Workers' Compensation System Study

Public Report No. 7

July 1987

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OMBUDSMAN OF BRITISH COLUMBIA

Legislative Assembly
Province of British Columbia

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OVERVIEW

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The central theme of this report is fairness to individual workers and employers affected by the administration of workers' compensation in British Columbia. This is consistent with the Ombudsman's role of monitoring the fair treatment of individuals by provincial public institutions. The report does not address broad public policy issues, which are outside the Ombudsman's mandate and are properly the subject of wide politicial discussion.

The report deals with two major fairness issues. The first is the effectiveness of the claims and appeal systems in reaching correct and acceptable decisions within a reasonable period of time. Recommendations concerning the quality of first level decisions, disclosure of information, and access to competent advice, representation and resources for all parties to a claim address this issue.

The second major issue deals with accountability. Fairness in a democracy requires the opportunity for individuals to hold public bureaucracies to account. The political process can safeguard the general policy objectives of our society, in workers' compensation and elsewhere. However, it is less effective in dealing with cases of individual unfairness. Entrusting individual rights to a non-reviewable, technical bureaucracy, however expert and well meaning, risks replacing accountability with paternalism and challenges democratic values. Recommendations concerning an appeal system which is truly independent, expert and final address this issue.

The report is based on the experience of the Ombudsman's office in reviewing workers' compensation complaints over the years. This is a neutral but limited view which focuses on problems in a system which claims to discharge most of its responsibilities effectively. The recommendations represent a legitimate point of view but are not presented as the only accepted options. There are many interested parties to this complex and vitally important topic. All our public institutions should be subject to regular and open review, and this is particularly important for those which affect our fundamental interests of life, health, safety and livelihood. Therefore, the concluding recommendation of this report calls on the Minister of Labour and Consumer Services to convene at the earliest convenient date a forum of representatives of all interested parties to discuss these and other issues of workers' compensation.

Stephen Owen
Ombudsman

TABLE OF CONTENTS

ABBREVIATIONS

W.C.B. - Workers' Compensation Board

W.C.R.B. - Workers' Compensation Review Board

M.R.P. - Medical Review Panel

Policy Manual - Rehabilitation Services and Claims Manual

the Act - the Workers Compensation Act, R.S.B.C. 1979, c.437, as amended

Reporter Decision - Workers Compensation Reporter Decision

C.A.S. - Compensation Advisory Services

I. INTRODUCTION

A. Role of the Ombudsman in Workers' Compensation

The workers' compensation system affects the legal rights of employers and employees and can have a wide impact on the life, safety, health and livelihood of workers and their families. As such, it represents substantial public intervention into the fundamental interests of individual members of society.

The Ombudsman's office has been established to monitor this type of relationship between state and citizen. Section 22 of the Ombudsman Act sets out a statutory code of conduct against which the office must measure the administrative acts of provincial government authorities, which include the Workers' Compensation Board (W.C.B.) and the Workers' Compensation Review Board (W.C.R.B.). This code goes beyond legal rights and includes any government activity which may cause unfairness. The determination of unfairness may involve a consideration of the merits of an administrative or quasi-judicial decision as well as the process by which it was reached.

It is the statutory duty of the Ombudsman's office to investigate possible unfairness from administrative action and to recommend change where it is substantiated. Investigations can be on the receipt of complaints or on the Ombudsman's own initiative. The Act confers full powers of inquiry and publication on the Ombudsman in order to create an effective agency for change. The independence and neutrality of the office are designed to ensure that conclusions are accepted by both the public and the public service.

To a large extent, the activity of the Ombudsman's office is demand driven, following the specific individual complaints received from the public. However, over time, trends and areas of recurring difficulty become apparent. These attract special attention and result in the development of special expertise in the Ombudsman's staff. Over the past eight years the Ombudsman's office has received thousands of workers' compensation complaints, and established an extensive data base of cases and recognized expertise in the field. The work is handled by a skilled team of investigators, composed of legal and social service professionals.

