CHAPTER III. NATURE OF THE APPEAL PROCESS & PROCEDURAL ISSUES

A. Burden of Proof, Standard of Proof and Presumptions

Defining Terms

The terms "burden of proof" and "standard of proof" are sometimes used interchangeably. For the sake of clarity in this report the following definitions apply:

"Burden of proof": "A duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in [a claim]."

"Standard of proof": The standard used in weighing evidence (normally "on a preponderance of evidence" or "balance of probabilities" in civil cases and "beyond a reasonable doubt" in criminal cases).

Summary of Issue:

It has been submitted to the Royal Commission that unfair presumptions of "guilt" and "recovery" are being used by claims adjudicators and appeal bodies which work against workers' interests.

The RSCM provides that the claims adjudicator must not start with any presumption for or against the worker. "There is no burden of proof on the claimant." "Some basic evidence must be submitted by the worker", but the adjudicator has the burden of seeking all further relevant evidence. On the face of it, this approach does not appear to be in conflict with established principles of procedural fairness.

However, in practice, it may be that the policy is being interpreted in a manner which is contrary to the original intention of the policy-makers, leading to unfair results. The policy implies that the adjudicator has the substantial burden of gathering evidence to prove the claim. Yet submissions contend that, in practice, the heavier burden has been placed on the worker. Preliminary empirical research supports this view.

Submissions and Reports

Worker and Employer Submissions

It has been submitted at public hearings that there is a presumption of "guilt" affecting workers. For example, it was submitted that workers are deemed "guilty until proved innocent" and that adjudicators and medical advisors are not qualified to weigh evidence. Another presenter suggested that, where a worker delays in submitting a claim, this creates a presumption or bias against acceptance of the claim. It has also been reported that some workers believe they have the burden of proving their claims and that "presumptions of recovery" increase this burden. In a document prepared by consultants for the WCB, the following assertion was made:
"Workers oppose the current initiative regarding clinical protocols and treatment guidelines... [because] medical protocols often contain recovery norms. In adjudication practice, these often become a presumption of recovery, increasing the burden of proof on workers and their physicians to establish continued eligibility for benefits..." 

Law and Policy

Initial Adjudication

Section 99 of the Act provides the standard of proof to which the Board is bound when disputed possibilities are evenly balanced:

"The Board is not bound to follow legal precedent. Its decisions shall be given according to the merits and justice of the case and, where there is doubt on an issue and the disputed possibilities are evenly balanced, the issue shall be resolved in accordance with that possibility which is favorable to the worker." [emphasis added].

The Act does not articulate the standard of proof to be applied when disputed possibilities are not evenly balanced. There is no general presumption in the Act either in favour of the worker or against the claim. However, there are three circumstance-specific presumptions in favour of workers or dependents in ss. 5(4), 6(3) and 6(11).

Section #97.00 of the Rehabilitation Services and Claims Manual ("RSCM") elaborates on the standard of proof in s.99. A discussion of presumptions and the burden of proof is also included in this context:

"Under the old English system, which was an adversary system of workers compensation, there was a burden of proof imposed on the worker, but that is not the correct approach here. The Claims Adjudicator must not start with any presumption against the worker, but neither must there be any presumption in the worker’s favour. The correct approach is to examine the evidence to see if it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the adjudicator should consider what other evidence might be obtained, and must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached. But if it appears upon the weighing of the evidence that the disputed possibilities are evenly balanced then the rule comes into play which requires that the issue be resolved in accordance with that possibility which is favourable to the worker. [s.99]

Although there is no burden of proof on the claimant, the Act contains prerequisites for benefits. Compensation will not be paid simply because, for example, a telephone call is received from someone claiming to be a worker, who has been hurt, and was disabled for a certain number of days. Some basic evidence must be submitted by the worker to show that there is a proper
The extent of that basic evidence, and the weight to be attached to it, is entirely in the hands of the Adjudicator...." [emphasis added].

The *Field Investigations Procedure Manual* of the Compensation Services Division (not published policy) elaborates on s.97.00 and provides guidance regarding the use of "judgement to set reasonable limits on an investigation."9

**Appeals**

**WCRB:**
The WCRB *Policies and Procedures Manual* states that facts must be proved on a "balance of probabilities" and that the WCRB is bound by s.99 where the disputed possibilities are evenly balanced. The WCRB also follows the "general rule that the burden of responsibility for proving a fact is on the person who asserts it."10 The WCRB requires the appellant to submit certain basic evidence as a prerequisite to launching an appeal.11 Where an appellant fails to provide the necessary basic information, the WCRB may suspend the appeal. The Registrar "seeks substantial rather than strict compliance in this regard."12 Additional policies set out requirements for the filing and exchanging of submissions and new evidence.13

**The Appeal Division and MRPs**
Section 99 of the *Act* applies to the "Board". It is therefore assumed that the standard of proof described in that section applies to both of these internal appeal bodies. It is assumed that that the normal "balance of probabilities" standard applies (unless the disputed possibilities are evenly balanced in which case s.99 of the *Act* applies) and that the burden of responsibility for proving a fact is on the person who asserts it. The Appeal Division and MRPs require an appellant to submit certain basic evidence as a prerequisite to launching an appeal and may decide not to proceed with the appeal where such evidence is lacking.14 Additional policies set out requirements for the filing and exchanging of submissions and new evidence.15

**Discussion**

Is the *Act* and are WCB policies in accordance with established principles of procedural fairness and natural justice?

**Burden of Proof**

**Initial Adjudication**
On the face of it, law and policies in this area do not appear to be in conflict with established principles of procedural fairness.

However, in practice, it may be that s. Section 97.00 of RSCM is being interpreted in a manner which is contrary to the original intention of the policy-makers, leading to unfair results. The policy states that "there is no burden of proof on the claimant" and implies that the adjudicator has the substantial burden of gathering evidence to prove
the claim. Yet submissions contend that, in practice, the heavier burden has been placed on the worker. Preliminary information from Susan Furlong’s file analysis supports this view.

This problem may be partially attributable to the wide discretion afforded to adjudicators in the RSCM. As noted above, "the extent of the basic evidence [supplied by the worker] and the weight to be attached to it, is entirely in the hands of the Adjudicator." In other words, an adjudicator has broad discretion to deem basic information supplied by the worker to be insufficient -- arguably placing the substantial burden on the worker. Since there is no presumption of injury or disease in favour of the worker, he or she would have little choice in such a case but to present evidence to prove the claim. Alleged inherent presumptions against workers may compound this burden.16

It may be that too great a burden is being placed on workers. As well, it would be unfair to state that "there is no burden of proof on the claimant" if in fact there is a substantial one. At a minimum, if it is intended that such a burden be placed, this should be clearly articulated in the Act or in policy.

Appeals
The theoretical approach of the WCRB, the Appeal Division and the MRPs in this area appears to be in accordance with established principles of procedural fairness and natural justice.17 Empirical research into their actual practice may reveal deviation from these principles.

[File analysis in progress]

Standard of Proof During Initial Adjudication & Appeals
Application of the civil standard of proof during initial adjudication and subsequent appeals does not violate any principles of procedural fairness or natural justice.

Section 99 of the Act, which favours worker, is somewhat unusual. It is noted in the WCRB Policies and Procedures Manual that:"

"Section 99 represents a departure from the common law [standard] of proof in which, if the disputed possibilities are evenly balanced, the person who is asserting a particular fact would lose the case if only a possibility (50% or less likelihood) could be established."18

However, despite its uncommon character, s.99 does not appear contrary to principles of procedural fairness or natural justice.

It has been confirmed by the B.C. Court of Appeal that the standard of proof before administrative tribunals "is generally that of a balance of probabilities", though a range exists within that standard.20 The range within the civil standard of proof was examined in Rak v. British Columbia (Superintendent of Brokers) 21. It was held that, where
"serious matters are concerned", a "relatively high degree of proof" is required within the civil standard. The gravity of the consequences of an adverse finding to those investigated must be considered in this determination. A number of circumstances which might give rise to a higher degree of proof within the civil standard were identified. For example, a higher standard might be appropriate where a person would be deprived of the ability to pursue his or her profession.

One must bear in mind that the Rak case related to the misconduct of persons involved in the securities business, who had had penalties imposed upon them. Many of the cases considered in Rak related to the discipline, dismissal or imposition of penalties upon professionals. It is therefore somewhat distinguishable from claims adjudications or appeals in the WCB context. However, certain parallels may be drawn. For example, an injured worker may face grave consequences, including the loss of his or her livelihood. It may be arguable that a higher degree of proof within the civil standard is appropriate before a claim may be denied.

It is possible that a higher standard is being used in such cases in the WCB context. If so, the fact that this approach has not been articulated in law or policy would not be unusual. In Rak it was held that an administrative tribunal is not required as a matter of law to articulate the degree of proof it requires in any given case before it. It is sufficient if the administrative tribunal is "mindful of the common law principles of standards and degrees of proof as they apply to the case before it."

Additional Comments

Comparison with Criminal Context
The language used by presenters at the public hearings suggests a comparison to a criminal context. This comparison can be seen, for example, in the phrase "guilty until proved innocent" and in the suggestion that there should be a presumption of a compensable injury or disease in favour of workers until proved otherwise. It is likely that the reason such comparisons are being made is that workers see the very strong protections afforded to an accused in a criminal context. By contrast, there is a relative lack of protection under the workers' compensation system for injured workers.

In the criminal context, an accused has the right to remain silent and the use of silence cannot be used as evidence of guilt. He or she is presumed innocent until proved guilty and enjoys the benefit of the presumption of innocence until the Crown proves guilt beyond a reasonable doubt.

In the WCB context, the worker must submit some basic evidence in support of a claim (perhaps a more substantial amount, as submitted by workers). If this is not done the claim may be rejected. There is no general presumption that the worker has a compensable injury or disease. Despite s.99, the modified civil standard of proof is much lower than "beyond a reasonable doubt."

