted of the chief appeal commissioner, the deputy chief appeal commissioner, the assistant chief appeal commissioner and twenty-three appeal commissioners as follows:

<i>Name</i>	<i>Term Expires</i>
<b>(a) 14 full-time, non-representational appeal commissioners</b>	
Daphne Dukelow	October 3, 2001
Sonja Hadley	December 31, 2001
Cassandra Kobayashi	December 31, 2001
Randy Lane	December 31, 2001
Jane MacFadgen	December 31, 2001
Susan Marten	January 7, 2003
Herb Morton	July 17, 2002
Marguerite Mousseau	December 31, 2001
Michael O'Brien	November 15, 2002
Lorna Pawluk	December 31, 2001
James Sheppard	January 7, 2003
Gail Starr	December 31, 2001
David Van Blarcom	December 31, 2001
Teresa White	December 31, 2001

**(b) 5 part-time, non-representational appeal commissioners**

Laura Bradbury	December 31, 2001
Heather McDonald	September 6, 2001
A. Grant McRitchie	September 5, 2001
Hilrie Reimer	August 15, 2001
Judith Williamson	December 31, 2001

**(c) 4 full-time, representational appeal commissioners***Worker interest perspective*

Sarwan Boal	December 31, 2001
Michael Carleton	November 14, 2001

*Employer interest perspective*

Rob Kyle	December 31, 2001
James L. Tonn	March 31, 2001

Appeal Commissioner salaries are \$86,517 per annum for non-representational appeal commissioners and \$83,352 per annum for representational appeal commissioners.

John Steeves, as chief appeal commissioner, manages the Appeal Division, sits as a non-voting member of the Panel of Administrators, and sits as an appeal commissioner as well. His annual salary is \$144,000. His term as chief appeal commissioner expires on March 6, 2005.

Paul Petrie's annual salary as deputy chief appeal commissioner is \$99,688.

Jill Callan's annual salary as assistant chief appeal commissioner is \$91,517.

The rates for part-time appointments paid on a *per diem* basis are \$403.00 per day for non-representational appeal commissioners and \$352.00 per day for representational appeal commissioners.

## **2. PLANNING, EDUCATIONAL AND OTHER ACTIVITIES OF THE APPEAL DIVISION**

### **(a) Planning**

#### **(i) Access to Appeal Division Decisions**

As indicated in past Annual Reports of the Appeal Division, an important goal of the Appeal Division's Strategic Planning has been to increase the accessibility of Appeal Division decisions for the public, and therefore, increase the accountability of the Appeal Division. The Royal Commission on Workers' Compensation in British Columbia had recommended in their January 1999 final report that the appeal tribunal should "publish all decisions in a manner which does not identify the parties". The commissioners commented that "the Commission believes that granting the public full access to 'de-identified' decisions will help to promote consistency and predictability through the claims adjudication and appeal systems". A November 1999 resolution of the Panel of Administrators supported proposals put forward by the Appeal Division for establishing an internet website, with a search engine, to permit public access to Appeal Division decisions which do not contain identifiers, and to unedited section 11 decisions which have been filed in British Columbia courts.

By the end of 2000, the website containing all Appeal Division decisions from January 1, 2000 was launched on the Board's website at <http://www.worksafebc.com>. The Appeal Division will be maintaining the data base of decisions to ensure its timely updating. This represents a significant new development in the adjudication of workers' compensation appeals in British Columbia.

#### **(ii) Strategic Planning**

The Appeal Division conducted a retreat with the appeal commissioners on October 19 and 20, 2000 in Richmond, British Columbia. The retreat provided an opportunity for the appeal commissioners to engage in strategic planning for the division. Part of the retreat involved discussing the decision making process with Mr. Justice Paul Williamson of the British Columbia Supreme Court. In addition, the Appeal Division commissioners received feedback

regarding the performance of the Appeal Division from Peter Hopkins, the Board's Ombudsman, and Alan Winter, a lawyer who represents employers before the Appeal Division. Ian Strachan, chair of the Ontario Workplace Safety Insurance Appeals Tribunal, was good enough to participate in the retreat as a facilitator and colleague.

In addition, the appeal commissioners engaged in a productive planning session developing strategies to deal with such issues as continuing internal education programs, the Appeal Division's role in relation to Board policy, strategies to continue the development of a consistent Appeal Division jurisprudence, and administrative issues for the Division. As a result, the following four committees began their work in the Fall of 2000, with goals expected to be achieved by mid-2001. These committees are:

- Consistency Committee
- Policy Committee
- Education Committee
- Administrative Support Committee

## **(b) Educational Activities**

Ongoing education and training is an essential requirement of an effective administrative tribunal. In 2000, the Appeal Division continued its internal education program. This program, together with external workshops and conferences, provides appeal commissioners with necessary information specific to the workers' compensation field and, more generally, to emerging issues in administrative law. Outlined below are the Appeal Division's educational activities in 2000.

Arising from the Appeal Division's retreat in October 2000, the following educational sessions for appeal commissioners were presented by members of the Appeal Division:

- Carpal Tunnel Syndrome – presentation by Appeal Commissioner Teresa White
- Issues Related to Claims for Psychological Impairment – presentation by Appeal Commissioner Marguerite Mousseau

- Chronic Pain – presentation by Appeal Commissioner Gail Starr
- The Application of Policy and the Exercise of Discretion on Pension Appeals — presentation by Deputy Chief Appeal Commissioner Paul Petrie.

In addition, the Appeal Division organized Mediation Training for Appeal Commissioners and the assistant to the chief appeal commissioner in March, 2000, facilitated by external consultant Gordon Sloan.

External education activities included the following:

- Chief Appeal Commissioner **John Steeves** and non-representational Appeal Commissioners **Laura Bradbury**, **Daphne Dukelow**, **Sonja Hadley**, **P. Michael O'Brien**, **Paul Petrie**, **Gail Starr**, and **Teresa White**, together with Appeal Division Manager **Linda Hart** and Assistant to the Chief Appeal Commissioner **Gene Jamieson**, attended the October 29 and 30, 2000 5<sup>th</sup> Annual Education Conference of the British Columbia Council of Administrative Tribunals in Richmond, British Columbia entitled “Administrative Justice Reform: To Change or Not to Change, That is the Question”.
- Non-representational Appeal Commissioner **Lorna Pawluk** became a certified mediator through the Continuing Legal Education Society of British Columbia.
- Non-representational Appeal Commissioner **Daphne Dukelow** attended the British Columbia Continuing Legal Education Society course entitled “Administrative Law Update” on November 2, 2000.
- Chief Appeal Commissioner **John Steeves** and non-representational Appeal Commissioners **Laura Bradbury**, **Randy Lane** and **Jane MacFadgen** attended the annual conference of the Council of Canadian Administrative Tribunals (CCAT) on June 11 to 13, 2000 in Ottawa, Ontario. The conference was entitled, “Independence and Accountability: The Coming of Age of Administrative Tribunals in Canada at the Dawn of a New Millenium”.
- Non-representational Appeal Commissioner **Randy Lane** attended the course entitled “Personal Injury: Medical Issues” sponsored by

the Continuing Legal Education Society of British Columbia in Vancouver on September 29, 2000.

- Representational Appeal Commissioner **Michael Carleton** attended the National Symposium on Disability Management in Ottawa, Ontario on September 26 to 28, 2000. The symposium was sponsored by the National Institute of Disability Management and Research.
- **Rob Kyle**, representational Appeal Commissioner, attended the British Columbia Council of Administrative Tribunals course entitled "Foundations of Administrative Justice" on October 26 and 27, 2000 in New Westminster, B.C.

### (c) Other activities of the Appeal Division

Members of the Appeal Division were also involved in the following activities:

- Chief Appeal Commissioner **John Steeves** met with representatives of the following organizations to discuss the work of the Appeal Division and his appointment as Chief Appeal Commissioner:
  - Employers' Forum to the WCB (with appeal commissioners Jill Callan and Jim Tonn)
  - Workers' Compensation Committee of the Mining Association of British Columbia
  - Workers' Compensation Committee of the Council of Forest Industries

John also spoke on general topics in workers' compensation to students and faculty in the Occupational Hygiene Program at the University of British Columbia on September 22, 2001. In addition, on November 15, 2000, John spoke on "The Appeal Division in the Context of Administrative Law" at the Faculty of Law, University of British Columbia.

John is a member of the provincial Circle of Chairs of Administrative Tribunals, a group of chairs of various tribunals in the province, as well as the Policy and Research Committee of the British Columbia Council of Administrative Tribunals (BCCAT).

- **Paul Petrie**, non-representational appeal commissioner, continued as a member of the British Columbia Council of Administrative Tribunals' (BCCAT) Education Committee until October 2000. He participated in the further development of BCCAT's course entitled "Foundations of Administrative Justice".
- **Heather McDonald**, non-representational appeal commissioner, continued as co-chair of the Workers' Compensation Board's Joint Union/Management "Committee on the Care of Dependents — Focus on Work and Family" which organized activities in 2000 designed to assist employees at the Workers' Compensation Board in balancing work and family responsibilities.
- Representational appeal commissioner **James L. Tonn** attended the annual conference of the Union of British Columbia Municipalities in Victoria. In that context, he had discussions with municipal leaders from throughout the province.
- **Daphne Dukelow**, non-representational appeal commissioner, became the co-ordinator of the British Columbia Council of Administrative Tribunal's course entitled "Foundations of Administrative Justice". Daphne is also a member of BCCAT's Education Committee.
- **Gail Starr**, non-representational appeal commissioner, spoke to the Capilano College class in the Labour Studies Programme on workers' compensation advocacy in April 2000.
- Representational appeal commissioner **Sarwan Boal** attended the annual conventions of the Canadian Autoworkers' Union (September 18, 2000), the Hospital Employees' Union (October 14 to 20, 2000) and the British Columbia Federation of Labour (November 28 to December 1, 2000).

- Representational appeal commissioner **Sarwan Boal**, along with representational appeal commissioner **Michael Carleton**, spoke at an Advanced Workers' Compensation class at the Canadian Labour Congress Winter School at Harrison Hot Springs on February 3 and 4, 2000.
- **Judith Williamson**, part-time non-representational appeal commissioner, continued to serve on the Education Committee of the British Columbia Council of Administrative Tribunals. She and Nitya Iyer of the B.C. Human Rights Tribunal completed the development of a two-day Advanced Decision Writing Workshop for tribunal members, and presented a pilot offering of the workshop in July, 2000. In the fall, Judith and Nitya presented a tailored version of the workshop to decision-makers in the Office of the Superintendent of Motor Vehicles, and the first general offering of the workshop. At year's end, they had commenced planning for a course in early 2001 to train other tribunal members to deliver the decision-writing workshop. Judith also participated as an instructor in offerings of BCCAT's "Foundations of Administrative Justice" course at Northern Lights College and North Island College.
- **Gene Jamieson**, assistant to the chief appeal commissioner, continued as a member of the Board of Directors of the British Columbia Council of Administrative Tribunals (BCCAT) in 2000, as well as serving as a member of the BCCAT Education Committee. Gene is also an instructor for the BCCAT courses entitled "Foundations of Administrative Justice for Post Secondary Educational Decision-makers" as well as the course entitled "Foundations of Administrative Justice for Administrative Tribunal Support Staff". In addition, Gene performed curriculum development work for both of these BCCAT courses during 2000.