The complaints received by the Ombudsman's office in workers' compensation matters come from employees, public and private sector employers, doctors, lawyers, unions, injured workers' groups, and provincial and federal politicians. The wide spectrum of concern reflects the complexity of the field and the immense challenge that the system must meet. The W.C.B. will always be in the unenviable position of having to balance apparently competing interests. In this situation, it is of paramount importance that the fairness of the claims and appeal process is beyond reproach. The Ombudsman's office has the statutory duty and the accumulated information and expertise to issue a constructive and preventative report on the administrative fairness of the system.

This "systems" approach is particularly appropriate at the present time, given the widespread public discussion and the internal government review that is underway. The scope of the study includes an examination of the public policy objectives of the Workers Compensation Act to determine the extent to which these are being achieved through the development and execution of administrative policy and the review and appeal systems. The study's particular focus is on issues of fairness and quality in decision-making at each level.

The concern with delay is a recurring theme of this report. Fair process is sometimes assumed to be a contributing factor to delay in a system, requiring trade-offs to be made. This report challenges that assumption and holds that delay is itself a major element of unfairness. The recommendations reconcile the apparent conflict by addressing the causes of unnecessary or prolonged appeals and by strengthening the integrity of the decision-making process. The study is substantially experience-based, drawing on concerns expressed to the Ombudsman's office over the years, and analyzing this experience against general standards of administrative fairness. However, particular care is taken to ensure that the consideration of problems does not distort the general perspective on a system which responds effectively to the majority of its responsibilities. To this end, the W.C.B. and the W.C.R.B. have been helpful in providing such general statistics as are available in the context of which our complaint experience can be considered. However, the importance to effective administration of more comprehensive management information systems has been recognized.

The Ombudsman's office is not attempting to fulfil the role of a Royal Commission of Inquiry into the workers' compensation system. Such an exercise would involve reviewing the basic philosophy and statutory framework of the current system, and require a canvassing of wide public, expert and interested opinion. While many feel that such a review is necessary, it is not the purpose of this report. Rather, the report takes the current system generally as it is and recommends adjustments which the experience of this office suggests would improve the quality of decision-making and the fairness of the process. It is important to note that it reviews the system as a whole and is not intended in any way as a criticism of the individuals working within it, whom we generally have found to be of a high calibre. Because of its focus, the Report does not address all of the outstanding concerns with the system. Rather, it concentrates on the major problems of a recurring nature arising in this office's own work with respect to the appeal system.

Because of our focus, we would encourage the Ministry of Labour and Consumer Services, in its review process, to solicit submissions from outside interest groups, especially with respect to major concerns within the experience and expertise of these groups, which have not been included in our report. Examples which are not covered by this report and which can give rise to employer complaints to this office are employer assessments and appeal right notification.

Our experience has been that 66% of the workers' compensation complaints received by the Ombudsman's office have not yet been considered internally and are therefore referred back to the system for appeal. This very significant involvement of the Ombudsman's office as an advice and referral agency suggests inadequate notice of appeal rights and procedures within the system, and a widespread disquiet with the effectiveness of the process. Given the long delays within the process, it also troubles us to have to send complainants back to a system which we know will respond slowly to their concerns, and within which they may not have access to adequate representation.

Of the 34% of complaints that are investigated by this office, the vast majority are either resolved by the W.C.B. or W.C.R.B. accepting the Ombudsman's recommendation for change (59%) or are found to be not substantiated (34%). The difficulty, therefore, is not

that the Ombudsman's office is regularly ignored by the system, for this happens very infrequently, but that the office should need to be involved to the great extent that it is. This report represents an attempt to address the systemic or recurring causes of our involvement in a way which should make it significantly less necessary in the future.

The problems identified in this report come directly from the repeated experience of this office. However, specific case examples have not been cited in order to ensure that the discussion of issues is not displaced by disputes over the interpretation of emotional and often tragic circumstances. The large majority of complaints to the Ombudsman's office are from workers whose claims have been refused. However, the issues of fairness raised by this experience apply with equal force to the protection of employer rights.