The comparison to the criminal context is a bit like "comparing apples to oranges". The differences between the workers' compensation and criminal law contexts are much
greater than the similarities. In general, a very different and separate legal framework applies to each. However, it is true that occasional overlaps are seen where administrative processes begin to resemble criminal ones. (e.g., in disciplinary proceedings before administrative tribunals where a sanction would have grave consequences depriving the respondent of his or her livelihood). Perhaps the comparison lends some philosophical support to the argument that stronger protections are needed where workers face the loss of their livelihood or other grave consequences.

**Options/ Recommendations**

**Burden of Proof**
If empirical research confirms that too great a burden is being placed on workers, it could be recommended that:

- Section #97.00 of the RSCM be clarified to ensure that, while some basic evidence must be submitted by the worker to show that there is a proper claim, the substantial burden is on the WCB adjudicator.

- the sentence "the extent of the basic evidence [supplied by the worker] and the weight to be attached to it, is entirely in the hands of the adjudicator" be removed from section #97.00 of the RSCM.

**Standard of Proof**
No recommendations appear necessary.
B. Inquiry versus Adversarial Approach

Historical Perspective/ Summary of Issue

The debate about whether the appeal process should be based on an adversarial or inquiry model dates at least as far back as 1966. At that time, the Honourable Mr. Justice Charles W. Tysoe, determined that "an adversary system and a full-dress hearing with witnesses and cross-examination" and "a litigious attitude is the last thing that should be introduced into a scheme designed to rehabilitate injured workmen." In his view, the inquiry model was the more appropriate response for the WCB context. The following excerpt from his report explains some of the key differences between the two concepts:

The inquiry system as it is practiced by the Board and by other boards across Canada bears little resemblance to the adversary system. A workman who has become injured in industry reports the occurrence to the Board and to his employer. Immediately thereafter the latter and the workman’s doctor send in to the Board such information as they can give concerning the occurrence of the injury and the results thereof on the physical condition of the workman. The Board proceeds to investigate or “inquire” to the extent that seems to be necessary to satisfy itself that the workman has or has not a compensable claim. …Where the matter is in doubt, the Board searches for relevant information from all available sources. It weighs and evaluates to the best of its ability whatever evidence comes into its hands and arrives at a decision as to its trustworthiness or otherwise. In this latter respect it acts the part played by a judge or jury in an action at law. The same process is applied to the matter of the casual connection of the workman’s disability with his industrial injury and the extent of disability that is properly related to that injury. The Board arrives at its judgment on the workman’s claim on such evidence as has been submitted to it and which it has itself gathered. Two matters are of some significance. The Board may accept and act upon evidence which would not be received in a Court of law because it does not meet the rules of evidence applicable there. Moreover, the truth of any particular evidence is not subjected to the test of cross-examination by the workman or the employer or his representative, legal or lay. Whatever cross-examination there is, is conducted by the Board, which uses what in its opinion are the means best suited to sift truth from falsehood.

The goal of both systems is the ascertainment of the true facts of every case and a decision based on the truth, the whole truth, and nothing but the truth. Where there is contradictory evidence, the one who has the responsibility of determining where the truth lies may err in his judgment, and this whether the system employed has been the adversary method or the inquiry method. A plausible liar may succeed in deluding a Judge or a jury. Even skillful cross-examination is no sure and certain protection against this. However, it must be conceded that diligent questioning by a well-trained cross-examiner is the best-known means of showing up a false witness for what he is. It must not be
thought that the lack of opportunity for cross-examination by a workman-claimant or an employer makes the inquiry system as practiced by the Board less likely to be productive of decisions based on the true facts. Admittedly it may do so in some rare instances, but it is my opinion that, in the hands of conscientious and competent administrators, the inquiry system will on the whole, bring about as many correct judgments as will the adversary system. Truth can frequently be determined by weighing the evidence in the scale of reasonable probabilities.

Lawyers are far better acquainted with the adversary system than with the inquiry system. There is, I fear, a tendency to mistrust a process with which one has little or no familiarity, but this must not be permitted to blind one to the merit of the application of such a process in particular circumstances. The application of the adversary system to the workmen's compensation scheme would, I think, carry with it a measure of expense to workmen that many would find difficult to bear. It would also, in my opinion, mean that there would be delays in the adjudication of quite a number of claims. I can imagine the problems that would arise and the costs that would be incurred if persons who have some knowledge of relevant facts have to attend before officers of the Board to give evidence and be subjected to cross-examination by workmen and employers, for both should in such case have equal rights to question witnesses adverse to their interests. I think, too, of the justifiable objections doctors would have to spending their time at hearings. Moreover, contests of this nature would not be a wholesome thing to introduce into the relationship of workmen and their employers.

The inquiry system, on the other hand, involves neither workmen nor employers in any expense. There are none of the problems and difficulties associated with the attendance of witnesses -- lay and medical -- at full-dress hearings. If, by reason of special circumstances, a particular witness, in the opinion of the Board, ought to be subjected to cross-examination by a workman or employer, that can be arranged. The inquiry system carries with it all the elements likely to produce speedy decisions.

For the foregoing reasons I am persuaded that it would not be in the best interests of workmen or employers to introduce the adversary system into the administration of the workmen's compensation scheme. I think one must choose one system or the other. My choice is the inquiry system. My opinion is that, with such improvements in practices and procedures and with such safeguards against possible misuse of power as I suggest in other sections of this Report, the inquiry system is peculiarly suited to workmen's compensation administration.

Submissions by stakeholder counsel to the Royal Commission have not proposed that the current inquiry-based approach be replaced with an adversarial model (although Sayre did propose a final, third level appeal to a court of law - discussed in Chapter IV).
There is a general consensus that the inquiry based model is most appropriate for the WCB context -- for the reasons cited above by Tysoe. However, several modifications or improvements to the inquiry based model have been proposed:

1. **The appeal tribunal’s duty to investigate**
   It has been submitted that appeal tribunals do not always thoroughly discharge their duty to conduct a thorough investigation, as is required under a true inquiry based model. The measure of the panel’s duty to investigate has been questioned and it has been suggested that there should be a mechanism to insure that this duty has been discharged.

2. **Employer as a party to appeals**
   Worker advocates have submitted that in an inquiry-based system, the employer does not need to be a party to an appeal, since the investigation and any cross-examination should be the responsibility of the appeal tribunal.

3. **Need for legal representation**
   The WCRB submission points out that, in a true inquiry based system workers appearing before appeal tribunal should not have need for legal representation because the inquiry process allows the tribunal to seek out what “information or evidence is required in order to ensure it properly applies the provisions of the legislation and protects all of the rights of the individuals.” However, worker advocates have submitted that, due to the increasing complexity of the system, and the fact that the appeal tribunals do not always thoroughly discharge their duty to conduct a thorough investigation, the expertise of legal counsel is now required.

**Law and Policy**

An inquiry approach, as opposed to an adversarial one, is used by the WCRB, the Appeal Division and the MRP.

**WCRB**

Both workers and employers appear as parties to an appeal before the WCRB and both are entitled to have representatives. However, some choose not to do so, or are represented by non-legally trained persons.

The following chart from the WCRB “Chair’s Annual Report” shows that the number of represented workers at WCRB oral hearings increased in 1996 and 1997:
The WCRB is given extensive inquiry powers under s.88. Under s. 88(2) (and s.87) of the Act, the WCRB is empowered to compel attendance of witnesses, examine them under oath, compel production of documentary and physical evidence and take dispositions of witnesses. The onus is on each party to present evidence in support of his or her case. The WCRB also has power to require and receive medical or other evidence or information on oath or affidavit or otherwise as in its discretion that it considers proper to make a fair decision, and to "require a worker to attend for examination by a physician chosen by the review board."

### Appeal Division

As with the WCRB, workers and employers appear as parties before the Appeal Division and are entitled to have representatives. Again, many choose not to do so, or are represented by non-legally trained persons.

The Appeal Division has characterized its approach as “non-technical.”

Under s. 87 of the Act, the Appeal Division “has the like powers as the Supreme Court to compel the attendance of witnesses and examine them under oath, and to compel the production and inspection of books, papers, documents and things.” It may also cause depositions of witnesses. The Appeal Division is also given extensive inquiry powers under s. 88. “The Appeal Division has discretion to initiate and conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it.”

According to policy, the Appeal Division:

- "has discretion to determine what evidence it will accept in the course of conducting its proceedings.”
- may seek independent medical opinions;
- recognizes and facilitates the appearance and participation by workers, employers and lay advocates;
- allows intervention by other parties who may assist the inquiry into the merits of the issue."
The 1991 Administrative Inventory observed that, relatively speaking, lawyer involvement in the WCB system is minimal -- and that this is due to the use of employer and worker association representatives, Workers' and Employers' Advisers and the Ombudsman:

*It is no great challenge for a system like British Columbia's to minimize the use of lawyers. Rather, the significant challenge is to provide a fair and equitable system where lawyers are not needed to represent the interests of the parties involved. In general, this province has managed to meet that challenge successfully...*

1. **The appeal tribunal’s duty to investigate**

**Submissions**

**WCRB Submission**

The WCRB has offered the following commentary and recommendation on this topic:

*Each formal level of appeal has full authority to conduct inquiries as it sees fit to reach a sound conclusion on the issues before it... [Unlike the adversarial approach, this] means that workers are not necessarily put to the expense of obtaining medical evidence on their own.*

*The Appeal Tribunal [should] have full authority to inquire into all aspects of the appeal including the right to examine documents, order investigations or medical examinations and require evidence under oath.*

**Stakeholder Counsel - Sayre**

Sayre asserted that a potential disadvantage of the inquiry model is that, in practice, the appeal tribunal may not always seek out the necessary evidence. He provided an example where the attitude of the WCRB was "too bad if only we had that evidence we would have allowed your appeal." One of the Commissioners commented as follows

*That shouldn’t happen in an inquiry system. That is what an appellate body says in an adversarial system. If there is evidence out there and the Review Board is conducting an inquiry then surely with an unrepresented worker they would see that that evidence is brought before them.*

Sayre's responded that, in the past, such a scenario would have been less likely:

*In a perfect world that can be done. Certainly when the Boards of Review were first created in the 70s that was the way that they operated. It was much more common then than it is now for the members to pick up the phone and call witness to look for something that wasn’t in the file. They saw themselves as partially an appeal tribunal and partially an Ombudsperson. The Review Board, now, faces a very heavy workload and I don’t think that it is probably practical to expect that they can achieve that level of hands-on investigating on all of the
claims that come before them. By and large they are going to have to take it that when a worker comes in and submits part 2 in order to do their appeal and they say that they have their complete evidence they will take the worker at face value. The Review Board will then have to say that this is what we will make our decision on. Sure if there is an obvious gap then they should go and fill it even if it means adjourning the hearing and reconvening it later. In a lot of these cases the gap won’t be that obvious. It will be something that the Review Board will have to do a lot of digging to even realize that there was something missing there.  