### 3. MANAGEMENT AND ADMINISTRATION

As of January 1, 2001, there were, in addition to the manager, 37 staff working in the Appeal Division. Secretaries Lisa Ross, Sherri Dalton, Melanie Collins, and appeal officer Allison Walker were each on leave from the Appeal Division at this date.

The Appeal Division continues to provide four-month placements for law students from the co-operative program at the University of Victoria. The student provides legal research support to the division.

The Appeal Division staff on that date were as follows:

Manager	Linda Hart
Assistant to the Chief Appeal Commissioner	Gene Jamieson
Secretaries	Blanche Andrews (temporary to the position) Sharon Ertner Donna Hanson Patricia Spannier
Intake Clerks	Suzi Beck (temporary position) Robyn Scott-Smith
File Clerks	Adelle Smith (temporary to the position) Andrew Wilson (temporary position— Relief of Costs)
Phone Control Clerks	Joan Robinson Corey Jaco

## Appeal Officers

Morag Brown  
 Ursula Dixon  
 Bonnie Eisworth  
 Linda Horvath  
 (temporary to the position)  
 Janice Macrae  
 (temporary to the position)  
 Andrew Roznicki  
 Doreen Russell  
 Valaine Sananin  
 (temporary to the position)  
 Margaret Shea  
 Anne Toews

## Junior Appeal Officers

Connie Lowe  
 Sharon Watt

Junior Appeal Officers (Relief of Costs)  
(all temporary positions)

Donna Epp  
 Kim Ertner  
 Sarah Moore  
 Aviva Perez

## Appeal Secretaries

Susan Au (temporary position &  
 temporary to the position)  
 Claire Day  
 (temporary to the position)  
 Ingrid Exner  
 Heidi Kelly  
 (temporary to the position)  
 Carol Steinhart  
 Julia Thickett  
 (temporary to the position)  
 Ria Wildeman (temporary position &  
 temporary to the position)

Secretaries (Relief of Costs)  
(all temporary positions)

Joni Daigle  
 Avril DeCruz  
 Adrienne Maxwell

**4. EXPENDITURES**

The total Appeal Division budget for 2000 was \$4,315,500. The actual amount of expenditures for 2000 at year-end was \$3,775,882. The amount of expenditures in 1999 was \$3,778,805.

## 5. PRACTICE AND PROCEDURE

The following four practice and procedure decisions and directives were issued under the authority of the chief appeal commissioner in 2000:

**(a) Delegation by the Chief Appeal Commissioner  
Decision #30 (6 March 2000)**

Section 85(8) of the Workers Compensation Act authorizes the chief appeal commissioner to delegate in writing any of his powers and duties to an appeal commissioner, subject to any terms or conditions set out in the delegation. *Decision #30* made various delegations to appeal commissioners and appointed Herb Morton as Deputy Chief Appeal Commissioner.

**(b) Delegation by the Acting Chief Appeal Commissioner  
Decision #31 (29 November 2000)**

Pursuant to the delegation power under section 85(8) of the Workers Compensation Act, the chief appeal commissioner issued this delegation which contains various delegations to appeal commissioners. The decision appointed Paul Petrie as Deputy Chief Appeal Commissioner and Jill Callan as Assistant Chief Appeal Commissioner.

**(c) Appeal Division requirements for Authorizations  
(29 September 2000)**

The Appeal Division identified an issue regarding the timeliness of authorizations used by representatives of employers and workers in Appeal Division proceedings. Extensive consultation with the community was completed and the Appeal Division adopted a practice regarding authorizations for all types of matters coming before the Appeal Division.

**(d) Leave and Merits decisions in matters under the Criminal Injury Compensation Act  
(29 September 2000)**

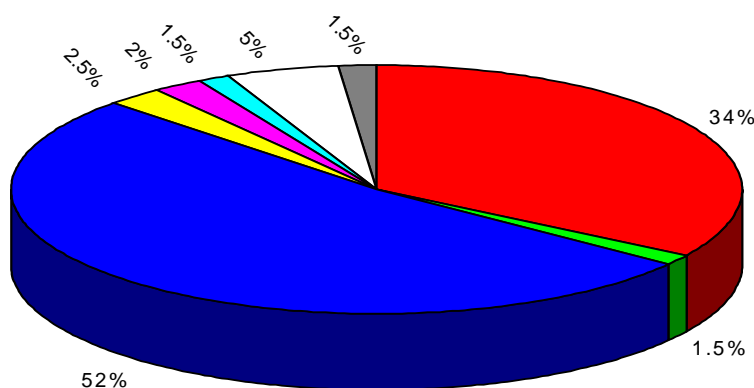
After consultation with the Ministry of the Attorney General and the Board's Legal Services Division, the Appeal Division implemented changes to the process by which it considers application under the Criminal Injury Compensation Act. Instead of having a separate panel deal with the leave and merits parts of an application, these two stages are now generally combined so as to expedite consideration of such applications.

## 6. NEW MATTERS

### (a) General

The Appeal Division received 4757 new appeals or other matters during 2000, for an average of 396 per month. This is a decrease from the monthly average of 437 in 1999, but is consistent with the monthly averages of 397 in 1998, 376 in 1997, and a significant increase over the 255 in 1996, 194 in 1995, and 155 in 1994.

NEW MATTERS IN 2000 BY TYPE



<ul style="list-style-type: none"> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: red; border: 1px solid black; margin-right: 5px;"></span> Appeals from Review Board findings [s. 91]</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: green; border: 1px solid black; margin-right: 5px;"></span> Prevention [s. 73]</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: blue; border: 1px solid black; margin-right: 5px;"></span> Employer Relief of Costs [s. 39(1) and ERA]</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: yellow; border: 1px solid black; margin-right: 5px;"></span> Assessments (86)</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: magenta; border: 1px solid black; margin-right: 5px;"></span> Certificates for Court Action [s.11]</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: cyan; border: 1px solid black; margin-right: 5px;"></span> Criminal Injuries</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: white; border: 1px solid black; margin-right: 5px;"></span> Extension of Time Requests</li> <li><span style="display: inline-block; width: 15px; height: 15px; background-color: grey; border: 1px solid black; margin-right: 5px;"></span> All other matters:</li> </ul>	<ul style="list-style-type: none"> <li>(1)</li> <li>(72)</li> <li></li> <li>(35)</li> <li></li> <li></li> <li></li> <li>(9)</li> <li>(5)</li> <li>(70)</li> <li>(67)</li> <li>(3)</li> </ul>	<ul style="list-style-type: none"> <li>1610</li> <li>73</li> <li>*2470</li> <li>121</li> <li>97</li> <li>70</li> <li>232</li> <li>84</li> <li></li> <li></li> <li></li> <li></li> </ul>	<ul style="list-style-type: none"> <li>34%</li> <li>1.5%</li> <li>52%</li> <li>2.5%</li> <li>2%</li> <li>1.5%</li> <li>5%</li> <li>1.5%</li> <li></li> <li></li> <li></li> <li></li> </ul>
<b>TOTAL NEW MATTERS</b>		<b>4757</b>	<b>100%</b>

\* See comments regarding these 2470 appeals immediately after the following tables.

**APPEAL DIVISION INTAKE  
MONTHLY AVERAGE OF NEW MATTERS RECEIVED  
1992 TO 2000**

<i>Time Period</i>	<i>Intake</i>	<i>Monthly Average</i>
1992	1992	166
1993	2296	191
1994	1860	155
1995	2325	194
1996	3056	255
1997	4511	376
1998	4764	397
1999	5249	437
2000	4757	396

**NEW MATTERS FILED TO THE APPEAL DIVISION BY YEAR**

<i>Matter Type</i>	<i>2000</i>	<i>1999</i>	<i>1998</i>	<i>1997</i>	<i>1996</i>	<i>1995</i>	<i>1994</i>	<i>1993</i>	<i>1992</i>
Section 91 from Review Board	1610	1630	1745	1590	1482	1475	1200	1429	1206
Review Board Referrals Section 96(4)	9	6	4	3	7	7	2	4	1
Prevention – General	1	52	102	94	121	120	171	155	179
O.H.S. (Bill 14)	72	20	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Section 39(1) Employer Relief of Costs	2470	2967	2355	2286	942	151	131	387	219
Criminal Injuries	70	65	84	83	44	32	46	12	6
Section 47(2) Employer Charged with Costs	35	34	17	22	42	20	14	16	19
Assessments	86	73	53	61	66	201	110	118	85
Ombudsman (Reconsideration)	0	0	1	0	0	0	1	1	26
Section 10(8) Transfer of Claim Costs	5	6	10	1	10	8	11	5	10
Section 11 Certificates for Legal Action	97	112	85	78	78	55	74	84	86
Reconsideration Section 96.1	67	49	36	50	43	59	93	69	64
Reconsideration Section 96(2)	3	1	4	8	2	13	7	15	34
Extension of Time	232	234	268	235	219	184	*	*	31
Miscellaneous	0	0	0	0	0	0	0	1	26
<b>TOTAL</b>	<b>4757</b>	<b>5249</b>	<b>4764</b>	<b>4511</b>	<b>3056</b>	<b>2325</b>	<b>1860</b>	<b>2296</b>	<b>1992</b>

\* Extension of time applications were included in the figures for each matter type in 1993 and 1994.

The Appeal Division received 9% less new matters (492) in 2000 than was received in 1999. 1999 was the year the Appeal Division received more new matters than any other year in the nine years of the Appeal Division's existence. The 4757 new matters received in 2000 compares with a similar amount received in 1998 (4764) which represented a 6% increase in new matters from those received in 1997 (4511). The number of new matters received in 2000 represents a 56% increase if compared to the number of new matters received in 1996 (3056), and a 105% increase if compared to the number of new matters received in 1995 (2325).

The single largest source of appeals to the Appeal Division continues to be employer appeals for relief of costs under section 39(1)(e). Appeals under section 91 from Review Board findings are the next largest source of appeals. The number of Review Board appeals decreased slightly in 2000 over 1999 (decrease of just over 1%). The Appeal Division experienced small increases in 2000 in appeals on assessment matters, criminal injury matters, section 96(4) referrals, and applications for reconsideration of Appeal Division decisions.