Another major concern of the Ombudsman's office is that it has become, in essence, a further level of appeal within a system which already involves several complex and time consuming review processes. It was not anticipated that this office would have to fill this substantive role and it simply does not have the resources to continue to do so in a fair and effective manner. While the Ombudsman's office has developed the expertise to make credible recommendations in the workers' compensation field, the volume of cases that it is asked to investigate has caused a serious backlog in this work. This in itself represents unfairness. Therefore, it is a major objective of the report to identify changes in the system that will have the effect of increasing the quality and reputation of workers' compensation decisions. This would significantly reduce the need for Ombudsman review.

While recognizing the wide responsibilities and general effectiveness of the workers' compensation system, this report identifies the major, recurring sources of dissatisfaction from the experience of our office, and makes specific recommendations for change. The central insight is that the fairness of the system depends on the quality of first level decision-making and the timeliness and independence of the appeal process. While appeals may represent only a small percentage of the total claims handled by the W.C.B., the manner by which they are settled determines the integrity of the whole system. Further, it is not the small percentage of cases that are appealed that is relevant. Rather, it is the large percentage of successful appeals and the long delay in reaching those successful results which define the problem.

Although there are rarely simple solutions to complex problems, the general conclusion of this report is that the appeal process is overly complex and cumbersome, and that it requires significant refinement in order to achieve acceptance and fairness. The recommendations address this need.

B. Background

The workers' compensation system in British Columbia is frequently referred to as the "historic compromise". Workers gave up their right to sue their employers and fellow-workers for job related injuries in return for a compulsory no-fault compensation scheme. Employers gave up their right to raise the traditional common-law defences in negligence actions; in return they got a system of relatively low cost industrial accident insurance available to all employers, large or small. Compensation was to be limited to purely economic loss. Loss of enjoyment of life, pain and suffering would not be compensated. The system was completely employer financed through assessments based on a system of industrial classifications. Administration was given to a statutory body - the Workers' Compensation Board - whose decisions were not subject to review in the courts.

The fact that the system remains essentially unchanged over the 70 years since its inception is a testament to the soundness of the basic concept. It is therefore not the purpose of this report to question the fundamental principles of the "historic compromise".

Originally no provision was made for review of claims decisions. This aspect of the system has been problematic over the years and recent developments have thrown it into question again. The cumulative delay of the various levels of review is unconscionable. Public confidence in the system continues to erode. Therefore, it is the claims review system that is the major focus of this report.

When the W.C.B. was established in 1917 there was no right of appeal against claims decisions because it was the Commissioners themselves who made the initial decisions. However, as the volume of claims increased beyond the Commissioners' capacity to handle, decision-making authority was delegated to W.C.B. staff. As a response to an increasing workload the strategy of delegation was established relatively early. The Commissioners retained the right to review claims

decisions on an informal basis. However, as the volume continued to expand, even this became too much for the Commissioners to cope with personally. This led to the establishment of an internal review system - the Board of Review - consisting of three senior W.C.B. officers. The review function was delegated to them. The Commissioners continued to retain discretion to exercise further review. This system continued until 1973 when the Boards of Review were provided with a statutory base and removed from W.C.B. control. This was the result of recommendations by the Tysoe Commission in 1966, which recognized the need for independence in the Boards of Review. [1]

Both worker and employer appellants were given a further right of appeal from the Boards of Review (now the W.C.R.B.) to the Commissioners and the Commissioners retained the right to refuse to implement Boards of Review decisions. Criteria were developed to help the Commissioners determine whether or not Boards of Review decisions would be implemented. The function of screening requests for referral of Boards of Review decisions to the Commissioners was delegated to an official of the W.C.B. Today the Commissioners' review function is limited to appeals from the W.C.R.B. and approved referrals from W.C.B. staff who are dissatisfied with W.C.R.B. decisions. Even so, the Commissioners ordinarily require 12-18 months to dispose of an appeal. Occasionally, the Commissioners review cases at the request of the Ombudsman, who has been drawn into the role of a further appeal body.

In 1975, appeals to the Boards of Review increased sharply, a trend which continued for the next 10 years. Response to the increased case load of the Boards of Review had to be somewhat different. The statutory scheme did not permit them to delegate their functions. The strategy adopted with respect to the Boards of Review and W.C.R.B. was to expand the number of panels and members. The most recent expansion came in 1986-87. However, as of December 1986, it takes over 18 months on average to dispose of an appeal where an oral hearing is held.