[Jurisdictional comparison in progress]

Discussion

Reaffirming the inquiry based model
As discussed, submissions to the Royal Commission have not proposed replacement of the current inquiry based model with an adversarial one. It would therefore be reasonable for the Royal Commission to reaffirm that the inquiry based model should stand.

Reinforcing the duty to investigate
It has been submitted that appeal tribunals do not always thoroughly discharge their duty to conduct a thorough investigation, as is required under a true inquiry based model. Royal Commission researchers attending appeal hearings at the WCRB and Appeal Division have observed that appeal tribunals may decline to seek out missing, relevant evidence and that appeals may be denied as a result. It has been suggested that a mechanism should be instituted to ensure that appeal tribunals discharge this duty. For example, it could be recommended that guidelines be established which specify the measure of an appeal tribunal’s duty to investigate.

Recommendations offered in Chapter I of this Report respecting the elimination of backlogs and delays may also address the fact that very heavy caseloads currently make it difficult for appeal tribunals to discharge this duty.

Options/ Recommendations

The Royal Commission could reaffirm that the inquiry approach should continue to be taken, as opposed to an adversarial one.

It could be recommended that, appeal tribunals should have full authority to inquire into all aspects of the appeal including the right to examine documents, order investigations or medical examinations and require evidence under oath.

It could be recommended that guidelines be established which specify the measure of an appeal tribunal’s duty to investigate.
2. **Employers as parties to appeals**

**Submissions**

**WCRB Submission**
The WCRB offered the following submission on the topic:

> Many employer respondents are reluctant to appear at Review Board hearings for labour relations reasons, and when they do appear, are often reluctant to pursue an aggressive cross-examination on difficult issues for the same reason. The inquiry approach permits this to take place, while still assuring the respondent that a thorough examination of the evidence will take place. In a traditional adversarial system this would not be possible."

**Stakeholder Counsel - Steeves**
Steeves submitted that the involvement of employers as parties to appeals detracts from the inquiry nature of the process:

> One obstacle to the informal nature of the work of the Review Board has been the increased activity of employers in the appeal process. This has made the process decidedly adversarial as workers are having to fight the Board and the employer in the appeal process. Workers have become relatively disadvantaged in these circumstances and this is compounded by the fact that employers have more resources to employ consultants and other representatives. And there are very serious issues of confidentiality that arise when workers' claim files are disclosed to employers. A final feature of increased employer activity in the appeal system, especially at the first level, is that their presence creates additional delays…

> In our view a fundamental change is needed at the first level of appeal to try and restore the inquiry nature of appeals before the Review Board.

> We believe that employers should not be given party status at the Review Board. They may continue to participate as witnesses in order to provide evidence to the Review Board. However, they could not give argument in a workers' appeal or commence their own appeal. In the event that the Review Board makes a finding and the employer does not accept that finding they would then have the right to take that matter to the Appeal Division. Employers would also have party status in any workers' appeal to the Appeal Division.

> These changes would expedite the work of the Review Board by relieving it of the procedural issues of dealing with two parties, they would reduce the adversarial tensions in the current system, they would facilitate the use of an inquiry model but they would also permit employers a right of appeal to the Appeal Division.

> We recommend that the Act be amended to state that only workers have a right to appeal decisions of the Board to the Review Board.\(^{39}\)
The concept is to change the Review Board to wholly an inquiry model of an appeal system. That is it is up to the Review Board to make the inquiries through controlling their own procedures and so on and to deal with the appeal in the absence of the employer as a party. 40

Stakeholder Counsel - Sayre
Like Steeves, Sayre submitted that employers should not have party status:

Workers’ compensation is a no-fault social insurance program which replaces the adversarial process of court proceedings. Allowing an employer the status of an adverse party to every claim contradicts this fundamental principle, and reintroduces unnecessary and destructive elements of the adversarial process. An employer should only be a party to a decision such as a penalty assessment which imposes direct financial consequences. 41

The true parties to a compensation dispute are the worker and the Board. In an essentially no-fault system, the employer need not and should not be considered a separate party in its own right. It is simply one of the collectively insured within the subclass that may be affected by a claim. If our submissions on a new approach to employer accountability are accepted, the employer will not be directly affected by a claim unless it has been found by the Board to be responsible because of something which it has done or omitted to do. That will be a separate decision focusing on employer responsibility, leading to a separate or review appeal process. Consistently with our position on the employer’s role in a compensation appeal, the injured worker should not be a party to this process either. 42

Stakeholder Counsel - Winter
Winter submitted that employers should retain party status:

For the employer not to have party status …raises a lot of concerns in my mind. Take the cancer cases .. the employers were respondents – they went ten days. Those were very significant cases to put in the system; …The precedent value is such that the employer should obviously have the right to be party status. (It is not sufficient) to probe the whole aspect of the case from the view point of being a party as opposed to just being a witness, having the opportunity to come up and present evidence but that is the end of that. 43

[Jurisdictional comparison in progress]

Discussion
Tysoe’s description of the inquiry based model included employers as parties to appeals. It would be a significant departure from longstanding practice to exclude them. As well, as pointed out by Winter, employers’ presence may result in a more informed process.
However, a persuasive argument has been offered in support of the workers’ position. That is, that an employer’s presence as a party contributes to a more adversarial climate, which runs counter to the aims of an inquiry based model. If this approach is taken in other jurisdictions it would add additional weight to that position.

**Options/ Recommendations**

[Pending jurisdictional comparison]

3. Need for legal representation

**Submissions**

**WCRB Submission**

The WCRB offered the following submission on the topic:

- [Unlike the adversarial approach], appellants appearing in front of workers’ compensation appeal bodies are often not represented in any fashion. The vast majority of those who are represented have as their advocates union representatives, Workers’ or Employers’ Advisers, injured workers associations and other non-legally trained individuals... [The inquiry process allows the tribunal to] seek out what information or evidence is required in order to ensure it properly applies the provisions of the legislation and protects all of the rights of the individuals.

**Stakeholder Counsel - Sayre**

Sayre submitted that workers should be entitled to free representation:

All workers should be entitled to free legal advice and assistance with their claim. Where there is a dispute, and the issues are complex and financially important, the worker should be entitled to representation by a lawyer or other trained advocate. Workers should not automatically be denied such assistance simply because they may belong to a union.

Given the complexity of the legislation, the issues, and their importance to a worker, anyone who has suffered a serious injury must be entitled to free, independent legal advice and representation. Without this, other rights will have little meaning.

The 1987 Ombudsman Report discusses the need for trained representation, and another theme which the Commission heard repeatedly from injured workers is that they do not now feel that they have adequate access to advice and representation. See the submission to the Board of Governors from the Canadian Bar Association, which proposes a limited, partial response to this concern.

[Note: I have requested this from Gerry Schive -- follow up required]
Stakeholder Counsel - Steeves
Steeves offered the following alternative proposal to paid legal representation for workers

[The Royal Commission has] heard about the increasing complexity of appeals and of the increased expertise required to conduct these appeals. Another feature of the current appeal system is the increased activity of employers and this too makes it more difficult for workers to participate in the appeal system.

The primary source of assistance to workers in the appeal system is the office of the Workers' Advisors. This office contains considerable expertise but it is not available to all workers because of the heavy demand on the office. Further, Workers' Advisors do not represent or provide advice to workers on health and safety matters. We have already recommended that workers' advisors be given resources to advise workers on issues relating to election for compensation.

We recommend that resources be increased to the office of the Workers' Advisors so that they can represent and provide advice to more workers. Further, the role of the workers' advisors should be expanded to permit advice and representation to workers on occupational health and safety matters.38

Stakeholder Counsel - Winter
Winter countered Steee's assertion that employers have more resources to hire consultants and other representatives. In support of this position, he cited a letter from the WCRB addressed to Terry Robertson, containing "shocking" information about the level of representation that the worker has as opposed to the employer [See appendix #2 for a copy of this letter]49:

...In all years except [one]... the level of representation for the worker is substantially greater than the employer. And what was really surprising was the number of lawyers involved for workers. But the main categories are worker's advisor, lawyer, and union representative. For the employer you have some consultants, you have some organization, some lawyers but the percentage when you work out the unrepresented is always much greater on the employer's side for their appeals than the worker's side. So I don't think that justifies the argument that employers have the resources.50

Ombudsman's 1987 Report
The Ombudsman's 1987 report recommended more funding for representation on appeal.51

[Jurisdictional Comparison in progress]
Note: A WCB briefing paper by the Policy and Regulation Development Bureau has stated that "representation by lawyers was said by one author in 1989 to be becoming more common in some jurisdictions, particularly as a response to the development of external appeal tribunals and the expansion of experience rating." 52
**Discussion**
It is clear that appeals are becoming increasingly complex and that significant expertise is required. However, it is also true that introducing free legal representation would promote a more adversarial climate and run counter to the philosophical underpinnings of an inquiry based model. As well, it may add significant expense to the appeal process. Steeves' proposal appears to offer a balanced compromise position. That is, it could be recommended that "resources be increased to the office of the Workers' Advisors so that they can represent and provide advice to more workers and "the role of the workers' advisors [could] be expanded to permit advice and representation to workers on occupational health and safety matters."