Regarding the number of employer appeals under section 39(1)(e), the number of such appeals has been large since the second half of 1996. During the five years from the inception of the Appeal Division in June 1991 to June 1996, the Appeal Division received 953 appeals under section 39(1)(e). This contrasts with the 10,955 such appeals received during the four and one-half years from July 1, 1996 to the end of 2000.

The dramatic change in the number of such appeals can be traced to the June 11, 1996 resolution of the Panel of Administrators which implemented recommendations of the provincial Information and Privacy Commissioner, effective July 1, 1996. One recommendation was that employers not receive full disclosure of workers' claim files until an appeal has been filed. Prior to the change of policy, employers were provided full disclosure of claim files once an appealable decision was made. With the change of policy, an employer must first initiate an appeal before full disclosure is provided.

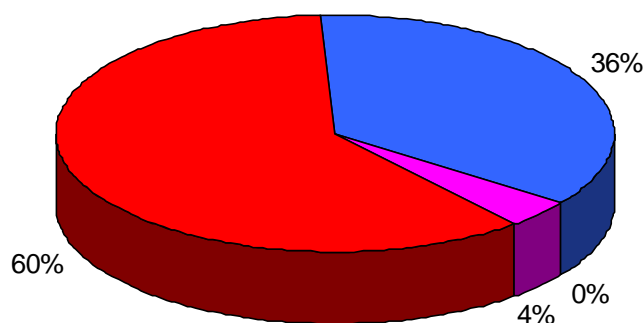
The vast majority of such appeals in 1997, 1998, 1999 and 2000 were withdrawn before an Appeal Division panel was required to rule on the appeal. Of the 8177 employer relief of claim costs appeals dealt with by the Appeal Division during 1997, 1998, 1999 and 2000, appeals totaling 7625 (93%) were withdrawn prior to an Appeal Division panel having to adjudicate on the appeal. The high number of withdrawals of such appeals

suggests that the adjudicative function of the Appeal Division will not be unduly taxed by the volume of such appeals. Nevertheless, the processing of such appeals by the administrative staff of the Appeal Division represents a significant allocation of resources. In this regard, the Appeal Division initiated a project in 2000 (which will last until April 30, 2001) to assist in the more expeditious processing of these appeals by dedicating nine temporary administrative staff members to this process.

**(b) Requests for an extension of time to appeal**

In 2000, 232 applications were received for an extension of the 30 day time limit for appealing to the Appeal Division.

**EXTENSION OF TIME REQUESTS BY TYPE**



<span style="color: red;">■</span> Review Board s.91	139	60%
<span style="color: blue;">■</span> Employer Relief of Costs	83	36%
<span style="color: yellow;">■</span> Employers Charged with Costs section 47(2)	1	0%
<span style="color: magenta;">■</span> Assessments	9	4%

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Total	<b>232</b>	<b>100%</b>
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The number of extension of time requests in 2000 represents a 1% decrease from the number of such requests received in 1999 (234). The Appeal Division received 268 such requests in 1998, 235 in 1997 and 219 in 1996.

### (c) Review Board appeals

During 2000 the Appeal Division received 1610 appeals from Review Board findings, a monthly average of approximately 134. This represents a 1% decrease from the number of such appeals received by the Appeal Division in 1999 (1630).

The 1610 appeals from Review Board findings represent 15% of the total number of Review Board decisions (panel findings and summary decisions) in 2000. This is consistent with the range of total Review Board decisions received by the Appeal Division in 1999 (15%), 1998 (16%), 1997 (14%) and 1996 (15%). The percentage remained in the range of 17% to 21% from 1993 to 1995.

### (d) Employers' appeals or applications

3050 of the new matters initiated to the Appeal Division in 2000 were brought by employers.

#### Employer appeals or applications in 2000 by type

<i>Type</i>	<i>Number</i>
Employer appeals of Review Board findings	249
Prevention appeals	1
O.H.S. (Bill 14)	71
Employer relief of costs appeals	2470
Employer charged with costs - Section 47(2) appeals	35
Assessment appeals	86
Transfer of claim costs Section 10(8) appeals	5
Reconsideration applications	21
Extension of time requests	112
<b>Total</b>	<b>3050</b>

Employers' appeals or applications in 1999 totaled 3470 which was comprised of: 194 appeals of Review Board findings; 72 prevention/Bill 14 appeals; 2967 relief of costs appeals; 34 appeals by employers charged with costs; 73 assessment appeals; 6 section 10(8) applications; 11 reconsideration applications; and 113 extension of time requests.

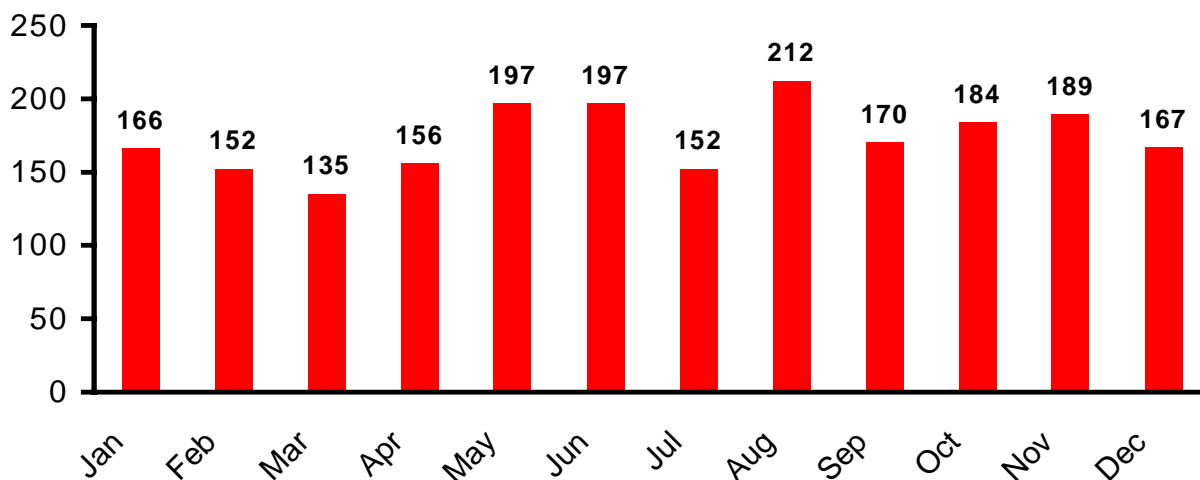
## 7. DECISIONS OF THE APPEAL DIVISION

### (a) General

There were 2077 decisions rendered by the Appeal Division in 2000, an average of 173 per month. This is the greatest number of decisions the Appeal Division has issued in a calendar year since the Division's creation in 1991.

In addition to the 2077 decisions in 2000, there were 2593 cases which were withdrawn or rejected on a preliminary basis, and 326 cases where the matter was withdrawn to facilitate other action outside the Appeal Division. In total, therefore, there were 4996 cases dealt with during 2000.

**DECISIONS OF THE APPEAL DIVISION BY MONTH**

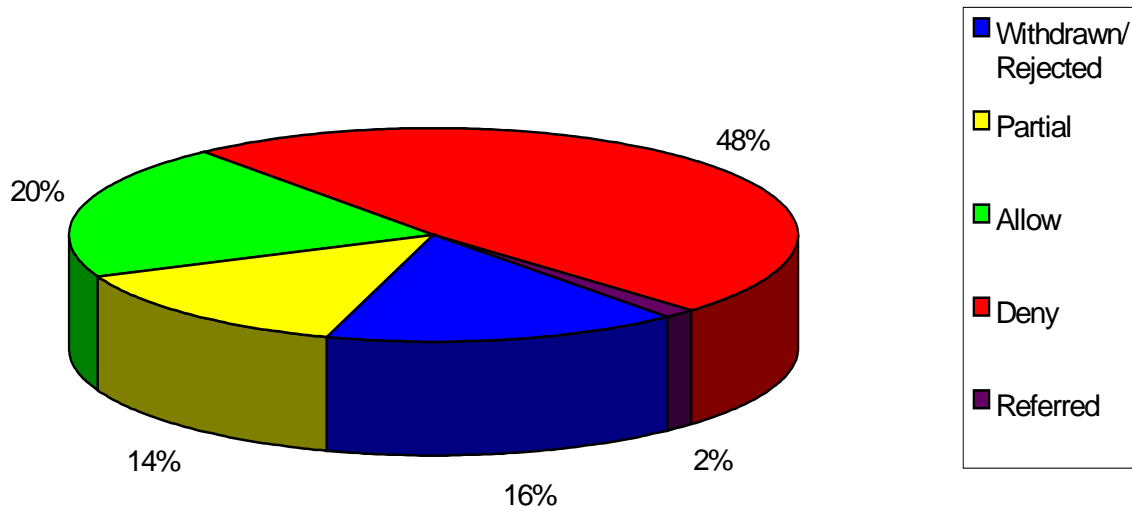


## DECISIONS BY THE APPEAL DIVISION BY YEAR

<b>Matter Type</b>	<b>2000</b>	<b>1999</b>	<b>1998</b>	<b>1997</b>	<b>1996</b>	<b>1995</b>	<b>1994</b>	<b>1993</b>	<b>1992</b>
Section 91 appeals from Review Board	1361	1374	1433	1192	1320	1053	1067	1304	1247
Section 96(4) President's Referrals	5	6	1	2	9	4	3	2	2
Prevention – General	17	81	69	96	93	106	140	159	301
O.H.S. (Bill 14)	30	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Section 39(1) Employer Relief of Costs	209	108	107	128	83	87	89	130	212
Criminal Injury matters	110	97	77	51	40	29	40	14	0
Section 47(2) employer charged with Costs	23	22	9	23	27	14	11	13	22
Assessments	29	34	31	35	164	46	62	72	86
Reconsideration – Appeal Division Decisions	64	38	44	48	44	49	55	29	15
Reconsideration – Former commissioners' decisions	3	7	5	9	11	12	16	29	56
Section 10(8) Transfer of claim costs	2	10	0	1	2	1	5	1	6
Section 11 certificates	48	49	53	41	53	41	39	51	58
Extension of time to appeal	134	185	201	140	119	139	*	*	*
Preliminary matters	42	10	2	4	5	2	*	*	*
<b>TOTAL **</b>	<b>2077</b>	<b>2021</b>	<b>2032</b>	<b>1770</b>	<b>1970</b>	<b>1583</b>	<b>1527</b>	<b>1804</b>	<b>2005</b>

\* Extension of time and other preliminary decisions were included in the number of decisions for each appeal matter type.  
 \*\* In some instances these total figures differ slightly with the total number of decisions indicated in each year's annual report (variance of 0 and 1 for 2000 and 1999, respectively, to a high variance of 14 for 1992). This may have been caused by the introduction and revision over time of the Division's computerized appeal tracking system.