The Medical Review Panels (M.R.P.) too have experienced increased volume in recent times. As with the W.C.R.B., this has led to an expansion of membership for this level of review. The delay in disposing of M.R.P. appeals is one to two years.

The system has now reached a point where these two strategies - delegation of review functions and expansion of membership - have been employed beyond their practical limits. The Commissioners' administrative and policy making functions require that the number of Commissioners be kept to a manageable few. It is also difficult to see how the Commissioners could delegate any further adjudicative function within the structure of the W.C.B. For the W.C.R.B. and (M.R.P.) delegation is simply not an option.

The Ombudsman's office now devotes 25% of its investigative resources to handling workers compensation cases. This is a disproportionate allocation to a single system. It means that other deserving areas are underserved.

This report therefore attempts to find alternative procedures and strategies to improve the claims and appeal systems. The recommendations are designed to deal with the problems indicated by this office's experience, and we believe their implementation would go a long way toward raising the level of public confidence in the workers compensation system as a whole.

1. Commission of Inquiry, Workmen's Compensation Act, Report of the Commissioner the Honourable Mr. Justice Charles W. Tysoe, 1966, p.22.

II. DESCRIPTION OF THE REVIEW STRUCTURE

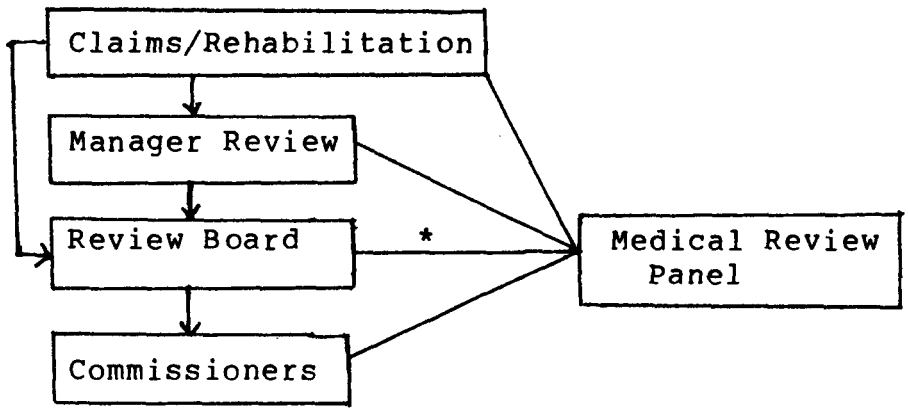
A. The Review Structure

A worker injured on the job in British Columbia has a conditional right to compensation from the W.C.B. If the claim is accepted, the Claims Department may pay medical aid, wage loss, or both. For more serious cases the worker may be referred to the Rehabilitation Department for vocational assistance or to the Disability Awards Section for a pension assessment.

The Act provides that any decision made by an officer of the W.C.B. with respect to a worker may be appealed by either the worker or employer (S.90(1)). Three appellate bodies are established under the Act: the W.C.R.B., the Commissioners, and (M.R.P.). A worker or employer, dissatisfied with a decision of the W.C.B. with respect to a worker, may appeal to the W.C.R.B. and from there to the Commissioners (S.91(1)). As well, if the decision involves strictly medical issues, there is a further right of appeal to a M.R.P. whose decision is final and binding (S.65). S.96(1) of the Act precludes any right of appeal to the courts.[1]

As well as the preceding statutory appeals, there are informal manager reviews of W.C.B. decisions. These exist as a matter of W.C.B. policy and may be utilized prior to launching a formal appeal.