To be fair, it could be recommended that resources be increased to the office of the Employers' Advisors in a similar fashion. The letter to Terry Robertson described above [see Appendix B of this Report] is not determinative one way or the other, regarding the question of whether employers have greater resources than workers to hire consultants and legal representatives. While some larger corporations clearly have greater resources than their employees, some employers who operate on a small scale may have very limited resources.

**Options/ Recommendations**
It could be recommended that resources be increased to the office of the Workers' Advisors and Employers' Advisors so that they can better represent and provide advice to more workers and employers.
The scope of an appeal is defined by statute:

What matters may be the subject of an appeal? The scope of an appeal is defined by the statute granting the right of appeal. The appellate body has no mandate to go beyond that. Sometimes the mandate is so broad that the appellate tribunal may rectify any errors of fact and law and do whatever it considers appropriate in the circumstances of the case... However broad the appellate body’s powers, it should not retry the case unless the statute expressly permits it to do so. Sometimes statutes permit appeals only on questions of law or of mixed fact and law, preventing appeals on pure questions of fact. Some statutes permit appeals only from final orders, while others permit appeals from any orders, including interlocutory orders.

As discussed in Chapter I of this report, narrowing the scope of the final appeal has been proposed as a potential solution to reduce the number of appeals, improve appeal timeliness and to reduce or eliminate appeal backlogs. For example, WCB Compensation Services staff have submitted that there is a need "to limit the reasons for appeal and the scope of appeals." Such limitations could include:

- a final appeal on the record rather than de novo;
- narrowing the grounds of appeal (i.e. restricting final appeals to questions of law, restricting the final appeal body’s authority to hear matters to those raised in the decision letter and those raised in the notice of appeal); and
- narrowing the jurisdiction of the final appeal body from a substitutional role to a supervisory role.

Submissions on each of these sub-topics are examined below:

1. **De Novo or On the Record Appeals**

   **Summary of Issue**

   Should Appeal Hearings be de novo or on the Record?

   A "hearing de novo" has been defined in Black’s Law Dictionary as follows:

   "Generally, a new hearing or a hearing for the second time, contemplating an entire trial in [the] same manner in which [the] matter was originally heard and a review of [the] previous hearing. On hearing "de novo" [the] court hears [the] matter as court of original and not appellate jurisdiction."
Law and Policy

Appeal Division:
The Appeal Division considers its appeals from WCRB findings to be de novo, despite the fact that some of those appeals may proceed on the basis of the written record only. This is presumably because new evidence may be submitted and new submissions may be made on appeal whether or not an oral hearing is held. The following explanation has been offered:

The Appeal Division hears appeals from Review Board findings on a de novo basis. Section 96(3) provides that, on an appeal from Review Board findings, the Appeal Division may reopen, rehear and redetermine any matter that has been dealt with by the Review Board. The Governors said in decision #75 (1994), 10 WCR 753, "The Appeal Division has the discretion to initiate and to conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it."

WCRB:
Subject to the Regulation, the WCRB may conduct an appeal in the manner it considers necessary and is not required to hold an oral hearing. WCRB appeal hearings may be oral or "read & review." New evidence may be submitted and new submissions may be made on appeal whether or not an oral hearing is held.

In a recent submission to the Royal Commission, the WCRB characterized its appeals as hearings de novo. Conversely, at a recent round table discussion at the Royal Commission, WCRB members described the hearings as a combination of de novo and on the record.

Submissions

Stakeholder Counsel - Steeves

Steeves submitted that "there are not 2 de novo hearings but 2 de novo appeals" in the appeal process. His reasoning was that, "at the Review Board the normal thing is to have a hearing and at the Appeal Division it is normally by written submissions."

Stakeholder Counsel - Winter

Winter advocated a trial de novo for the single level of appeal that he proposed.

Stakeholder Counsel - Sayre

Sayre made the following submission on this topic:

It is our very strong position that no matter how many levels of appeal we end up with at the end of the day they should have the capacity to hear new evidence and resolve the issues according to the merits and justice of the case before
them. Any artificial restrictions in that jurisdiction will simply defeat the whole purpose of having a broad based appeal system. ... we say that all appeal bodies should be de novo. 63

WCRB
The WCRB recommended a single level of appeal de novo (with an option for either party to request reconsideration of a panel's decision on the basis of error of law). 64

[Jurisdictional comparison in Progress]

2. Grounds of Appeal

Grounds for appeal and leave to appeal provisions act to restrict the kinds of appeals which may be heard. 65 Under a typical application to an administrative tribunal for leave to appeal, the appellant "must establish a fairly arguable case of substance and importance and show reason to doubt the correctness of the [impugned] decision." 66

The applicant need not show that he or she is likely to succeed on the merits. If the grounds upon which an appeal may be taken are restricted by statute, the appellant must show that the appeal is permitted on grounds. For example, an appeal under a statute that permits appeals only on questions of law must raise a question of law. 67

Law and Policy

WCRB:
Under the Act, leave is not required for an appeal to the WCRB -- nor are specific grounds for appeal listed as such. However, the scope of the WCRB's authority to hear appeals is restricted under s.90(1) of the Act. 68 Section 90(1) states as follows:

"Where an officer of the Workers' Compensation Board makes a decision under this Act with respect to a worker, the worker, or if deceased, his dependents, or his employer, or a person acting on behalf of the worker, dependents or employer, may, not more than 90 days from the day the decision is communicated to the worker, dependents or employer, or within another time the review board allows, appeal the decision to the review board in the manner prescribed by the regulations." 69

The appeal must be from a specific decision contained in the original WCB decision letter. The WCRB does not have authority to review the WCB's treatment of a claim generally. It also has no "binding authority to criticize the actions of the WCB or its officers." 70
Appeal Division:
Leave is not required for s.91 appeals (claims adjudication) to the Appeal Division, nor are grounds for appeal specifically listed under the Act. Section 91(1) of the Act provides that:

"Where the review board makes a finding under s.90, the worker, the worker’s dependents, the worker’s employer or the representative of any of them, may, not more than 30 days after the finding is sent out, or within a longer period the chief appeal commissioner may allow, appeal the finding to the appeal division."

As well, under s.96(3), the Appeal Division is empowered to reopen, rehear and redetermine any matter that has been dealt with by the WCRB.

The scope of appeals to the Appeal Division is defined further under Decision of the Governors #1:

"The role of the Appeal Division is to inquire into the merits of matters properly before it. In appeals commenced under s.91...The Appeal Division has discretion to initiate and conduct a full inquiry into all of the issues arising out of an appeal once the matter is before it..."

Under Appeal Division decision #1, "All matters raised in the decision letter which was appealed to the Review Board may be considered in the appeal.” Until 1996, the majority of Appeal Division activity involved appeals from WCRB findings.

Note that the Appeal Division’s jurisdiction to hear appeals has been specifically limited to “error of law or fact or contravention of a published policy of the Governors” in the following circumstances:

- Under s.96(6) & 96(6.1), an employer who has received a notice of assessment, classification, special rate, differential or additional assessment, levy, contribution, monetary penalty, apportionment or shifting of cost between classes, may appeal to the Appeal Division on the grounds of error of law or fact or contravention of a published policy of the Governors.

- Under s.96(4) of the Act, the president of WCB may, “not more than 30 days after a finding of the Review Board is sent out, refer the finding to the appeal division for redetermination on the grounds of error of law or fact or contravention of a published policy of the Governors." Such a referral may be initiated by a WCB officer who has reviewed the WCRB’s findings.

- The Appeal Division’s jurisdiction to reconsider an appeal has also been specifically limited. Under s.96.1 of the Act, “a decision of the appeal division is final and conclusive”. However, "a worker, the worker’s dependents, the worker’s employer or the representative of any of them may apply to the Chief Appeal Commissioner for reconsideration of a decision on the grounds that new evidence has arisen or has been discovered subsequent to the hearing of the
matter decided by the Appeal division.” The Chief Appeal Commissioner may decide to grant the “reconsideration” based on criteria listed in s.96.1(3).

a. **Restricting the final appeal body’s authority to hear matters to those raised in the decision letter and those raised in the notice of appeal**

**Law and Policy**

**WCRB**
The WCRB only hears matters in the decision letter.

**Appeal Division**
The Appeal Division hears "all matters raised in the decision letter that was appealed to the Review Board." and "the Review Board finding may be considered issues in the appeal." The Appeal Division will also review WCRB findings not specifically appealed to the Appeal Division. Acting Chief Appeal Commissioner Kobayashi cited Appeal Division decision #92-0634 in support of this approach, which provides in part as follows:

> The requirement under the Act that the Appeal Division decide each appeal with reference to the merits and justice of the case calls for a broad interpretation of the word "finding" in the context of subsection 91(1).

> There is ample judicial authority for the proposition that workers’ compensation legislation is to be regarded as a remedial legislation and interpreted liberally and non-technically to facilitate the expeditions and fair handling of injured workers’ claims.

> ... If we are to prevent the Workers’ Compensation appellate structure from becoming a legal maze of technical complexities, it is imperative that the Appeal Division conceive of its role in the broadest possible terms compatible with the statute.

> ... Published policy is consistent with an expansive interpretation of the Appeal Division’s jurisdiction... The governors’ Decision No. 1 states:

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

> The discretion to enquire into "all of the issues arising out of an appeal" entails a broad discretion... In selecting the issues on which it will focus, the Appeal Division’s concern must be a determination of the issues essential to findings consistent with merits and justice of the case.