**(b) Appeals from Review Board findings**

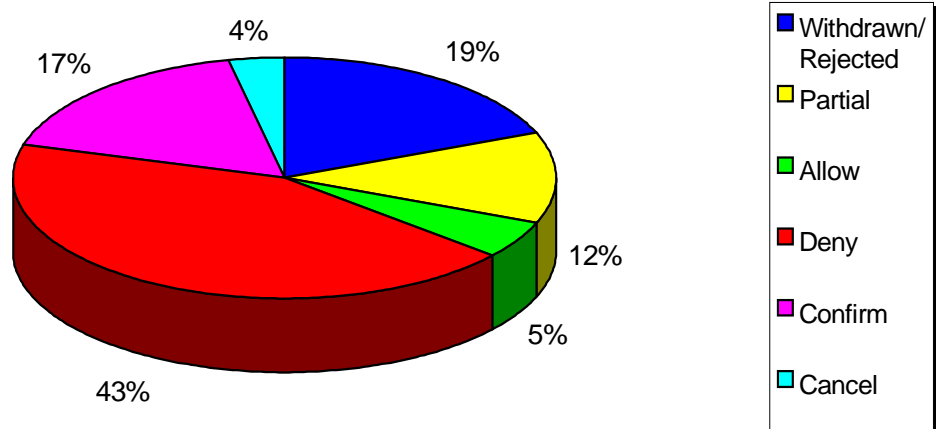


<b>Disposition</b>	<b>Number</b>	<b>Percentage</b>
Withdrawn/Rejected	258	16
Decisions (1361)		
Partial	225	14
Allow	331	20
Deny	781	48
Referred	24	2
<b>Total</b>	<b>1619</b>	<b>100</b>

Pending at the end of 1999	953
New applications in 2000	*1622
Total for consideration	2575
Total completions (withdrawals and decisions)	1619
Pending as of December 31, 2000	973

\* includes adjustment from 1999 annual report and seven (7) appeals recommenced following reconsideration decisions voiding the original Appeal Division decisions.

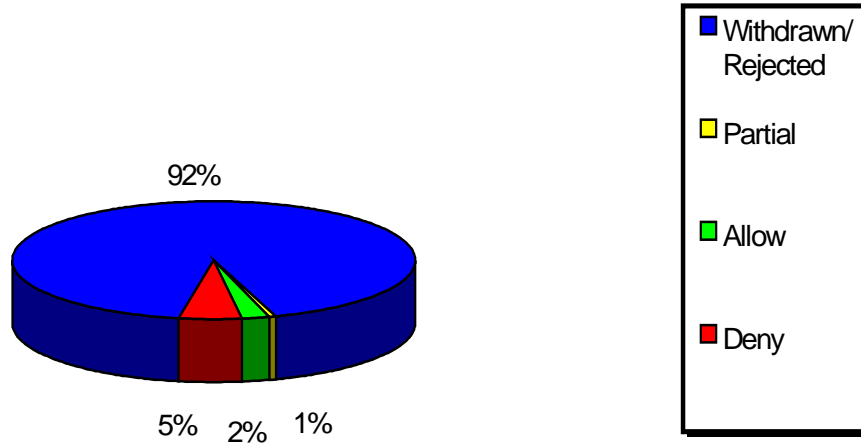
**(c) Prevention (including Bill 14 matters)**



<i>Disposition</i>	<i>Number</i>	<i>Percentage</i>
Withdrawn/Rejected	11	19
Decisions (47)		
Partial	7	12
Allow	3	5
Deny	25	43
Confirm	10	17
Cancel	2	4
<b>Total</b>	<b>58</b>	<b>100</b>

Pending at the end of 1999	33
New applications in 2000	73
Total for consideration	106
Total completions (withdrawals and decisions)	58
Pending as of December 31, 2000	48

**(d) Relief of claim costs  
(under section 39, and for experience rating purposes  
under section 42)**

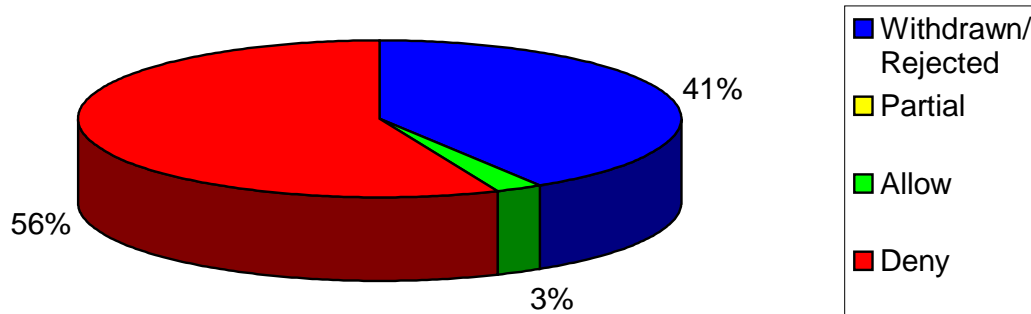


<i><b>Disposition</b></i>	<i><b>Number</b></i>	<i><b>Percentage</b></i>
Withdrawn/Rejected	2513	92
Decisions (209)		
Partial	12	1
Allow	62	2
Deny	135	5
<b>Total</b>	<b>2722</b>	<b>100</b>

Pending at the end of 1999	2590
New applications in 2000	* 2468
Total for consideration	5058
Total completions (withdrawals and decisions)	2722
Pending as of December 31, 2000	2347

\* includes adjustment from 1999 annual report and one appeal recommenced following a reconsideration decision voiding the original Appeal Division decision.

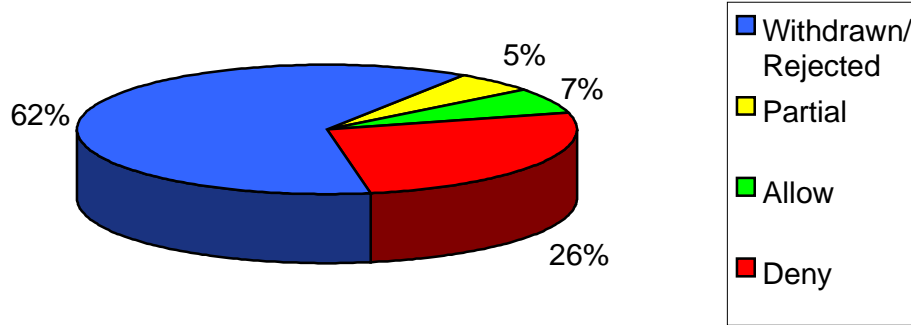
**(e) Appeals by unregistered employer charged with claim costs under section 47(2)**



<i>Disposition</i>	<i>Number</i>	<i>Percentage</i>
Withdrawn/Rejected	16	41
Decisions (23)		
Partial	0	0
Allow	1	3
Deny	22	56
<b>Total</b>	<b>39</b>	<b>100</b>

Pending at the end of 1999	20
New applications in 2000	35
Total for consideration	55
Total completions (withdrawals and decisions)	39
Pending as of December 31, 2000	16

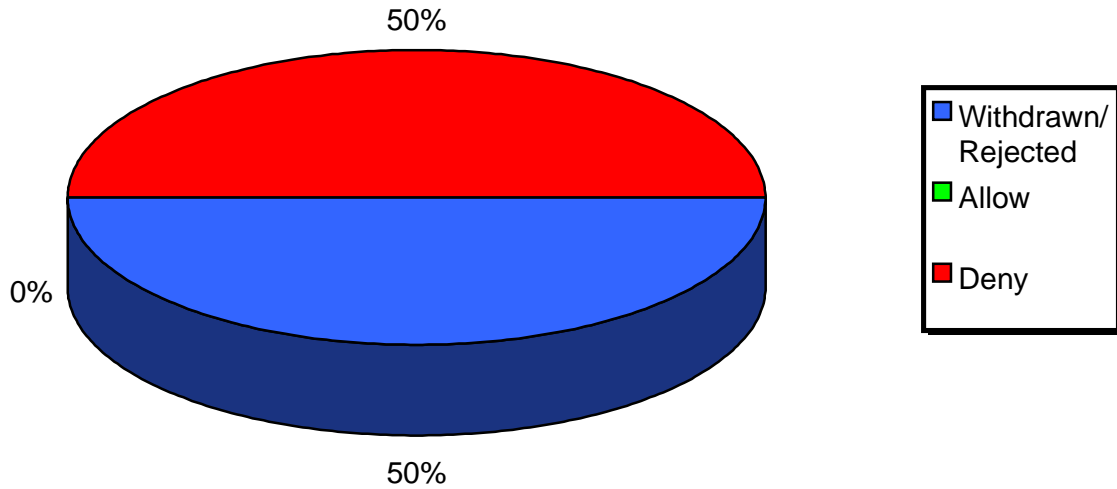
**(f) Assessment appeals**



<i>Disposition</i>	<i>Number</i>	<i>Percentage</i>
Withdrawn/Rejected	47	62
Decisions (29)		
Partial	4	5
Allow	5	7
Deny	20	26
<b>Total</b>	<b>76</b>	<b>100</b>

Pending at the end of 1999	37
New applications in 2000	86
Total for consideration	123
Total completions (withdrawals and decisions)	82
Pending as of December 31, 2000	47

**(g) Transfer of claim cost – section 10(8)**



<i>Disposition</i>	<i>Number</i>	<i>Percentage</i>
Withdrawn/Rejected	2	50
Decisions (2)		
Allow	0	0
Deny	2	50
<b>Total</b>	<b>4</b>	<b>100</b>

Pending at the end of 1999	1
New applications in 2000	5
Total for consideration	6
Total completions (withdrawals and decisions)	4
Pending as of December 31, 2000	2

### (h) **Section 11 certificates for legal actions**

The Appeal Division rendered 48 decisions during 2000 on applications under section 11 of the Workers Compensation Act for a certificate for filing in a legal action. Written reasons were provided by the Appeal Division for each decision rendered, together with a certificate for filing in the Supreme Court of British Columbia.

Pending at the end of 1999	126
New applications in 2000	97
Total for consideration	223
Total completions	82
Withdrawals (34)	
Decisions (48)	
Pending as of December 31, 2000	141

In 1999, the Appeal Division made 49 decisions on section 11 applications, 53 in 1998, 41 in 1997, 53 in 1996, 41 in 1995, and 39 in 1994.

### (i) **Criminal Injury Compensation Act**

The Appeal Division issued 113 decisions in 2000 on review applications under the Criminal Injury Compensation Act. Written reasons were provided in each case. Leave was granted in 26 cases and denied in 55 cases. Twenty-nine decisions were made after a review on the merits, resulting in 17 applications allowed, 10 denied, and 2 partially allowed. In addition, 3 decisions were made on applications for reconsideration of an Appeal Division decision. The applications were denied in each case.

