First Set

CHART #3, APPEAL TO THE APPEAL DIVISION

NOTES

1. Unlike the WCRB, the Appeal Division is part of the WCB (is not considered independent). Under s.85 of the Act, the Chief Appeal Commissioner is appointed by the Governors for a fixed term. One or more Appeal Commissioners is appointed by the Chief Appeal Commissioner "in accordance with the policies established by the Governors."

Appeal panels are comprised of both representational and non-representational members. [See notes 16, 17 & 18, & Decision No.75 of the Governors, s.3.0]. As of March, 1997, the Appeal Division consisted of the Chief Appeal Commissioner, the Deputy Chief Appeal Commissioner and 20 Appeal Commissioners. The 20 Appeal Commissioners may be further described as follows:

- 12 full-time & non-representational;
- 2 part-time & non-representational;
- 4 full-time representational
  (2 representing workers' interests & 2 representing employers' interests);
- 2 part-time representational
  (1 representing workers' interests & 1 representing employers' interests);

[1996 Appeal Division Annual Report, p.3 & 4]

Under s.85(7), the Chief Appeal Commissioner is deemed responsible to the Governors for the general operation of the appeal division, and must "implement the policies of the Governors with respect to the administration of the Appeal Division." The Appeal Division, in its 1993 Annual report, has commented as follows:

"In the course of applying the Governors’ policy, the Appeal Division is frequently called upon to interpret that policy in order to reach a decision. The Appeal Division must also consider the lawfulness of the Governors’ policy under the Workers’ Compensation Act or the Canadian Charter of Rights and Freedoms."

In such cases, the Appeal Division's interpretations are forwarded to the Governors, so that the Governors may determine whether to develop new policies.
The difficulty of the Appeal Division in interpreting policy "without seeming to create policy" or "usurping the WCB's exclusive authority to set policy" is discussed at AI, p.66-67.

2. **(a) Section 96.1**

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." (note: in the past the Ombudsman has been given standing under this section but this is no longer the case). The Chief Appeal Commissioner may decide to grant the "reconsideration" based on criteria listed in s. 96.1(3) [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].

**(b) Appeal Division decision #93-0740**

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 does not constitute published policy).

**(c) Section 96(2) & Decision of the Governors #75**

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)]

3. 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.[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].

It appears that distinct appeal processes apply to some or all of the above "employer appeals". See "Appeals Officers - Procedures Manual (Draft) ", which arrived at the Commission of Inquiry on May 9th, 1997. The cover letter to Angie Weltz from Eugene Jamieson (Assistant to the Chief Appeal Commissioner) reads as follows:

"This is a draft document which has not proceeded to finalization and which has not recently been addressed. The document may therefore not accurately or fully reflect the procedures that appeal officers follow on a day to day basis..."

The letter does not comment on the extent to which the manual is being followed. This will be clarified in due course.

4. Section 91(1) of the Act provides as follows:

"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."
[See also RSCM 104.10]

Most Appeal Division activity involves appeals of decisions of the WCRB. [Appeal Division Annual Report, 1996, p.11 AI, p.68].

5. 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 [See RSCM,
p.13-14 for full details].

6. Under s.20 of the Criminal Injury Compensation Act, RSBC 1996, c.85 ("CICA")
the Board adjudicates initially with respect to compensation matters relating to
the death or injury of victims (see s.20(5) CICA for a further definition of this
jurisdiction:

(2) "[The Board has] exclusive jurisdiction to inquire into, hear and
determine all those matters and questions of fact and law arising or
required to be determined under this Act, and the action or decision of
the Board is final and conclusive and not open to question or review in
any court."

Under s.20(6) of the CICA, the Board is given "full discretionary power to
reopen, rehear and redetermine any matter, except a decision of the appeal
division, that has been dealt with by it or by an officer of the Board." Also see
s.22 of the CICA.

7. Under s.11 of the Act, where a court action based on a disability caused by an
industrial disease, personal injury or death is brought, "the board" is
empowered to determine "any matter that is relevant to the action" (including
the matters listed in the section) on request of the court or by any party to the
action. The "Boards" obligation to issue s.11 certificates has been assigned to the
Appeal Division [Decision of the Governors, #4]. The effect of the certificate on
the court action is for the court to determine. ["WCB Appeal Division
Operational Status Report", 1966, p.4]

8. Extensions are allowed for several reasons, including "exceptional
circumstances" and substantial & material new evidence. [Decision #1 of the
Appeal division, p.39, AI, p.68.]

Section 96(3) of the Act allows the Appeal Division, on an appeal under 91(1), to
"reopen, rehear and redetermine any matter that has been dealt with by the
Review Board."

9. In appeals under s.91 of the Act, 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. "Written notification... within 30 days of the
mailing of the Review Board finding will constitute notification of intent to
appeal to the Appeal Division." Oral notification received by the Registrar’s
office within 30 days will also be accepted. 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]. Note: 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 #1 of the Appeal Division, May 29, 1991, p.38-39 (not published policy)].