Kobayashi recently commented that "in exercising our discretion to inquire into matters raised in the decision letter and Review Board findings that were not specifically
appealed to the Appeal Division, the Appeal Division must ensure compliance with the rules of natural justice. This means notifying the parties that the issue is under consideration and inviting submissions."78

**Michael Karton**

Michael Karton asserted that the Appeal Division has widened the scope of its jurisdiction to hear appeals even further. In support he has cited several examples in which the Appeal Division not only made findings on decisions which had not been appealed, but also made original decisions regarding issues that had not been the subject of any decision by a WCB adjudicator.79

Karton has offered the following description of the approach of the Appeal Division in this area:

> In other words, the Appeal Division has the discretion to consider issues in decisions which have not been appealed and issues which have not been adjudicated at any level, and the word "enquiry" in the decision of the Governors includes making decisions on issues which have not been appealed. Moreover, the Appeal Division has the discretion to "focus" on any issues it deems essential. (see also A.D. #91-0902, 92-0008, 92-1403, 92-1552, and 96-0674).80

**b. Restricting final appeals to questions of law**

**Submissions**

**Tysoe**

The debate about whether the appeals should be limited to questions of law dates back as far as 1966. At that time, the Honourable Mr. Justice Charles W. Tysoe, commented as follows:

> It appears to me that the union leaders, while complaining of alleged injustices perpetrated by the Board, feel that a remedy for them that involves the introduction of rights of appeal on questions of fact to the Courts or to some other outside body or person would be worse than the disease. Accordingly, they shy away from any such cure. Some of them have advocated a right of appeal to the Courts on questions of law, including questions of interpretation of the Act. I cannot help feeling that this was based on a lack of appreciation of what is a "question of law" as distinct from a "question of fact" and of how few claims involve the former alone. The truth is that practically every claim depends for its validity on matters of fact or mixed fact and law, and, so long as there be any evidence to support the factual finding of the Board, a right of appeal on a question of law would be of value to a workman only in the rarest of cases. I would add that the existence of such a right could become the cause of even more dissatisfaction than now exists. It is very difficult to explain to a layman the difference between a question of law, a question of fact, and a question of mixed fact and law as it applies in his particular circumstances. Workmen
whose claims have been disallowed in whole or in part, seeing or hearing that some other workman in like case has succeeded in an appeal on a question of law, might well wonder and continue to wonder why they themselves are helpless. I fear that misconceptions and misunderstandings would be prevalent. Bearing in mind in how few cases a right of appeal to the Courts on a question of law would be of any benefit to a workman, I am convinced that on balance the granting of it would be productive of far more harm than good to the general body of labour. I must, therefore, reject the request made in this regard. I might say that no segment of industry supported the request.81

Stakeholder Counsel - Winters
Winters pointed out that in an appeal with limited grounds there is stronger incentive to submit evidence properly the first time and "not to miss anything."82

Stakeholder Counsel - Steeves
Steeves took the following view:

Limiting any reconsideration to errors of law eliminates any further review of factual matters and any further review of medical issues. The latter especially are the heart of the compensation system. Important cases involving new areas of medicine and science will not have the benefit of deliberation at more than one level of appeal. It is reasonable to expect that judicial review applications in these circumstances will be more frequent and more successful.83

Stakeholder counsel - Sayre
J. Sayre made the following submission on this topic, on behalf of injured workers:

There should be a final right of appeal to the courts respecting issues with important consequences to injured workers...84

We would not favour limiting such appeals to issues of law or jurisdiction, as that would be little improvement over the access to the courts which workers now have by way of judicial review. At what will clearly be the final hope for vindication, a worker should be able to talk about the real issues, and to receive a decision based on those issues.

If it is felt that allowing all decisions to be appealed to the Court would result in too many appeals for the system to absorb, we would prefer to see a system of applications for leave to appeal a registrar-like official used to control the floodgates, rather than restricting the grounds for appeal. The leave process can be flexible enough to recognize that some appeals should simply proceed because of their financial importance to the worker, while others might to granted leave because they do involve a legal issue of general importance.85

Jurisdictional Comparison in progress]
3. Narrowing the jurisdiction of the final appeal body from a substitutional role to a supervisory role

Summary of Issue

The question is whether appeal bodies should have a substitutional role, as opposed to a supervisory one, and if so whether this role should extend to discretionary decisions of WCB adjudicators.

As well, this issue raises concerns about the independence of the WCRB. The WCRB’s ability to review the WCB’s exercise of discretion has been limited by WCB policy. It may be that the WCB’s exercise of discretion is therefore not subject to a sufficient degree of independent scrutiny. That is, it is arguable that the WCB is undermining the independence of the WCRB by continuing to define and restrict its jurisdiction. [Note: This second issue is discussed in more detail in Chapter IV of this Report concerning the independence of appeal bodies]

Law and Policy

A number of sections in the Act confer broad discretionary powers on the Board and its compensation claims adjudicators. For example, see sections 17(14), s.17(16), s.32(1), s.33(3), s.35(1) and s.35(2).

WCRB:
The WCRB’s ability to review the WCB’s exercise of discretion has been limited by WCB policy in #102.24 of the RSCM. Various views commonly taken of the role of an appellate tribunal are noted in the policy. One view holds that the tribunal should have a "substitutional role". On this view "the role of the tribunal is to substitute its judgement for that of the person making the decision." On the second view, the role of the tribunal is merely "supervisory. It does not substitute its judgement for that of the initial adjudicator, but rather, ensures that "when the discretion is exercised by an officer of the WCB, it is properly exercised." The policies adopt the second, more restrictive view with respect to discretionary decisions. Furthermore, they set out guidelines for the appellate tribunal regarding when it may send a decision of an adjudicator back for reconsideration of discretion.

Michael O’Brien, Chair of the WCRB, expressed surprise that the RSCM contained policy #102.24 and commented that no one at the WCRB follows it.

Appeal Division:
RSCM policy #102.24 specifically concerns the WCRB only and does not appear to have been extended to the Appeal Division by implication.

Acting Chief Appeal Commissioner, Cassandra Kobayashi, has recently commented that "In making our decision, we substitute our finding for that of the Review Board."
This substitutional jurisdiction is exercised in accordance with s.99 of the Act, which requires that the Board decision be given in accordance with the merits of the case. She did not comment on whether this substitutional role extends to a review of the initial adjudicator’s discretion.

Kobayashi stated that the Appeal Division does not take a substitutional role respecting s.96 employer appeals. Rather, such an appeal can be allowed only if the Appeal Division finds an error of fact or contravention of a published policy of the Governors. 87

Submissions and Reports

Policy and Regulation Development Bureau

It was suggested in a recent WCB briefing paper by the Policy and Regulation Development Bureau that the scope of the Appeal Division’s jurisdiction to hear appeals could be restricted to a supervisory role in the interest of reducing delays:

In B.C., both the Review Board and the Appeal Division now exercise a “substitutional” rather than a “supervisory” role. When exercising a substitutional role the appeal tribunal substitutes its judgment for that of the person making the previous decision. An appeal tribunal that exercises only a supervisory role does not substitute its judgment for that of the preceding adjudicator, but simply ensures that a decision had been made in accordance with proper law and policy. Perhaps the Appeal Division, as the second level of appeal, could be restricted to a supervisory role.

Such a restriction would presumably reduce both the number of matters that could be appealed and the length of time required for deciding each appeal. However, it would mean that the WCB’s final decision-making authority on factual matters would be assigned to an external agency, the Review Board. This would be a significant departure from the intent of section 96(1) of the Act, which bestows exclusive jurisdiction on the WCB to determine all matters of fact and law under the Act. In addition, restricting the Appeal Division jurisdiction to “legal” issues, and precluding it from considering new facts, could exacerbating the revolving door aspect of the appeal system. It might also increase the need for legal representation, as arguments would be directed to whether grounds had been established for an appeal. 88

Karton

Michael Karton has commented as follows:

Is the Appeal Division limited to a supervisory role, or can it substitute its judgment for that of the Review Board, even in the absence of error? Board published policy (#102.24 RSCM) states that the [Review]Board (sic) only has a supervisory role. However the Appeal Division panel concluded that it has a substitution role in considering these appeals (EOT) and that, although it should give greater weight to Review Board policy, it need not do so in considering individual appeals. 89
[Jurisdictional comparison in progress]

**Discussion re: De Novo or On the Record Appeals/ Grounds of Appeal/ Substitutional or Supervisory Role**

[Note that the following discussion uses generalities when referring to levels of appeal (i.e. does not refer specifically to the WCRB or Appeal Division or any of the proposed models) because it is uncertain how many levels of appeal will be recommended by the Royal Commission. The question of how many levels of appeal are necessary is discussed in Chapter IV.]

No submission has recommended narrowing the scope of a first level of appeal. However, a variety of suggestions have been received which favour narrowing the scope of a final appeal (or final reconsideration) to some extent.

The extent of such measures will depend on the importance which the Royal Commission places on competing aims. Those who place the highest priority on:

- reducing the number of appeals;
- improving appeal timeliness;
- reducing or eliminating appeal backlogs; and
- reducing costs

will tend to favour narrowing the scope of a final appeal to some extent. That is, they will favour implementing all or some of the following limitations:

- a final appeal on the record;
- a final appeal restricted to questions of law;
- a final appeal restricted to hearing matters in the decision letter and the notice of appeal; and
- a final appeal restricted to a supervisory role.

Those who place the highest priority on:

- affording workers in dire circumstances the fullest opportunity to be present their case;
- promoting medical and scientific debate; and
- promoting refinement and focussing of issues through several full levels of appeal

will tend to favour a final appeal with a wider the scope. They will favour implementing all or some of the following features:

- a final appeal de novo;
- no restriction of final appeals to questions of law;
- no restricting of a final appeal body's authority to hearing matters to those raised in the decision letter and those raised in the notice of appeal; and
- a substitutional role for the final appeal body.