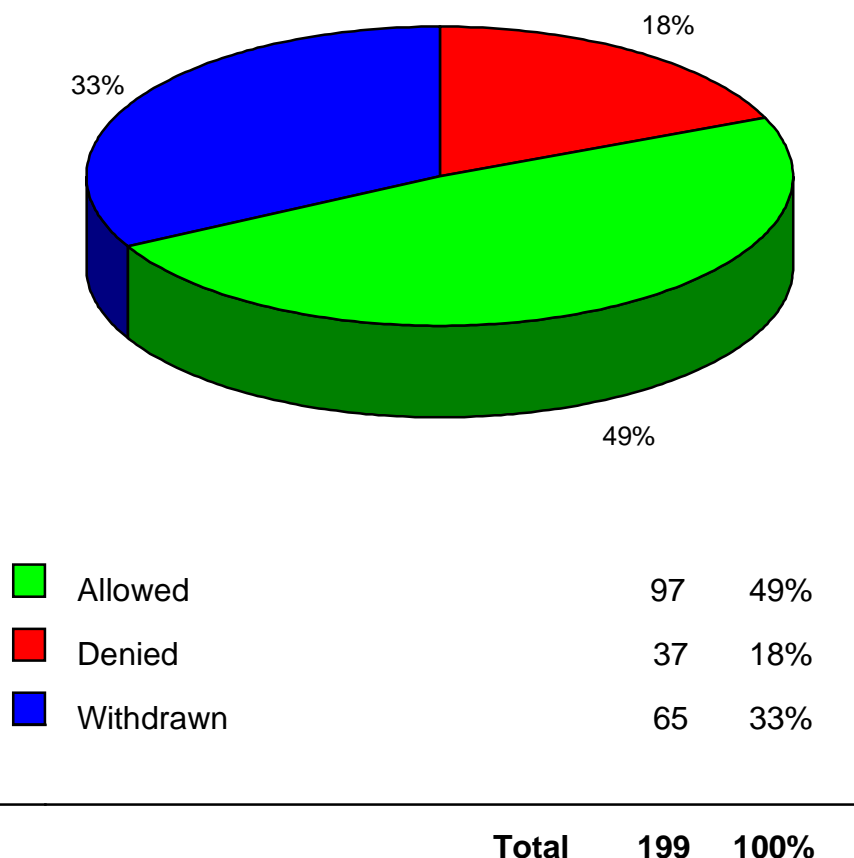
The Appeal Division issued 97 decisions in 1999, 77 decisions in 1998, 51 decisions in 1997, 40 decisions in 1996, and 29 decisions in 1995, on review applications under the Criminal Injury Compensation Act.

**(j) Preliminary dispositions**

The Appeal Division issued written reasons on 176 preliminary matters in 2000. These 176 decisions on preliminary matters included 134 decisions on applications for extension of time to appeal, and 41 applications for a stay in relation to occupational health and safety penalties. A stay application was allowed in one of the 41 cases. One preliminary decision related to an appeal under section 42.

The following chart represents the results on applications for an extension of time to appeal in 2000. As noted in the chart, there were 65 withdrawals of requests for an extension of time in 2000.

**APPLICATIONS FOR AN EXTENSION OF TIME TO APPEAL:  
OUTCOMES IN 2000**



The 134 extension of time to appeal decisions are noted in the following table according to the type of matter to which the decision relates and outcomes of those decisions:

<i>Type of Matter</i>	<i>Allow</i>	<i>Deny</i>	<i>Total</i>
Section 91(1) appeals	67	30	<b>97</b>
O.H.S. (Bill 14)	1	0	<b>1</b>
Employer relief of claim costs	26	5	<b>31</b>
Employer charged with costs	1	0	<b>1</b>
Assessments	2	2	<b>4</b>
<b>Total</b>	<b>97</b>	<b>37</b>	<b>134</b>

### (k) Reconsideration applications

#### (i) General

Sixty-five reconsideration decisions were issued by the Appeal Division during 2000. Three concerned decisions of the former commissioners, and 62 concerned Appeal Division decisions.

#### DECISIONS RENDERED ON APPLICATIONS FOR RECONSIDERATION, BY YEAR

<i>Year</i>	<i>Former Commissioners' Decisions</i>	<i>Appeal Division Decisions</i>
1992	56	15
1993	29	29
1994	16	55
1995	12	49
1996	11	44
1997	9	48
1998	5	44
1999	7	38
2000	3	62

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**(ii) Decisions of the former commissioners**

The Appeal Division continues to have jurisdiction over decisions made by the former commissioners prior to 1991. During 2000, three applications for reconsideration of decisions of the former commissioners were considered.

Two of these applications were made on behalf of workers. One application was made by a foster mother.

Two applications were made on the basis of new evidence. In neither of these cases were the preliminary requirements met.

All three applications contained arguments that decisions of the former commissioners involved an error of law. One of these arguments was successful (Appeal Division decision #00-1317).

In total, one of the three applications for reconsideration was allowed.

**(iii) Appeal Division decisions**

During 2000, 62 applications for reconsideration of Appeal Division decisions were considered. In addition, two decisions were made on the merits of the matters after grounds for reconsideration were earlier established.

Twelve applications were made on the basis of new evidence alleged to be not previously available, and 28 applications were made on the basis of common law grounds (primarily error of law going to jurisdiction, including a breach of the rules of natural justice). These common law grounds were described in Appeal Division decision #93-0740 (10 WCR 127). Twenty-two applications were made on the basis of both new evidence and common law grounds.

## **New evidence**

Of the 34 applications for reconsideration of an Appeal Division decision on the basis of new evidence under section 96.1, five were found to have met the preliminary requirements for obtaining reconsideration on the basis of new evidence that was substantial, material and which met the required due diligence test.

## **Error of law going to jurisdiction**

Eleven cases were allowed of the 50 applications for reconsideration invoking an allegation of error of law going to jurisdiction. The following is a brief summary of the basis for these successful reconsideration applications in 2000. The decisions can be viewed on the Board's internet website [<http://www.worksafefbc.com>] using the decision number provided as the search term.

### **(a) Breach of the rules of natural justice**

- Appeal Division decision #00-0373 (14 March 2000)

Written submission received by the Appeal Division was not brought to the attention of the Appeal Division panel.

- Appeal Division decision #00-0550 (19 April 2000)

Appeal Division panel was not made aware by Appeal Division staff that a further submission from a party was forthcoming.

- Appeal Division decision #00-1012 (30 June 2000)

Parties were not informed of, or provided an opportunity to respond to, an issue parties did not anticipate Appeal Division panel would decide.

**(b) Not considering an issue**

- Appeal Division decision #00-0107 (24 January 2000)

Appeal Division panel did not deal with an issue regarding whether the worker was entitled to re-opening of his claim although the issue was clearly within the panel's jurisdiction to decide.

- Appeal Division decision #00-2010 (15 December 2000)

The Appeal division panel did not deal with an issue of whether the worker's 1990 work injury was of causative significance for his hearing loss, although the issue was part of the Review Board finding appealed to the Appeal Division.

**(c) Failure to consider evidence**

- Appeal Division decision #00-0091 (19 January 2000)

Appeal Division panel overlooked evidence central to its decision regarding the worker's employment income during two years.

- Appeal Division decision #00-0995 (29 June 2000)

The Appeal Division panel failed to specifically refer to or analyze evidence that contradicted a factual determination made by the panel.

- Appeal Division decision #00-1032 (7 July 2000)

The Appeal Division panel did not comment on evidence concerning a particular diagnosis that may have been significant and relevant to the issue that was before the panel.

**(d) Error related to whether Appeal Division panel had jurisdiction**

- Appeal Division decision #00-0441 (30 March 2000)

The Appeal Division panel engaged in a patently unreasonable application of the Act in granting an extension of time to appeal from a decision that had already been the subject of an appeal to the former commissioners.

- Appeal Division decision #00-1159 (31 July 2000)

The Appeal Division panel erred in concluding the worker's appeal did not raise an appealable issue.

- Appeal Division decision #00-1819 (15 November 2000)

The Appeal Division panel lacked jurisdiction to consider whether the worker was entitled to an extension of time to appeal since that issue had already been decided in an earlier Appeal Division decision.

**(l) Section 96(4) referrals**

Under section 96(4) the president has authority, within 30 days of a finding of the Review Board, to refer the finding to the Appeal Division for redetermination on grounds of error of law or contravention of a published policy of the governors.

In considering referrals by the president under section 96(4), the Appeal Division is fulfilling its responsibility under the Act to provide interpretive guidance to the workers' compensation system.

During 2000, the Appeal Division received nine section 96(4) referrals of Review Board findings by the president. This compares to six in 1999, four in 1998, three in 1997, and seven in both 1996 and 1995, two in 1994, and four in 1993. The Appeal Division rendered a decision on the merits of five

referrals in 2000 (three of which were in relation to referrals made in 1999). The decisions can be viewed on the Board's internet website [<http://www.worksafebc.com>] using the decision number provided as the search term.

Six referrals remained before the Appeal Division at year-end.

- **Alleged discrimination on the basis of marital status contrary to the Charter of Rights and Freedoms**  
***Appeal Division decision #00-0119 (26 January 2000)***

The Appeal Division panel concluded that the Review Board had given retrospective effect to section 15 of the Charter, contrary to judicial authority which found such application of the Charter improper.

- **Provision of rehabilitation benefits with waiver of further rehabilitation benefits**  
***Appeal Division decision #00-0223 (14 February 2000)***

An order in the Review Board finding indicated the worker had to sign a waiver with receipt of benefits. The Appeal Division panel concluded there was no support in policy for such a waiver and it was contrary to the Act. Section 96(2), for example, states that the Board must be able to "reopen, rehear and redetermine" any matter and a waiver is contrary to this statutory power.

- **Wage loss payments for period prior to pension effective date**  
***Appeal Division decision #00-0307 (29 February 2000)***

The Review Board's finding in this case of entitlement to benefits for a 10 month period violates item #33.00 of the Rehabilitation Services and Claims Manual. The worker was working during that 10 month period save for a brief period when the worker was on suspension as a result of a labour relations matter.

- **Fringe Benefits**  
***Appeal Division decision #00-1155 (31 July 2000)***

Section 33(1) of the Act deals with the establishment of average earnings. The Appeal Division panel concluded the language in section 33(1) was broad enough to support either the inclusion or exclusion of fringe benefits in or from average earnings.

- **Section 6(1) – “disabled from earning full wages”**  
***Appeal Division decision #00-1188/1189 (4 August 2000)***

The Appeal Division panel stated it had little difficulty concluding under section 6(1) that a worker was disabled from earning full wages at the work at which he was employed in circumstances where the worker retired effective February 1, 1995 and his claim was made in May 1995, but his first symptoms were prior to these dates. Most important for the panel’s conclusion, the worker had missed work as a result of undergoing a related operation. The worker was therefore clearly disabled within the meaning of item #26.30 of the Rehabilitation Services and Claims Manual in October 1994.