10. The first level of appeal from such a decision is to an “Appeal Committee”, whose members are appointed by the Board [s.22 of the CICA]. These appointees are comprised of WCRB members who have been selected by the Board [WCRB Annual Report, 1996 SJS: verify].

The second level appeal is to the Appeal division. An appeal to the Appeal Division from the finding and report of an Appeal Committee requires leave from the Appeal Committee or the Chief Appeal Commissioner of the Board. [s. 22(5) of the CICA, RSCM, #104.50].

“Applications to the Chief Appeal Commissioner for leave to appeal shall be made in writing. If leave to appeal is granted, the Appeal Division may further review the findings and report of the Appeal Committee, or the decision provided by the Board officer to the victim or his dependant. The [same] procedures [as outlined in Chart 3] for "submissions by parties" will be followed although there is no legal requirement that a decision be made on the appeal within any specified time frame. An oral hearing may be requested...” [Decision #1 of the Appeal Division (not published policy)]

Finally, the Appeal Division has discretion to reconsider its own decisions. A victim, an immediate family member or the Attorney General may apply to the Chief Appeal Commissioner for reconsideration on specified, limited grounds (e.g. substantial and material new evidence or previously undiscovered evidence) [s.23 of the CICA].

11. 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 #1 of the Appeal Division, May 29, 1991, p.38 (not published policy)].

12. See Decision #12 of the Appeal Division re submissions and time frames, extensions. Decision #1 of the Appeal Division, May 29, 1991, p.40-41 (not published policy), AI, p.69. See Decision #1 of the Appeal Division re participation invited by respondents or interested parties with standing/legal or material interest in the matter.

13. Under s.91(2) of the Act, "the Appeal Division may direct the WCRB to reconsider the matter, either generally or on a particular issue, and the Appeal Division may withhold its decision pending the finding of the WCRB.” In such a case, under s. 91(3)(b), the Appeal Division decision must be made within 90 days of the WCRB reconsideration. (See note 8 below) [See also Decision of the Governors, #75 ("published policy").
14. 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 prescribed by this section". The board includes the Appeal Division [Decision of the Governors, #75 ("published policy"). [Query: Would such a decision of the Appeal Division be appealable, given that a MRP decision is final and the appellant appears to have been made to bypass the Appeal Division?]

15. Under s.85.2(4) of the Act, a panel of the Appeal Division is deemed to consist of:

"(a) the chief appeal commissioner or an appeal commissioner designated by the chief appeal commissioner, sitting alone; or

(b) the chief appeal commissioner or an appeal commissioner designated by the chief appeal commissioner to preside over the panel and of two other appeal commissioners designated by the chief appeal commissioner.

Under s.85.2(5) of the Act, the chief appeal commissioner may terminate a designation to a panel and may fill any vacancy on a panel.

There are three types of Appeal Commissioners: worker representatives, employer representatives and non-representational. [Decision no. 2 of the Governors ("published policy"). A party may request an oral hearing, but must provide reasons why an oral hearing is necessary. [Decision of the Governors, #75] The decision about which form the panel will take, and whether or not it will be an oral hearing, is made by the Chief Appeal Commissioner [Decision of the Governors, #75], (or her delegate). [AI, p.68]. Within 10 days of an appeal commencement, the Chief Appeal Commissioner will respond to a request for an oral hearing. [AI, p.69]. Only 9% of hearings were oral in 1996 [PLTC, p.30, -1995 - SJS:verify]. [See Decision of the Governors, #75 for a list of factors to be considered in determining whether an oral hearing should be granted]

16. "A three-member panel shall generally consists of either the chief appeal commissioner or a non-representational appeal commissioner who shall preside over the panel and one appeal commissioner chosen from the worker representatives and one appeal commissioner chosen from the employer representatives." [Decision of the Governors, #75].

17. See note #16.

18. "A one member panel consists of either the chief appeal commissioner or a non-representational appeal commissioner selected by the Chief Appeal Commissioner." [Decision of the Governors, #75].

19. 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. The following are notable rules of conduct at proceedings" [Decision of the Governors, #75]. 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;
- must make its decisions based on the merits and justice of each case, as per s.99 of the Act.

20. Under s.91(3) (a) of the Act, a decision of the Appeal Division must be made within 90 days of the date on which the appeal was commenced. The Chief Appeal Commissioner may extend the 90 period where the appellant requests a delay, where an act or omission necessitates a delay or because of the complexity of the matter under appeal. Decisions must be in plain language and must explain the conclusions reached and reasons. [Decision of the Governors, #75]

21. The 1994 Annual Report of the Appeal Division reports that, of the 20 cases considered under s.96.1, only two were found to meet the preliminary requirements for obtaining reconsideration. Of these two, "...one case was remitted back to the claims adjudicator to be considered afresh in light of the new evidence." p.429.

22. Section 58(5) of the Act provides that "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." The "Board" appears to have been interpreted to include the Appeal Division. [See MRP Annual Report, 1994 & see Decision #75 of the Governors].