**Recommendations/ Options**

Depending on how many levels of appeal are recommended by the Royal Commission, it could be recommended that the scope of the final appeal level should be limited as described above. A final conclusion on this matter can not be drawn until the jurisdictional comparison has been considered and a decision has been reached regarding the appropriate number of appeal levels.

[Note: a preliminary recommendation in this regard has been offered in Chapter IV of this report]
D. **Increasing the Frequency of Oral Hearings**

**Summary of Issue**

Oral hearings on appeal have been decreased in an effort to reduce delays and backlogs. However, this has resulted in some dissatisfaction among stakeholders. It has been submitted that oral hearings should be granted with greater frequency -- particularly at the Appeal Division level.

**Law and Policy**

**WCRB:**
Subject to the *Regulation*, the WCRB may conduct an appeal in the manner it considers necessary and is not required to hold an oral hearing.\(^90\) According to the 1997 “Chair’s Annual Report” \(^1671\) or 42% of oral hearings from worker appeals were allowed\(^91\) and the number of oral hearings increased by 15%.\(^92\)

**Appeal Division:**
A party may request an oral hearing, but must provide reasons why an oral hearing is necessary.\(^93\) The decision about whether or not it will be oral is made by the Chief Appeal Commissioner or her delegate.\(^94\) The following statistics show the approximate percentage of oral hearings held by the Appeal Division in recent years:\(^95\)

<table>
<thead>
<tr>
<th>Year</th>
<th>Percentage</th>
</tr>
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<tbody>
<tr>
<td>1992</td>
<td>10%</td>
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<tr>
<td>1993</td>
<td>10%</td>
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<tr>
<td>1994</td>
<td>9%</td>
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<td>1995</td>
<td>7.4%</td>
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<tr>
<td>1996</td>
<td>8%</td>
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</tbody>
</table>

The 1997 Appeal Division Annual Report offers the following statistical information on the topic:

*The Appeal Division held 130 oral hearings during 1997. 58 were heard by non-representational appeal commissioners sitting alone. 72 were heard by panels of three appeal commissioners.*

*The total number of decisions issued in 1997 was 1768; oral hearings were held in approximately 7.4% of cases. This represents a small decrease from the 1996 figure of 8% of cases. The Appeal Division held oral hearings in 7.4% of cases in 1995, 9% in 1994 and 10% in both 1993 and 1992.*

*Of the 130 oral hearings during 1996, 100 concerned claims issues (one of which related to a section 96(4) referral by the president), 20 related to employer prevention penalty appeals, 8 related to employer assessment appeals, and 2 related to section 11 determinations.*\(^96\)
Submissions
Policy and Regulation Development Bureau

The following discussion on the topic was offered in a recent WCB briefing paper by the Policy and Regulation Development Bureau:

In February, 1986, new legislation and regulations were enacted that, in part, aimed to deal with backlogs by streamlining the Review Board process. Previously, there was a general right to an oral hearing before a three person panel. Since then, the decision may be made by one person and a request for an oral hearing may be declined.

...The right to an oral hearing is a common demand by the parties to workers’ compensation appeal systems. This may be particularly important if no oral hearing is granted at the prior level of adjudication. One author pointed out in 1989, that, except in B.C., generally there is a right to an oral hearing by the worker, and often the employer, at one level in the adjudicative structure. This situation has not changed in B.C. As indicated above, the Review Board changed its practice of automatically granting hearings because of the size of its caseload. The Appeal Division has a discretion whether to grant an oral hearing.

Stakeholder Counsel - Sayre

J. Sayre made the following submission on the topic on behalf of injured workers:

Oral hearings are denied almost routinely, forcing workers to try to present their own case in writing, or to find an advocate able and willing to do so for them.

In his view, the Appeal Division usually refuses to hold oral hearings because "is no credibility issue involved and because the issue is purely legal."

Appeal Division Acting Chief Appeal Commissioner

Sayre recently asked Acting Chief Appeal Commissioner Kobayashi why the Appeal Division has granted so few oral hearings. She responded that oral hearings are typically only granted where credibility is at issue or issues are very complex - and that they are not usually granted where written submissions are comprehensive, the issue is purely legal or it is a matter of interpretation of evidence. She conceded that the percentage of oral hearings appears low and noted that this is partially a question of allocation of limited resources. She commented further as follows:

The Appeal Division makes its decision on whether to hold an oral hearing based on the case before it. We don’t have a quota for hearings; we don’t aim for particular numbers – we have the benefit of the Review Board’s tape on file. That is automatically disclosed as part of the disclosure package – in cases where are a request is made by the appellant a preliminary decision is made as to whether this is the kind of case that might benefit from an oral hearing – whatever that – if an oral hearing is not granted at that stage it is still open to the panel to have an oral hearing depending on what is often where the issue is one of credibility the
Appeal Division will hold an oral hearing. The tendency if it is a medical – a matter of medical evidence the Appeal Division would tend not to hold an oral hearing.\textsuperscript{102}

Stakeholder Counsel - Steeves
Steeves made the following submission on behalf of the BC Federation of Labour:

\textit{We have a concern about the lack of oral hearings before the Appeal Division. While most appeals before the Review Board are conducted through hearings the reverse is true at the Appeal Division. We recommend that the Appeal Division amend their policies to permit more oral hearing of appeals.}\textsuperscript{103}
\textit{...In terms of representation it may take more skill to do a written submission as an advocacy function then to appear at a hearing and do your best.}\textsuperscript{104}

[Jurisdictional comparison in progress]

Discussion
The same kinds of considerations apply in this context as in the above discussion. The extent to which oral hearings should be increased depends on the importance which the Royal Commission places on opposing aims.

That is, those who favour improving appeal timeliness and reducing or eliminating appeal backlogs will tend to support fewer oral hearings.

Those who place the highest priority on affording workers in dire circumstances the fullest opportunity to be present their case will tend to favour an increase in oral hearings.

A possible compromise solution may be found in the previous section of this Chapter. That is, it has already been suggested that the Royal Commission could recommend that resources be increased to the office of the Workers' Advisors and Employers' Advisor so that they can represent and provide advice to more workers and employers. If so, it could be further specified that the offices of the Worker's Advisor and Employers' Advisor should allocate a portion these additional resources towards development of an improved program to assist workers and employers in the preparation of written submissions.

Recommendations/ Options
If the Royal Commission recommends that resources be increased to the Offices of the Workers' Advisor and Employers' Advisor, it could be further specified that the offices of the Worker's Advisor and Employers' Advisor should allocate a portion these additional resources towards development of an improved program to assist workers and employers in the preparation of written submissions.
E. **Extensions of Time**

**Summary of Issue**

It has been submitted by the WCRB that the 90 day time limit under s. 90(1) to launch an appeal is too short.

**Law and Policy**

**WCRB:**
Under s. 90(1) of the Act, a worker, dependent, employer, or representative has 90 days from the day the decision is communicated to initiate an appeal. The WCRB has discretion to extend this limitation period.\(^{105}\)

**Appeal Division:**
Section 91(1) of the Act provides that the worker, the worker’s dependents, the worker’s employer or the representative of any of them, may launch an appeal within 30 days after a WCRB finding is sent out, or within a longer period the chief appeal commissioner may allow.\(^{106}\) Extensions are allowed for several reasons, including “exceptional circumstances” and substantial & material new evidence.\(^{107}\)

"Under s.96(4) of the Act, the president of WCB may, "not more than 30 days after a finding of the review board is sent out, refer the finding to the appeal division for redetermination on the grounds of error of law or fact or contravention of a published policy of the Governors."\(^{108}\)

The 1997 Appeal Division Annual Report includes the following statistical information on this topic:

> In 1997, 235 applications were received for an extension of the 30 day time limit for appealing to the Appeal Division. …The number of extension of time requests in 1997 represents a 7% increase over the number of such requests in 1996 (219) and a 28% increase over the number of such requests in 1995 (184). “1997 Annual Report of the Appeal Division” \(^{109}\)
There were 140 written decisions during 1997 on applications for an extension of time to appeal. In addition, there were 82 withdrawals of requests for an extension of time.\cite{110}

**Submissions and Reports**

**WCRB**

It has been submitted by the WCRB that the 90 day time limit to launch an appeal is too short. This "is based on a review of several thousand applications for extensions of time and on the high proportion of those applications which are normally granted.\cite{111} The WCRB has recommended extending the limit to one year and eliminating provisions for extending the time limit:

*Appeals to the Tribunal [should] be made not more than one year from the day the decision is communicated to the worker, dependants or employer, and that each decision of the Board must contain notice to the worker, dependants or employer of his or her appeal rights, including the time limit.*

*There [should] be no provision for extension of this time.\cite{112}*

\begin{figure}
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\includegraphics[width=\textwidth]{extension_of_time_requests.png}
\caption{Extension of Time Requests by Type}
\end{figure}
Stakeholder Counsel - Steeves

Steeves made the following submission regarding extension of WCRB time limits:

Currently, section 90 of the Act requires a worker or employer to file an appeal within 90 days of the decision being appealed unless there are special circumstances. The Review Board explained the volume and success rates of extension of time applications. In 1996, for example, the success rate for extension of time applications where the days out of time were about one year was well over 50%. Apart from the cost of these applications there are issues of fairness when an otherwise meritorious appeal cannot proceed because of timeliness problems. The Review Board recommended extending the time for appeal to one year and we support that position.