In the panel’s view, as a matter of administrative fairness, it is important for a referral from the president to be presented in an impartial and non-partisan manner. That is, when the Board makes a referral to the Appeal Division pursuant to section 96(4) of the Act, it is acting within the mandate of its quasi-judicial functions in the same way as it operates when making original decisions and the Board is not in the position of a party advocating one side or another of a claim, appeal or referral.

## 8. POLICY MATTERS

The following eighteen Appeal Division decisions were among the more significant decisions referred by the chief appeal commissioner or acting chief appeal commissioner to the attention of the Panel of Administrators in 2000. The decisions can be viewed on the Board's internet website [<http://www.worksafebc.com>] using the decision number provided as the search term.

- ***January 18 and 19, February 14 and 18, March 14, 2000  
(Appeal Division decisions #00-0073, #00-0090, #00-0222,  
#00-0259, #00-0367)  
Claims for psychological impairment in absence of physical  
injury***

The test for determining whether there was a compensable psychological injury was articulated as follows in the five Appeal Division decisions listed above:

- Did the workplace circumstances or events involve unusual stimuli?
- Were the workplace circumstances or events reasonably capable of causing psychological injury?
- If so, were the workplace circumstances or events of causative significance with respect to the worker's psychological injury for which compensation is sought?

In all five cases, the Appeal Division panels found that the workers' claims were not compensable. These decisions were brought to the Panel of Administrators' attention as examples of the evolving nature of the Appeal Division's decisions on psychological claims.

- ***January 31 and February 14, 2000  
(Appeal Division decisions #00-0161 and #00-0218)  
Criminal Injury Compensation Act – appeals abandoned at  
Appeal Committee***

The Appeal Division panel concluded the Appeal Division has jurisdiction to review (with leave) a preliminary or procedural determination of the appeal committee, such as the determination an

appeal has been abandoned, where that determination would constitute a final disposition of the appeal.

- ***April 10, 2000 (Appeal Division decision #00-0482)  
Interest on retroactive rehabilitation payments***

The panel urged the Panel of Administrators to review Board policy at item #50.00 of the Rehabilitation Services and Claims Manual with regard to payment of interest in the case of retroactive rehabilitative payments.

- ***April 26, 2000 (Appeal Division decision #00-0583)  
Section 42 – special rates***

An employer appealed the denial of their request for a special rate under section 42 of the Act.

The employer's appeal was denied. The Appeal Division panel concluded that consideration of a request for a special rate under section 42 would constitute policy-making. Authority for such decision-making resides with the Panel of Administrators and not the Appeal Division.

- ***May 11, 2000 and May 16, 2000  
(Appeal Division decisions #00-0684 and #00-0705)  
Status of a responsible principal of an unregistered company***

These two decisions concerned injured principals of companies which were not registered with the Board. Both decisions involved consideration of governors' policy set out in Decision No. 335 (Re Principals of Limited Companies, 5 WCR 101, April 27, 1981), and number 20:30:30 of the Assessment Policy Manual.

Appeal Division decision #00-0684 involved a section 11 certificate for a civil court action. The majority concluded that the effect of the policy in Decision No. 335 is to deny compensation to the principal of an unregistered company because such a principal does not have the status of a worker under the Act for the purposes of establishing a claim. The majority interpreted the policy as also affecting the status of such a principal under sections 10 and 11 of the Act.

The second Appeal Division decision (#00-0705), dealt with a related issue. The director, Assessment Department, found that an employer which had failed to register with the Board should be assessed retroactively to a date about two years earlier. The employer objected to being required to pay assessments on the earnings of the sole corporate principal as of January 1, 1998, on the basis that if the principal had been injured the Board would have denied his claim. The Appeal Division panel denied the employer's appeal. In reaching her decision the appeal commissioner noted that the employer had raised an important issue regarding the fairness of the Board assessing a company on a responsible principal's earnings during a time period when governors' policy would have denied that principal compensation benefits for an injury or disease arising in that period.

- ***May 10, 2000 (Appeal Division decision #00-0668)***  
***Visual acuity – standard of review for lawfulness of policy***

A prior published Appeal Division decision (#93-1140, *Loss of Visual Acuity*, 10 WCR 225, August 12, 1993), held that item #39.42 of the Rehabilitation Services and Claims Manual concerning the use of corrected vision, contravened section 23(1) of the Workers Compensation Act. In the present case, the Appeal Division panel considered both Appeal Division decision #93-1140, and the subsequent policy amendments approved by the Panel of Administrators on June 15, 1999.

The Appeal Division panel considered, as a preliminary issue, the standard of review to apply in assessing whether policy adopted by the Governors/Panel of Administrators was consistent with the Act.

The panel was unanimous in adopting the “patently unreasonable” or “viability” standard of review. The panel was satisfied that the question to be answered when the Appeal Division considers the legality of a policy is whether that policy is viable under the Act.

The Appeal Division panel determined that the policy at #39.42 was viable or lawful under the Act.

- ***September 19, 2000 (Appeal Division decision #00-1457)  
Contribution to employee share purchase plans – whether assessable payroll***

The Appeal Division panel concluded the employer's assessable payroll should not include the employer's contribution to an employee share purchase plan. The panel noted each plan must be viewed with regard to its own specific features.

The panel concluded by stated that, as it exists today, the Assessment Policy Manual is "problematic" as it is not express and specific about the reasons why the Board includes some taxable benefits in assessable payroll and not others.

- ***October 11, 2000 (Appeal Division decision #00-1599)  
Assessment Policy Manual item #30:20:40***

Item #30:20:40 of the Assessment Policy Manual makes reference to five "main" reasons why a firm's classification would change and that there can be different effective dates related to different reasons for the change.

The Appeal Division panel indicated the use of the word "main" suggests that there can be other reasons for a change, ones that are not listed in policy. The panel stated that, speaking as someone looking for direction from policy in order to decide this appeal, the broad scope of this language is not especially helpful. Its broad scope leaves open the possibility of the effective date being the date of the decision being appealed and, therefore, the panel concluded it must consider whether using this date is sustainable.

In the result, the panel could not agree with the effective date established by the director. The panel went on to determine the appropriate date.

- **November 9, 2000 (Appeal Division decision #00-1770)**  
***Allergic reactivity to chromate and thiuram as an occupational disease – lawfulness of policy***

The Appeal Division panel expressed concern whether items #29.20 and #30.50 of the Rehabilitation Services and Claims Manual were consistent with section 23(1) of the Act. In the panel's view, the policies' automatic preclusion of a disability pension for a worker with a severe occupationally-induced allergy who **has** suffered a loss of income, just because the disability is the result of an allergy that does not cause symptoms except with exposure, is problematic and may not accord with a viable interpretation of the Act.

- **November 24, 2000 (Appeal Division decision #00-1867)**  
***Payment for acupuncture treatment — item #78.14 of the Rehabilitation Services and Claims Manual***

In the course of finding the worker was entitled to full reimbursement for acupuncture treatment, the panel noted that it seems that policy at item #78.14 of the Manual may not have kept pace with other developments. Since payment for this form of treatment is now found in the B.C. Medical Association agreement, it appears unnecessary as envisioned for the Board to set fees at the time approval is given to care providers who are covered by that agreement. As well, the policy refers to the vice-president, Medical Services Division. That position and that division have not existed for a number of years.

- **December 6, 1996 and June 6, 1997**  
***(Appeal Division decisions #96-1875 and #97-0759)***  
***Personal optional protection - appeals***

Individuals with personal optional protection (POP) coverage have in several cases sought to appeal to the Appeal Division from a decision by the Assessment Department. The objections concerned, for example, a refusal to allow the person to register for POP coverage, or the individual's liability for assessment premiums for a period during which they were no longer active but failed to notify the Board they were ceasing operations.

In a few cases coming before the Appeal Division, it was found that the individuals seeking to appeal the assessment decision to the Appeal Division concerning their POP coverage had no workers. It was concluded the individuals had no basis for asserting they were an employer. Thus, they could not exercise the right of appeal granted to employers under section 96(6) or (6.1) of the Workers Compensation Act. In decision #96-1875 (6 December 1996) the issue was whether the individual was liable for the cost of obtaining POP coverage for a period from October 1994 to June 1995. In decision #97-0759 (6 June 1997) the matter related to an objection to a Board decision to cancel POP coverage on the basis of the individual's failure to comply with reporting and remitting requirements.

Under section 90(1) of the Act, a worker may appeal a Board officer's decision "with respect to a worker". Policy at #102.27 of the Rehabilitation Services and Claim Manual specifies that these words mean that "the decision under appeal must be a claims decision involving an issue of a kind or class that affects workers financially." It appears the Review Board does not hear appeals concerning POP issues which do not affect a claim for compensation entitlement.

The net result is that there is a category of individuals who appear to have no appeal rights under the Act, in connection with disputes relating to their POP coverage. It is not clear whether this was deliberate, or an oversight, in the 1991 changes to the Act. Consideration might be given to whether a minor amendment to the Act is warranted, to extend appeal rights in these circumstances.

## 9. PUBLICATION OF APPEAL DIVISION DECISIONS

Twelve Appeal Division decisions issued in 2000 were forwarded for publication in the Workers' Compensation Reporter. In addition, ten decisions from 1999 were forwarded for publication during 2000. In total, twenty-two decisions were sent for publication.

Over the past nine years, 299 Appeal Division decisions have been published in the Reporter (to volume 15, no. 3). Appeal Division decisions published in the Reporter are also available on the internet at:

<http://www.worksafebc.com/policy/appeals/default.asp>.

In addition, all Appeal Division decisions issued since January 1, 2000 are available on the internet at:

<http://www.worksafebc.com>

Following are brief comments concerning the decisions forwarded for publication in the Workers' Compensation Reporter during 2000. These comments are intended to be descriptive only, to assist in locating relevant decisions.

- Section 10(8) appeal — Obligations on a principal contractor  
#99-0992, 23 June 1999

The Appeal Division panel rejected the proposition that a general contractor has discharged its obligations under section 10(8) by carefully selecting a contractor. While the general contractor cannot be held responsible for the activities of all subcontractors' workers, it is necessary for the Board on a section 10(8) application to consider the general contractor's responsibility when the actions or one subcontractor's workers endangered the workers of another.

- Section 10(8) appeal –  
Effect of delay in making section 10(8) application  
#99-1033, 30 June 1999

While there is no time limit on requests for section 10(8) transfers, or the making of such transfers, the Appeal Division panel did not consider that this means the Board must consider any section 10(8) application, no matter how long the lapse of time between the incident and the application. The difficulty of investigation is a valid consideration that may form the basis of a decision to decline to conduct an investigation into whether a cost transfer should be undertaken.