The review structure looks like this:



* This avenue of appeal is currently in question

B. Initial Claims Decisions

All claims for compensation are handled by the Claims Department where either a Claims Officer or a Claims Adjudicator will manage the file with the latter dealing with all but the simplest. In 1986, 156,312 claims were received, down from a 1980 high of 197,115. The Adjudicator's first responsibility is to consider the medical and other factual issues in order to determine whether the worker is eligible for compensation. Each claims unit has attached to it a Medical Adviser who is available to the Adjudicator for advice on medical issues. Once a claim has been accepted the Adjudicator must decide whether the worker is due payments for wage loss, medical expenses, or both.[2]

There are two other departments which may become involved in the more serious cases: Rehabilitation and Disability Awards. Rehabilitation aims either to assist workers in returning to their jobs or to help them remove or lessen any handicaps that might have resulted from their compensable injuries (S.16(1)). After meeting with the worker, a Rehabilitation Consultant may decide upon a program of vocational assistance appropriate to the worker's needs or may simply offer some recommendations to the Claims Adjudicator, Disability Awards Officer or Senior Pension Adjudicator who may or may not implement these recommendations. A recommendation by a Rehabilitation Consultant is not appealable; a decision is (Policy Manual 102.26).

In cases where a Claims Adjudicator suspects that there may be a permanent disability arising out of a worker's compensable injury the file is referred to the Disability Awards Section. The worker will be assessed by either a Disability Awards Officer or, in more difficult cases, a Senior Pension Adjudicator who will determine if a pension is in order, and if so, what the amount of the pension should be.

Any decisions with respect to a worker are appealable in the manner already noted. However, as well as these statutory remedies there exist informal reviews. For example, a worker dissatisfied with the decision of an officer in either the claims or disability sections may request a review of that decision by the Manager, Assistant Director, or Director of Claims (Policy Manual 108.30, 108.31). Similarly a decision of a Rehabilitation Consultant may be reviewed by the next level of authority in that department (Policy Manual 102.26).

C. The Workers' Compensation Review Board

Section 90(1) of the Act states:

> 90. (1) Where an officer of the Workers' Compensation Board makes a decision under this Act with respect to a worker, or, if deceased, his dependants, or his employer, or a person acting on behalf of the worker, his dependants or employer, may, not more than 90 days from the day the decision is communicated to the worker, dependants or employer, or within another time the review board allows, appeal the decision to the review board in the manner prescribed by the regulations.

Consequently, for the W.C.R.B. to have the jurisdiction to entertain an appeal there must have been a decision made by an officer of the W.C.B. that was "with respect to a worker". Use of the term "decision" limits what is appealable: for instance one cannot appeal a delay or a recommendation. That the phrase "with respect to a worker" is used indicates that employers concerned about assessment allocation cannot appeal that decision to the W.C.R.B.[3] The W.C.B. in its Policy Manual further states that the decision being appealed must involve "an issue of a kind or class that affects workers financially" (Policy Manual 102.27).

After the conclusion of an appeal the W.C.R.B. issues its findings, together with reasons, in writing (S.90(3)). As noted, these findings are appealable by either worker or employer to the Commissioners. If there is no appeal then the file is referred back to the officer who made the appealed decision. These findings will be implemented unless, in the officer's opinion, doing so would violate W.C.B. policy as stated in Reporter Decision No. 403. Where the officer's decision not to implement a W.C.R.B. finding is supported by both the departmental Manager and the Director, Research & Planning, the file is referred to the Commissioners for reconsideration pursuant to S.96(2) of the Act (Policy Manual 102.50).

Recent W.C.R.B. appeal statistics:

	App.Rec'd	Disposed of on Merits	Workers' App.Allowed	Employers' App.Allowed
1980	2775	2062	867 of 1960	18 of 102
1981	2922	2250	1020 of 2144	30 of 106
1982	4090	2746	1199 of 2622	41 of 124
1983	4090	2867	1059 of 2740	50 of 127
1984	5082	3111	1068 of 3000	26 of 111
1985	4045	2917	1151 of 2842	18 of 75
1986	3921	3259	1397 of 3192	16 of 67

D. The Commissioners

Section 91(1) of the Act grants the Commissioners jurisdiction to act as the final level in the appeal system on all non-medical issues:

> 91. (1) Where the review board makes a finding under section 90, the worker, his dependants, his employer or the representative of any of them may, not more than 60 days after the finding is sent out, or within another period as the board may allow, appeal to the commissioners of the board.