We recommend that Section 90 of the Act be amended to provide for an appeal to the Review Board within one year of the decision being appealed. 113

Stakeholder Counsel - Winter

Winter expressed the following view on the subject:

I personally have a concern with having one year .. because I just think that is too long due to both the nature of the cases that we are dealing with, availability of witnesses -- memories fade and it just adds more time to the end of the process because you already have a year at the front. I think that people have adapted well when the rules are put on them but the Review Board doesn’t have the same rules so we have to adapt to other rules with the Review Board. 114

…Currently to the Review Board and the Medical Review Panel it is 90 days to start and for the Appeal Division it is 30 days. I believe that that time frame is sufficient – somewhere between the 30 and the 90 day range no matter what the structure looks like. 115

Discussion

WCRB statistics show that the 90 day limitation period is routinely extended in a large volume of cases. Such extensions are arguably justifiable in the interest of promoting "fairness when an otherwise meritorious appeal cannot proceed because of timeliness problems." If this practice is to continue, it may simplify matters, administratively speaking, to adopt the WCRB proposal.

However, Winter has expressed some legitimate concerns about lengthening the process, contributing to delays and promoting "fading memories."

The Royal Commission could adopt a compromise position, accepting the WCRB proposal to extend the 90 day limitation period, but for a shorter period of time -- for example, for 6 months. The jurisdictional comparison would be helpful in this regard,
to determine what time periods are typical for extensions and to compare exceptions and grounds for exceptions.

**Recommendations/ Options**

[Pending jurisdictional comparison]

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4. He suggested that the Act or policy should be amended to clarify the situation. --Injured Worker Submissions, G-INJ-185-Benson. Supplemented by notes taken by Karen Ryan at public hearing, New Westminster, April 16th, 1997.
5. Injured Workers Submissions, B-INJ-192- Marjanovic, Public hearings, April 11th.
7. A "presumption " has been defined as follows: "A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence. A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence, or (b) a presumption affecting the [standard] of proof." Blacks, *supra*, note 3.
8. **Section 5(4):** Where an injury is cause by an accident, where the accident arose out of employment, unless the contrary is shown, it is presumed to have occurred in the course of employment. Where the accident occurred in the course of employment, unless the contrary is shown, it is presumed that it arose out of the employment.

**Section 6(3):** Where a worker becomes disabled or diseased, and the worker was employed in one of the specified industries, the disease is presumed to have been caused by employment in that industry, unless the contrary is shown.

**Section 6(11):** A deceased worker who was under 70 years old, who suffered from an occupational disease impairing lung function, and the death was caused by some impairment of the lungs or heart of non-traumatic origin, it is presumed that the death resulted from the occupational disease.

9. The *Field Investigations Procedure Manual* of the Compensation Services Division (not published policy) elaborates on s.#97.00 as follows:

"This means that a board officer investigating a claim has a responsibility to seek out all material evidence, whether it may favour the claimant’s position or not. The investigation and the report should not be aimed at finding support for a particular point of view.

The officer is not, however, obliged to contact every conceivable source of information and interview every possible witness. The officer may use judgement to set reasonable limits on an investigation, having regard to the issues at stake, the likelihood of further investigation producing significant new information, the possibly adverse effect on the claimant, the claimant’s family, or persons associated with the claimant of producing a particular line of investigation, and the time and effort required to carry out that further investigation."
"The general rule is that the burden of responsibility for proving a fact is on the person who asserts it. In civil cases, facts must be proved according to a "balance of probabilities". A probability is a likelihood of more than 50% while a possibility is 50% or less.

...The Review Board is bound by section 99. Before the section applies, the “disputed possibilities” on an issue must be “evenly balanced.” Section 99 represents a departure from the common law [standard] of proof in which, if the person who is asserting a particular fact would lose the case if only a possibility (50% or less likelihood) could be established.


An appeal to the WCRB is commenced by filing Part I of the "Notice of Appeal" at the WCB or the WCRB, in writing and signed by the appellant (or agent). It must specify the decision being appealed, state why the appellant believes it to be incorrect and specify the remedy sought. Where the grounds of appeal relate to evidence not considered by or disclosed to the WCB, additional material must be filed with the appeal. "Where the grounds of appeal relate to evidence that was apparently not considered by or disclosed to the officer of the Board, the written appeal must contain a description of documentary evidence to be offered, and where it is medical evidence, a "short statement as to how the evidence will affect the decision under appeal." [BC Reg 32/86. s.5(1)-(3)]. See chapter E of the WCRB Policies and Procedures Manual for a more complete list of requirements.

See s. 4(1)(c) and 5(4) of BC Reg 32/86 and p.E-4 of the WCRB Policy and Procedure Manual.

Under s.91 of the Act, the Appeal Division requires that the appellant must outline reasons explaining how the WCRB finding is in error. In appeals under s.96(6) of the Act, the appellant must outline the error of law or contravention of a published policy of the Governors [Decision of the Governors, #75 ("published policy")]. It is required that reasons for the appeal be submitted in writing, although notice of the appeal may be given orally. The appeal "is considered commenced when the Registrar's office determines that the requirement for the provision of reasons has been met" [AI, p.68]. If reasons for the appeal are not provided within 21 days following a request for them from the Appeal Division, the notice of intent to appeal is considered abandoned. [Decision of the Appeal Division, May 29,1991, p.38 (not published policy)].

An appellant may initiate an appeal to an MRP by sending a sufficiently detailed certificate from a physician certifying that there is a bona fide medical dispute to be resolved. A Medical Appeals Officer or the Assistant Registrar will decide whether a valid physician’s certificate has been provided in support of the appeal [RSCM, p.13-17 to 13-21]. See Decision of the Appeal Division, May 29,1991, p.40-41 (not published policy).

As discussed, workers have submitted that:
- recovery norm guidelines may become a presumption of recovery and increase the burden of proof on workers; and
- presumptions that claims not filed immediately are less likely to have merit.

Administrative law experts R.W Macauley, Q.C. and J. Sprague LL.B have offered the following summary of the law with respect to administrative tribunals:

"Generally, in civil proceedings before agencies, whoever will take the benefit of establishing a fact or case must satisfy the decision-maker that the fact or the case exists on a balance of probabilities-.


Canadian Encyclopedic Digest, ibid, citing Rak v. British Columbia (Superintendent of Brokers) (1990), 47 Admin L.R. 243 (BCCA) ("Rak"). The appellants in that case asserted that a higher standard was warranted "because of the gravity of the acts alleged and the consequences of an adverse finding to those investigated."

Rak, ibid.


Submission by the Worker's Compensation Review Board to the Royal Commission on Workers' Compensation, Jan 31, 1998 at p.24.


[Note: The cohort study should indicate percentages of represented parties and breakdown re type of representation. Kobayashi mentioned that a study has been done on this issue.]

Karen: Kobayashi said some tracking has taken place on this issue but there are some problems with trying to analyze the data. It is apparently impossible to tell what the relationship of the representative is to the worker - See Mar 6 notes re WCB presentation on appeal processes, p.29]

WCRB "Chair’s Annual Report" at p.28.

WCRBPPM, H-4.

Reg. s.6.

Act, s.91(1).

Presentation notes of Appeal Division Chief Appeal Commissioner Cassandra Kobayashi, from March 6, 1998 presentation by WCB on appeal processes, p.6. -referring to published case #92-0634, 8 WCR 151 re s.91 and remedial jurisdiction.

See Appeal Officers Manual, Tab#5, Decision of the Governors, #75.


Ibid. The WCRB submission recommended that: "The Appeal Tribunal have full authority to inquire into all aspects of the appeal including the right to examine documents, order investigations or medical examinations and require evidence under oath." Ibid at p.24.

Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998.

e.g., Acting Chief Appeal Commissioner, Cassandra Kobayashi, conceded that there is no guarantee that Appeal Division Panels will seek out independent medical advice in all cases where it is warranted.


Ibid at p.11.


Their purposes may include:
- preventing frivolous and vexatious appeals;
- avoiding backlogs; and
- maximizing the use of limited resources.
In a 1993 decision of the Appeal Division it was noted that "Under the Act, the appellant does not need leave to appeal to the Review Board. ...Leave [to appeal] provisions are intended as a check on unnecessary or frivolous appeals." -- Appeal Division Decision 93-1186 at p.20.


See also Appeal Division Decision #93-1186 at p.20.


Chapter D of the WCRBPPM provides a detailed explanation regarding this section

There is no right of appeal to the WCRB by an employer concerning employer assessments, occupational health and safety penalties or cost allocations respecting claims. An employer who is dissatisfied with a WCB decision concerning a worker's claim could appeal to the WCRB -- although in fact, very few such appeals are brought. [AI p.60,63, PLTC p.26].

Note that the 90 day time limit under s.90(1) "should not be confused with requiring leave to appeal which involves the substance of the appeal matter." -- Appeal Division Decision # 93-11186 at p.20.

Extensions are granted at the discretion of the WCRB. An application for an extension is considered by the WCRB to be a "summary decision," not a "finding," under s.91.1 of the Act and therefore not considered appealable to the Appeal Division. The Appeal Division has taken a different view with respect to requests for extensions of the 90 day limitation period. [See notes 3 & 5. Also, WCRBPPM, F-1 & E4, Reg,s.5(4), s.4(1)(c)]. Summary decisions may be reconsidered by the registrar or chair where there is significant new or previously unavailable evidence [WCRBPPM,F-6]

[PLTC, p.25]. There may be multiple appeals for a single claim [AI, p.62]. Separate appeals must be filed respecting separate decisions. However, multiple appeals are sometimes heard by the WCRB together. [PLTC, p.25]. See WCRBPPM for a detailed description of formal requirements of an appeal.

The WCRB "generally has no power to reconsider its own previous decisions." The WCRB may reconsider its own previous decisions under limited, exceptional circumstances, for example:

- where panel findings are declared void,
- where a panel has failed to decide an issue which was properly before it,
- where the Appeal Division directs the WCRB to reconsider a matter, either generally or on a particular issue [Act, s.91(2)].