- Section 26 of the *Criminal Injury Compensation Act* and  
Section 15 of the *Canadian Charter of Rights and Freedoms*  
#99-1281, 27 August 1999

After analyzing relevant Supreme Court of Canada authority, the Appeal Division panel concluded that it is not permissible to apply the Charter retroactively or retrospectively to a provision of the Criminal Injury Compensation Act that states the Act only applies to claims arising from an injury or death resulting from an act or omissions that occurs after July 1, 1972. The applicants had challenged the constitutionality of this provision, arguing that the provision was discriminatory and therefore contrary to section 15(1) of the Charter.

- Section 10(8) appeal — Serious breach of duty of care —  
Responsibility of general contractors  
#99-1385, 16 September 1999

The regulations impose a statutory duty on the general contractor to organize the construction project to provide safe working conditions for all workers involved, and to ensure the continuing co-ordination of the industrial health and safety activities of several employers. In addition, the general contractor must ensure that all industrial health and safety regulations are complied with in respect of the construction project. This is a clearly stated statutory duty placed upon the general contractor. A “mere breach” of the regulation is not “a

serious breach of the duty of care” under section 10(8). However, some breaches of the regulations may constitute a serious breach.

- Sections 17(3)(c) to (e) of the *Workers Compensation Act* and Section 15 of the *Canadian Charter of Rights and Freedoms (#2)*  
#99-1427, 22 September 1999

The Appeal Division panel concluded the Supreme Court of Canada decision in Nancy Law had not undermined the reasoning which led the Appeal Division panel in decision #98-0527, 14 WCR 114, to conclude that the scheme set out in section 17(3)(c) to (d) does not involve discrimination within the meaning of section 15 of the Charter. If anything, the panel indicated, the Supreme Court of Canada decision supports the Appeal Division’s reasoning.

- *Criminal Injury Compensation Act –*  
Claim for non-pecuniary loss by immediate family member of victim of crime  
#99-1439, 23 September 1999

Applying a purposive interpretation of section 2(4) of the Criminal Injury Compensation Act, and relying upon common law cases regarding damages for cases of intentional harm, the Appeal Division panel majority concluded that non-pecuniary compensation provided in section 2(4)(f) may be awarded to an immediately family member of a deceased victim of crime, regardless of whether they witnessed the crime.

- Section 96(4) referral — Wage loss for date of injury  
#99-1746, 17 November 1999

There is no provision in the Act or policy to pay wage loss for the date of injury. A Review Board finding that wage loss be paid for the date of injury was set aside by the Appeal Division panel.

- Section 10(8) appeal — Natural justice – Apprehension of bias  
#99-1768, 22 November 1999

An allegation of bias was raised in relation to the decision on a section 10(8) application by the director, Central Services, Compensation Services Division. The essence of the allegation was that the director is a personal friend of the representative of an employer involved in this case. In exercising the duties to make decisions under section 10(8) of the Act, the director must be and appear to be impartial. The law regarding bias and reasonable apprehension of bias is applicable. The mere allegation of a personal friendship is not sufficient evidence upon which a reasonable person could conclude that there was a reasonable apprehension of bias in the present case.

- Whole body vibration  
#99-1868, 6 December 1999

The Appeal Division panel was satisfied there is an association in the scientific literature between whole body vibration exposure and back disorders. Regarding causation issues, the Appeal Division panel indicated it was sufficient that the literature points to an association between vibration and low back disorders. In compensation matters generally, the Board does not require definitive proof.

- Section 96(4) referral — Reinstatement of widow benefits  
#99-1909, 10 December 1999

The Appeal Division panel concluded that foster mother benefits could not have been payable in this case past 1968 which is when the youngest child turned 18 years of age. Thus, even without the applicant's entry into a subsequent common-law relationship, the applicant would not have been entitled to a foster mother's pension after that time, let alone in 1985 when section 15 of the Canadian Charter of Rights and Freedoms came into effect.

- 
- Section 96(4) referral — No retrospective effect of section 15 of the *Charter of Rights and Freedoms*  
#00-0119, 29 January 2000

See summary of this decision in section 7(l) of this report (Section 96(4) Referrals).

- Section 96(4) referral —  
Implementation of a Review Board finding  
#00-0223, 14 February 2000

See summary of this decision in section 7(l) of this report (Section 96(4) Referrals).

- Section 96(4) referral –Provision of temporary disability benefits  
#00-0307, 29 February 2000

See summary of this decision in section 7(l) of this report (Section 96(4) Referrals).

- Loss of visual acuity #2 — Standard of review  
for determining legality of Governors' policy  
#00-0668, 10 May 2000

See summary of this decision in section 8 of this report (Policy Matters).

- Section 96(4) referral —  
Inclusion of taxable benefits in average earnings  
#00-1155, 31 July 2000

See summary of this decision in section 7(l) of this report (Section 96(4) Referrals).

- Section 96(4) referral — Whether disabled at the work at which employed under section 6(1)  
#00-1188, 4 August 2000

See summary of this decision in section 7(l) of this report (Section 96(4) Referrals).

- *Criminal Injury Compensation Act – Assault — Consent*  
#00-1267, 16 August 2000

Any sexual touching without consent is an assault. Consent must be genuine. It requires an active will in the mind of the complainant. It is therefore a subjective determination which requires the trier of fact to consider the credibility of the complainant. No defence of implied consent to sexual assault or indecent assault exists or has existed in Canadian law.

- *Criminal Injury Compensation Act – Status of “bystander”*  
#00-1422, 14 September 2000

The Appeal Division panel did not find the legislature intended to expand the definition of victim of crime to include persons who claim emotional injury from witnessing the death of a stranger.

- Assessable payroll under the *Assessment Policy Manual* —  
*Employee share purchase plan*  
#00-1457, 19 September 2000

See summary of this decision in section 8 of this report (Policy Matters).

- Reconsideration of an Appeal Division decision — Consistency and “Hallmarks of Quality Decisions”  
#00-1596, 11 October 2000

A decision of a tribunal is not patently unreasonable for the purposes of reconsideration simply because it is inconsistent with another decision of that tribunal.

- Delegation by the Chief Appeal Commissioner  
Appeal Division Decision #31, 29 November 2000

General delegations by the Chief Appeal Commissioner pursuant to section 85(8) of the Workers Compensation Act.

- Employers’ authorization to a representative on an appeal — Effect when employer enters bankruptcy  
#00-1967, 12 December 2000

The bankruptcy of a principal or an agent terminates the agent’s authority, except where the agency is irrevocable. In the present case, since the employer entered bankruptcy, the consultant representative was no longer authorized to pursue the appeal since the consultant did not have an authorization from the trustee-in-bankruptcy.

## 10. MATTERS PENDING BEFORE THE APPEAL DIVISION

The table below indicates the change in new matters pending at the end of 2000 compared to the matters pending at the end of each previous year in the Appeal Division's history. The decrease in matters pending over the course of 2000 is primarily due to a decrease in employer relief of claim costs appeals under section 39(1)(e). The Appeal Division experienced a 17 per cent decrease in such appeals in 2000 from 1999. At the same time, the Appeal Division initiated a project in late 2000 to deal with the delay experienced in processing appeals under section 39(1)(e). By year end this project resulted in the Appeal Division dealing with a significant number of such appeals, with many no longer pending before the Division. By March 5, 2001 the number of employer relief of costs appeals pending was 1,584.

### MATTERS PENDING AT DECEMBER 31 OF EACH YEAR

<b>Matter Type</b>	<b>2000</b>	<b>1999</b>	<b>1998</b>	<b>1997</b>	<b>1996</b>	<b>1995</b>	<b>1994</b>	<b>1993</b>	<b>1992</b>
Section 91 appeals from Review Board	973	953	902	821	644	627	387	426	490
Section 96(4) President's Referrals	6	3	3	1	1	3	1	2	0
Prevention – General	1	17	59	35	51	39	49	38	72
O.H.S. (Bill 14)	47	16	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Section 39(1) Employer Relief of Costs	2347	2590	1307	462	421	30	26	39	30
Criminal Injury matters	49	70	94	69	35	18	9	4	6
Section 47(2) employer charged with Costs	16	20	13	8	15	7	5	5	9
Assessments	47	37	28	23	22	140	24	27	16
Reconsideration – Appeal Division Decisions	46	45	37	52	54	46	56	44	39
Reconsideration – Former commissioners' decisions	2	3	7	6	8	16	7	6	10
Section 10(8) Transfer of claim costs	2	1	10	0	4	5	5	4	2
Section 11 certificates	141	126	86	81	65	56	66	56	47
Extension of time to appeal	111	88	104	97	70	27	*	*	5
Other matters	0	0	0	0	0	0	0	0	6
<b>TOTAL</b>	<b>3788</b>	<b>3969</b>	<b>2650</b>	<b>1655</b>	<b>1390</b>	<b>1014</b>	<b>635</b>	<b>651</b>	<b>732</b>

\*Extension of time to appeal matters were not separately tracked in matters pending in 1993 and 1994.

## 11. ORAL HEARINGS

The Appeal Division held 159 oral hearings during 2000. Seventy-one were heard by non-representational appeal commissioners sitting alone. Eighty-eight were heard by panels of three appeal commissioners.

The total number of decisions issued in 2000 was 2077; oral hearings were held in 7.7% of cases. This represents a slight increase from the figures of 7.6% in 1999, 7% in 1998 and 7.4 % in 1997. The Appeal Division held oral hearings in 8% of cases in 1996, 7.4%, in 1995, 9% in 1994 and 10% in both 1993 and 1992.

Of the 159 oral hearings during 2000, 128 concerned claims issues, 16 related to employer prevention penalty appeals, 9 related to employer assessment appeals, 3 related to section 11 determinations, and 3 related to matters under the Criminal Injury Compensation Act.

One hundred and six (67%) of the oral hearings were held at the Richmond offices of the Board. Fifty-three (33%) were held in locations around the province outside the lower mainland. These hearings were held in the following locations: Campbell River (1), Cranbrook (2), Kamloops (16), Kelowna (6), Nanaimo (9), Prince George (7), Terrace (3), and Victoria (6) and Williams Lake (3).

The following table provides information regarding the number of oral hearings held outside the Lower Mainland since 1992:

Year	Total oral hearings	Hearings held outside the Lower Mainland	
		Number	As a % of total oral hearings
2000	159	53	33%
1999	154	58	38%
1998	143	50	35%
1997	130	44	34%
1996	158	45	28%
1995	118	28	24%
1994	140	34	24%
1993	184	49	27%
1992	202	24	12%

In 2000 interpreters were utilized in 16 oral hearings, in the following languages: Punjabi (6), Hindi (2) Portuguese (1), Polish (1), French (1), Croatian (2), Tamil (1), Italian (1) and Persian (1). Interpreters were used in 9 hearings in 1999, 9 hearings in 1998, 6 hearings in 1997, 14 hearings in 1996, 10 hearings in 1995, and 16 hearings in 1994.