Section 96 outlines the general jurisdiction of the W.C.B. Subsection (1) establishes the W.C.B.'s exclusive right to set policy and administer the Act unfettered by the review of any court. Subsection (2) provides the W.C.B. with the power to initiate any reconsideration of a previous W.C.B. or W.C.R.B. decision:

> (2) Notwithstanding subsection (1), the board may at any time at its discretion reopen, rehear and redetermine any matter which has been dealt with by it, by an officer of the board or by the review board.

The W.C.B. relies on this subsection for authority in four circumstances:

(1) When it alters its original decision to accord with the findings of the W.C.R.B.[4]

(2) When it reviews a finding of the W.C.R.B. at the behest of an officer of the W.C.B. (Policy Manual 102.50, 108.20).

(3) When it reconsiders its own decision on the basis of new evidence (Policy Manual 108.11).

(4) When it reconsiders a matter pursuant to a recommendation of the Ombudsman.

Recent Commissioners' appeal statistics:

	App.Rec'd	Allowed in Whole	Allowed in Part
1980	271	40	2
1981	296	20	2
1982	373	47	13
1983	517	49	18
1984	490	N/A	N/A
1985	411	N/A	N/A
1986	377	12 (employer) 22 (claimant)	2 (employer) 27 (claimant)

E. Medical Review Panels

S.58 of the Act establishes a M.R.P. and subsection (3) defines the circumstances under which it may be invoked by a worker:[5]

> (3) Whenever a worker, not later than 90 clear days after the making of a medical decision by the board, expresses himself in writing to the board as being aggrieved by that medical decision and sends with that writing a certificate from a physician certifying that in the opinion of the physician there is a bona fide medical dispute to be resolved, with sufficient particulars to define the question in issue, the worker shall be examined by a M.R.P. appointed in the manner provided in this section.

The conditions, then, for convening a M.R.P. are that:

(1) a medical decision has been made by the W.C.B.;

(2) the worker expresses in writing to the W.C.B. that he is aggrieved by its decision;

(3) the worker's physician sends along a certificate stating that in his opinion there is a "bona fide medical dispute" to be resolved with sufficient particulars to define the questions in issue;

(4) the worker's physician outlines with sufficient particulars the medical question at issue;

(5) the above material is sent to the W.C.B. not later than 90 days[6] after the appealed decision has been made.

If the above conditions are met the Act stipulates that "the worker shall be examined".

In order to process applications for M.R.P. the W.C.B. created the position of an Appeals Administrator. The function of this Administrator is to determine whether the W.C.B. decision being appealed is a medical one (Policy Manual 103.11) and if so whether the application discloses a bona fide medical dispute (Policy Manual (103.12).[7]

If the answer to both of these questions is 'yes' then a M.R.P. is convened. If the answer to either question is 'no' then a panel is not convened. In the event of a negative decision by the Appeals Administrator, the worker or employer has the right to appeal that decision to the W.C.R.B.

The certificate produced by a M.R.P. is "conclusive as to the matters certified and is binding on the board"; it is not open to review (S.65).

Footnotes:

1 This does not, however, preclude the courts from reviewing a matter when the W.C.B. has exceeded its jurisdiction or where there has been a denial of natural justice.

2 The functions of adjudicators are dealt with fully in Part IV.

3 Employers may however appeal these decisions to the Commissioners.

4 The Policy Manual at 102.50 does not deal with this point; it simply says that the W.C.B. officer will "alter his decision to accord with the review board finding" without specifying the authority under which the officer effects such an alteration.

5 The employer has a similar right as outlined in S.58(4) with the only significant difference being that the employer's physician need only state that there "may be a bona fide medical dispute to be resolved".

6 In order to accommodate for postal difficulties the W.C.B. allows an additional 10-day "grace" period. In addition the W.C.B. considers that the requirements of this section are met if the worker's or employer's application (with or without the physician's supporting certificate) is received within the time allowed.