[Exceptions are discussed in ch.N of the WCRBPPM]

A panel may reaffirm or vary its original findings after reconsideration. [WCRB, ch.N].

See also RSCM 104.10


See also RSCM, #104.40. This includes:

- Section 39 relief of claim cost appeals under s.96(6)(a) of the Act;
- Section 73 occupational safety penalty appeals under s.96(6)(c) of the Act;
- Section 40,41 &42 assessment appeals, under s.96(6)(a) & (b) of the Act;
[Decision #1 of the Appeal Division (not published policy)]
- "a decision on any assessment matter;"
- a decision to impose an additional assessment with respect to first aid matters under s.70;
- a decision with respect to the application of s.39(1)(d) or(e);
- a decision with respect to the charging of claims costs under s.47(2).

[RSCM, p.13-39].

See RSCM, p.13-14 for full details.

I.e., New evidence is substantial and material or did not exist at the time of the hearing, or did exist but was discovered through the exercise of due diligence. See also RSCM #104.30.

Section 17 of the Workers Compensation Amendment Act provides that a worker, the worker's dependents, the worker's employer or a representative of any of them may apply to the Chief Appeal Commissioner for reconsideration of a decision made under s.91 or s.96 of the former Workers Compensation Act on the same ground and in the same manner as that set out in s.96.1 of the new Workers Compensation Act. This means that the Appeal Division also has the jurisdiction to reconsider decisions of the former Commissioners in accordance with the reconsideration provisions of s.96.1" [RSCM #104.30, p.13-38].

The Appeal Division has determined that it may reconsider its own decisions where an error of law going to jurisdiction exists, including a breach of the rules of natural justice or where the decision was patently unreasonable. This is described in Decision of the Appeal Division #93-0740 (not published policy). This appears to contradict Decision #75 of the Governors (published policy), which lists the Appeal Division's jurisdiction to reconsider its own decisions. That list does not include the grounds outlined in Appeal Division decision #93-074.

Subsequent to the list in Decision #75, the following statement is made: "The Appeal Division shall not otherwise exercise the Board's plenary independent power to reopen, rehear and redetermine matters under s.96(2)." Although the Appeal Division appears to have ignored this prohibition, the Governors and Panel of Administrators do not appear to have objected. It may therefore be that this Appeal Division "decision" has now been accepted, implicitly, under s.85.2(6) of the Act, which states that "a decision of the Appeal Division or of a panel shall be deemed to be a decision of the board." (If so, it still does not constitute published policy).

The Appeal Division may exercise the authority of "the Board" under s.96(2) to reopen, rehear and redetermine any decision of the former Commissioners prior to June 3, 1991, where the Chief Appeal Commissioner finds an error of law or where it involves an issue under the Charter. [Decision of the Governors, #75 (published policy)]

Note re scope of MRP appeals:
Under s.58(3), a worker is entitled to be examined by an MRP where the worker is aggrieved by a medical decision of "the board" (a WCB adjudicator or the Appeal Division), or by a medical decision of the WCRB, and there is a bona fide medical dispute to be resolved.75

Under s.58(4), an employer is entitled to have a worker examined by an MRP where the employer is aggrieved by a medical decision of "the board" (a WCB adjudicator or the Appeal Division), or by a medical decision of the WCRB, and there is a bona fide medical dispute to be resolved.75

Under s.58(5) of the Act, "the Board may decide that the worker shall be examined by a Medical Review Panel, in which case he shall be so examined in the manner provided by this section."
Under s.103.30 of the RSCM, no time limit for such a referral is applicable and there is no requirement that there be a *bona fide* medical dispute to be resolved.  

Decision #368 of the Commissioners (published policy), gives the administrator of MRPs (i.e. the Registrar) authority to change decisions where an error or new evidence is pointed out by a worker, employer or representative in respect of the substance of a decision.  

Acting Chief Appeal Commissioner, Cassandra Kobayashi, has recently commented that the Appeal Division may reconsider a matter where there has been an error of law going to jurisdiction, including a breach of natural justice, a clerical error or omission or fraud.  From March 6, 1998 presentation by WCB on appeal processes.  My notes, p.2.  

Ibid.  

During March 6th, 1998 presentation by WCB on appeal processes.  

Presentation notes of Appeal Division Chief Appeal Commissioner Cassandra Kobayashi, from March 6, 1998 presentation by WCB on appeal processes, p.6.  


"Royal Commission on Workers’ Compensation in BC Submission Summary," 2nd Phase Hearings, Stakeholder Counsel, Notetaker: Steven Noble, April 15 AM, 1998, at p.5.  

J. Sayer, "Royal Commission on Workers’ Compensation: Presentation on Behalf of Injured Workers" 1998 at p.3.  


Presentation notes of Appeal Division Chief Appeal Commissioner Cassandra Kobayashi, from March 6, 1998 presentation by WCB on appeal processes, p.13.  


Karton, M, Law Policy and Adjudication at the Workers Compensation Board of B.C. December 1997, p.56.  

[Act, s.89(6).  See also s.3(2) of the Reg. & WCRBPPM, G-1, G-2, & AI, p.60.  


WCRB "Chair’s Annual Report 1997" at p.1.  

Decision of the Governors, #75.  See Decision of the Governors, #75 for a list of factors to be considered in determining whether an oral hearing should be granted.  

Within 10 days of an appeal commencement, the Chief Appeal Commissioner will respond to a request for an oral hearing. Administrative Inventory, p.69.  


"Royal Commission on Workers’ Compensation in BC," 2nd Phase Hearings, March 6, 1998 at p.28n.
At the public presentation by the WCB to the Royal Commission, March 6, 1998 re Appeal Process.


An application for an extension is considered by the WCRB to be a "summary decision," not a "finding," under s.91.1 of the Act and therefore not considered appealable to the Appeal Division. The Appeal Division has taken a different view with respect to requests for extensions of the 90 day limitation period. -- WCRBPFM, F-1 & E4, Reg.s.5(4), s.4(1)(c).

See also RSCM 104.10.

Decision #1 of the Appeal division, p.39, AI, p.68.
It appears that the 30 day limitation period is routinely extended to 40 days. -- AOM, Tab#10.
Reasons should be provided in support of a request for an extension of time to appeal.” -- AOM, Tab #2.

"If appeal is received beyond 30 days (+10) with reasons but under 60 days - file is forwarded to Chief Appeal Commissioner for a decision on EOT [Extension Of Time] request. If received after 60 days (30 days +30 days, not 30 days + 30 days +10 days), respondent is notified and given opportunity to provide submissions on preliminary issue of EOT. Allow 1 day for response. When response received allow 7 days to respond. If no response received, the file is forwarded to the Chief Appeal Commissioner for a decision on the EOT request. If no reasons provided: Write appellant and request reasons for EOT. Allow 14 days for response. If no response, state in letter, matter referred to the Registrar for possible abandonment consideration. Any further consideration will only be given if accompanied by reasons for the delay. B/F 14 days - then refer to Registrar via Assistant to Registrar. If EOT has been granted, file is given to Intake Clerk to close out "E" number and file is given to Intake Clerk to initiate appeal number. File is then returned to Appeals officer to proceed with commencement.”

--AOM, Tab#10.

Such a referral may be initiated by a WCB officer who has reviewed the WCRB’s findings. See RSCM, p.13-14 for full details.


MRP:
Under s.58(3), a worker is entitled to be examined by an MRP where the worker is aggrieved by a medical decision of "the board" (a WCB adjudicator or the Appeal Division), or by a medical decision of the WCRB, and there is a bona fide medical dispute to be resolved. The worker has 90 days from the finding or decision to appeal the decision.

Under s.58(4), an employer is entitled to have a worker examined by an MRP where the employer is aggrieved by a medical decision of "the board" (a WCB adjudicator or the Appeal Division), or by a medical decision of the WCRB, and there is a bona fide medical dispute to be resolved. The employer has 90 days from the finding or decision to appeal the decision.

Under s.58(5) of the Act, "the Board may decide that the worker shall be examined by a Medical Review Panel, in which case he shall be so examined in the manner provided by this section." Under s.103.30 of the RSCM, no time limit for such a referral is applicable. This section may be used by the WCB in "some situations to ensure that procedural difficulties related to the commencement of a MRP (e.g. missing the 90 day time limit) do not preclude access to the MRP process for purely technical reasons." See RSCM, p.13-20 & 13-27 for additional guidelines.

The Board has established a policy that where there has been substantial compliance with the requirements of s.58(3), they will exercise their discretion under s.58(5) to refer the worker for examination by a
medical review panel. The Board considers that there has been substantial compliance if the worker’s request for examination is received within the 90 day period referred to in s.58(3) and an acceptable physician’s certificate is received within a reasonable period of time (90 days) thereafter. Therefore, at the expiry of the 90 day time allowed by s.58(#) or (4), a letter will be written advising the appellant that he has a further 90 days to submit a certificate under s.58(5)--MAOPM at p. 6, confirmed in Interview with MRP Dept. Registrar, Sept.18, 1997.

Where both the request and the physician’s certificate are received within 90 days of the medical decision of the Board and the certificate is rejected [on the basis that it is not a medical issue] within this initial 90 days, the appellant will be given:

(a) the remaining time in the initial 90 day period to submit a second medical certificate for consideration under s.58(3) or s.58(4), and

(b) a further 90 days (following the first 90 days) to submit a further certificate(s), or clarification from his physician under s.58(5)--MAOPM at p. 6, confirmed in Interview with MRP Dept. Registrar, Sept.18, 1997.

--Submission by the Worker’s Compensation Review Board to the Royal Commission on Workers’ Compensation, Jan 31, 1998 at p.21.


"Royal Commission on Workers’ Compensation in BC Submission Summary," 2nd Phase Hearings, Stakeholder Counsel, Notetaker: Steven Noble, April 15 PM, 1998, at p.3.