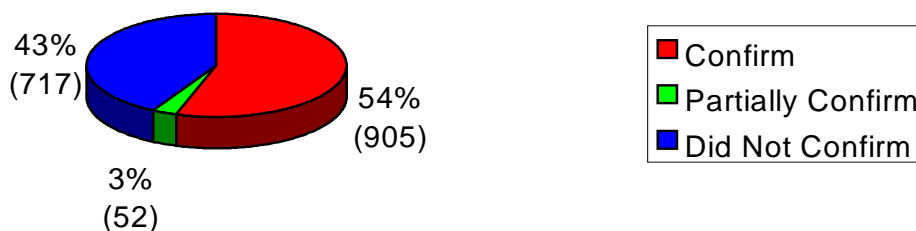
## 12. MEDICAL REVIEW PANEL APPEALS

As of February 6, 2001, 1,731 Medical Review Panel certificates had been issued on appeals from Appeal Division decisions since June, 1991. This is 245 more certificates than had been issued as of January 18, 2000. As of February 6, 2001, there are a further 214 appeals proceeding to Medical Review Panels from Appeal Division decisions.

There were 12,094 Appeal Division decisions issued between June 1991 and December 2000 on section 91 appeals from Review Board findings. The 1,945 Appeal Division decisions which have proceeded, or are proceeding, to a Medical Review Panel represents approximately 16% of decisions on section 91 appeals over the past nine years.

In the 1,731 completed Medical Review Panel appeals, 57 await implementation by the Board's Compensation Services Division. Until that occurs we cannot state whether the Appeal Division decision in those cases has been confirmed, partially confirmed, or not confirmed. However, 1,674 Medical Review Panel certificates have been implemented with the following results. The Appeal Division decision was confirmed in 905 cases (54%), partially confirmed in 52 cases (3%), and not confirmed in 717 cases (43%).

**MEDICAL REVIEW PANEL APPEALS FROM  
APPEAL DIVISION DECISIONS:  
JUNE 1991 TO 2000**



### 13. JUDICIAL REVIEW

Five decisions were issued by courts in 2000 on judicial review petitions arising from Appeal Division decisions.

The Supreme Court of British Columbia dismissed three petitions.

The British Columbia Court of Appeal upheld a British Columbia Supreme Court decision which had dismissed a petition for judicial review.

The Supreme Court of Canada restored a 1993 Appeal Division section 11 determination which had been set aside by the British Columbia Court of Appeal in 1998.

Since the inception of the Appeal Division in 1991, decisions from the courts have been rendered in relation to 24 Appeal Division decisions. The Appeal Division decision has, to date, been ultimately upheld by the courts in all cases.

The following are summaries of the five court decisions in 2000 in relation to petitions for review of Appeal Division decisions.

- (1) Jackson v. Newton and Workers' Compensation Board  
(25 February 2000)(B.C.S.C.)  
(Section 11 determination – significant deviation from a travelling route)

The Supreme Court of British Columbia dismissed a petition for judicial review of a January 17, 2000 Appeal Division determination under section 11 of the Workers Compensation Act.

The section 11 determination related to a court civil action arising from a motor vehicle accident. The accident involved the plaintiff in the civil action, a bicycle patrol officer, and a defendant truck driver making a right hand turn. The issue before the Appeal Division panel was the status of the defendant truck driver. The Appeal Division panel concluded that the truck driver's action or conduct did not arise out of and in the course of employment. The Appeal Division panel determined that the driver was involved in a significant deviation from

the work-related purpose of his driving at the time of the accident. The driver had completed a haul the night before the accident. The driver had not yet been assigned another haul on the day of the accident. The driver was going to have his truck fueled. Travelling to purchase fuel, the Appeal Division panel concluded, was a work-related errand during a "day off". However, the panel found that when the accident happened the driver was not involved in a work-related purpose, but rather was circling the block to go into a restaurant to get a cup of coffee. The panel found the stop for coffee was essentially the driver carrying out personal activities on a day off while waiting for dispatch, rather than an incidental intrusion of personal activities on a day of employment.

The court concluded there was evidence to support the Appeal Division panel's conclusion. The decision was not openly, evidently, or clearly unreasonable. The court also considered whether the Appeal Division panel failed to follow other decisions of the Board and other Board policies. The court stated that, assuming the Appeal Division decision is inconsistent with other decisions and other Board policies, although the court was not really satisfied that it is, the Appeal Division panel is not bound by earlier decisions or by Board policy as long as the panel exercises its discretion judicially. The court stated it cannot be said the Appeal Division panel failed to exercise its discretion judicially. The petition was dismissed.

- (2) Kovach v. Workers' Compensation Board et al.  
(20 January 2000) (Supreme Court of Canada)  
(Section 11 certificate – medical malpractice claim)

The Supreme Court of Canada set aside a 1998 judgment of the British Columbia Court of Appeal and restored the Appeal Division's section 11 determination (#93-1399, 10 WCR 603).

Ms. Kovach suffered a compensable injury to her back in 1987. Her family doctor referred her to Dr. Singh, who recommended surgery, which he performed. Ms. Kovach sued Dr. Singh, among others, in British Columbia Supreme Court alleging negligence and unskilled treatment causing her back to be made worse.

Dr. Singh requested a section 11 certificate for filing in the negligence action. The doctor had incorporated his practice and registered the company with the Board. The doctor was an active principal.

The Appeal Division concluded that at the time of the surgery, Ms. Kovach was a worker and her injuries arose out of and in the course of her employment. The Appeal Division also found that Dr. Singh was a worker and his conduct which caused the alleged breach of duty of care arose out of and in the course of his employment.

A seven-member panel of the Supreme Court of Canada issued judgment the same day the matter was argued before them. In brief reasons, the unanimous panel set aside the Court of Appeal majority judgment, and restored the Appeal Division section 11 determination, substantially for the reasons stated by Mr. Justice Ian Donald in dissent at the Court of Appeal.

Mr. Justice Donald's dissent in the Court of Appeal concluded by stating:

The truly vexing aspect of this case is that a doctor secures immunity from action through participation in the scheme as an employer or worker. We are not accustomed to such a result. But as anomalous as it may seem, the choice of including professionals in the scheme was made by the legislature, and the structure of the scheme must not be altered to defeat the immunity. The plaintiff must forgo the prospect of a large tort judgment for the prompt and certain payment of compensation without having to prove fault. The trade-off may seem disadvantageous in the circumstances involving a doctor but it is highly advantageous in the vast majority of claims.

- (3) Alivand v. British Columbia (Workers' Compensation Board)  
(1 March 2000) (B.C.S.C.)  
(Establishing wage rate to represent long-term loss of earnings)

The Supreme Court of British Columbia dismissed a petition for judicial review of an Appeal Division decision issued April 13, 1995 (#95-0408); application for reconsideration denied, March 11, 1996 (#96-0475).

The Appeal Division decisions related to establishing the worker's long-term loss of earnings. The worker had suffered a work-place fall in 1992.

The court stated the privative provision in section 96(1) requires a high degree of deference be accorded to the Appeal Division decision regarding the worker's annual earnings. The court concluded the Appeal Division reached its decision on a rational basis and that the Appeal Division correctly interpreted section 33(1) of the Act in exercising its powers.

- (4) Greyhound Canada Transportation Corp. v. Mariusz Brzozowski, Kazimierz Kowalski and WCB  
(1 June 2000) (B.C. Court of Appeal)

The Court of Appeal dismissed with oral reasons an appeal from the B.C. Supreme Court decision of September 9, 1999.

The case concerned the status of two commercial fishers/divers, who were travelling by Greyhound bus from Prince Rupert back to their residences in Victoria following completion of an opening. They were not paid travel expenses, but deducted travel expenses in calculating their income tax returns. In a section 11 certificate for a legal action, the Appeal Division panel found that the plaintiffs' bus travel did not arise out of and in the course of their employment.

As reported in the Appeal Division's 1999 Annual Report, the B.C. Supreme Court decision on September 9, 1999 dismissed a petition for judicial review of the Appeal Division section 11 determination (#99-0354 and #99-0355, February 26, 1999).

In upholding the B.C. Supreme Court decision, the Court of Appeal stated:

. . . it is not enough to criticize a tribunal's reasoning if the result can be rationally supported. The relationship between employment under the Act and travel to and from work sites is a vexing one. The Board is charged with the difficult task of drawing the line in particular cases. The Appeal Division had in mind and referred to in its reasons the passages in the Act and Regulations relied on by Greyhound in this appeal.

I cannot say that the result reached by the Board was patently unreasonable on the facts before it. . . .

(5) Yee v. Workers' Compensation Board of British Columbia  
(14 July 2000) (B.C. Supreme Court)

The British Columbia Supreme Court dismissed a petition for judicial review of two decisions by a Board claims adjudicator in October and November 1999. These decisions were preceded by a September 1999 reconsideration decision of the Appeal Division (8 September 1999, Decision #99-1337).

In decision #99-1337, the Appeal Division panel considered a request for reconsideration of a 1996 Appeal Division decision (#96-0234) which, among other things, determined the worker was not entitled to a pension on a projected loss of earnings basis. The worker's claim for asthma due to her work as a hairdresser had been accepted by the Board. The 1996 Appeal Division decision determined there should be a functional disability award of 16% and there would be no projected loss of earnings greater than her functional disability award. That Appeal Division decision was appealed to a Medical Review Panel which issued a certificate in June 1998. The dispute giving rise to this petition for judicial review related to implementation of the Medical Review Panel certificate.

The court noted that counsel for the worker argued before the Appeal Division reconsideration panel that the MRP certificate shows the

worker is unable to work as a result of her compensable injury and therefore should be entitled to a 100% loss of earnings pension. On that basis, counsel sought reconsideration of the 1996 Appeal Division decision pursuant to section 96.1, arguing the MRP certificate constituted new evidence under that provision. The Appeal Division reconsideration panel denied the request for reconsideration, concluding that the MRP certificate had a direct bearing on the loss of earnings pension issue and supercedes the earlier Appeal Division decision in respect of the matters certified. The certificate did not constitute new evidence under section 96.1. The reconsideration panel indicated the worker is entitled to take issue with the manner in which the MRP certificate has been implemented by pursuing her appeal rights under the Act.

The subsequent decisions of the claims adjudicator, which were the direct subject of this judicial review petition, concluded no change regarding a loss of earnings pension was necessary after the MRP certificate.

The court on judicial review indicated that if it had agreed with counsel's reading of the MRP certificate that the worker suffered a 100% loss of earnings, the court might agree the Board acted in excess of jurisdiction in not so implementing the certificate. However, the court concluded the MRP certificate does not inevitably lead to that conclusion. The implementation decision was within the Board's exclusive jurisdiction to make and was not patently unreasonable. The petition was accordingly dismissed.