III. SIGNIFICANT PROBLEMS COMMON TO ALL LEVELS OF APPEAL

A. The Appeal 'Treadmill'

One purpose of any appeal system is to identify and resolve any errors quickly, so that claimants will have the least possible disruption to their lives. This objective is especially important in the area of workers' compensation, where adverse decisions can have a profound effect on workers' lives from the medical, financial, emotional, and psychological points of view. The employer's assessment rate can also be affected by a decision to grant compensation. It is therefore essential that workers and employers have confidence in first-line decision making, as well as in an independent appeal system to provide a quick and effective remedy in cases brought to it. However, such confidence that exists at the initial stages of a claim can be undermined when an appellant faces protracted delays in having an appeal heard; when an appellant later must appeal back to the W.C.R.B. because of disagreement with the W.C.B.'s implementation of a W.C.R.B. decision; or when a favourable W.C.R.B. decision is overturned by the Commissioners.

This process could be described as a 'treadmill' - the appellant continues to go through the appeal routes available, but experiences the process as frustrating and meaningless. After some time, he or she may complain to the Office of the Ombudsman or to a M.L.A. An investigation may be undertaken, but by that time, years have passed, and evidence which may have been easily available at the beginning of the claim, had it been sought, is no longer available or memories are not as fresh as they once were.

In Reporter Decision No. 374, the Commissioners agreed that:

> It cannot have been the intention of the Legislature that there would have to be several exercises of a right to appeal to the Board of Review just to deal with one basic issue of whether compensation is payable for a particular period.

However, we have investigated numerous complaints from appellants caught up in such a treadmill, where it has taken many years of bitterness and frustration before compensation is finally recognized and paid.

In some cases, although the W.C.B. technically "implements" the W.C.R.B. finding, the appellant is left with "winning" his or her appeal but receiving no benefits. The result may be a loss of confidence in the appeal system and an ever increasing number of complaints to our office and to M.L.A.'s constituency offices.

B. Delay

A 1981 Price Waterhouse[1] report predicted that if the rate of appeals to the Boards of Review continued, the appeal system would be crippled by delay unless new panels were added. The report predicted that by 1985 the backlog of appeals could lead to a two-year wait. That prediction was realized.

Until recently, the delay commenced once a worker or employer requested disclosure of the file. However, in March, 1987, the W.C.B. conducted a special project using temporary staff which substantially reduced the backlog and, therefore, the waiting time for receipt of document copies. At present, the W.C.B. estimates the wait for disclosure to be approximately 2 to 6 weeks.[2]

Once the worker or employer appeals to the W.C.R.B., there is a long delay before the appeal will be decided. As of December, 1986, the average time from the receipt of a Notice of Appeal to the rendering of a decision after a hearing is 20.6 months outside of the Lower Mainland and 18.2 months within the Lower Mainland of British Columbia. A worker or employer has the option of electing a 'read and review' appeal, in which the W.C.R.B. makes a finding strictly on the basis of written submissions. However, that option still involves a delay of 10.6 months for the W.C.R.B. to issue a finding. In many cases, especially those where the worker's credibility is challenged, it is an inappropriate or inadequate option. W.C.R.B. statistics show that significantly more appeals are allowed after an oral hearing than after a 'read and review'.

It must be noted that the improvement of administrative practices and the addition of appeal panels of the W.C.R.B. during the past year are beginning to reduce this delay. We strongly encourage the continuation of these efforts.

The consequences of this delay can be devastating. Unionized workers may rely on private long term disability insurance plans to maintain themselves

throughout the long wait. Others who have no benefit plan may have to turn to income assistance; however, to qualify for income assistance they must have limited savings and assets. Money eventually awarded to the worker by W.C.B. for the same time period is then paid back to the Ministry of Social Services and Housing. However, the loss of property, vehicles and other depleted assets is not recognized even if the appeal results in the payment of retroactive benefits.

A considerable number of claims awaiting appeals involve causation of disability. The fact that a person has a disability is not in dispute in such cases; for example, many appeals involve debate over whether a problem pre-dated the work injury. Thus, while the appeal process drags on, the individual still requires medical treatment and medical aid. In such cases, the financial hardship caused by the delay and loss of benefits are compounded by mounting medical expenses. Some expenses can be paid by agencies other than the W.C.B. Many union members have long term disability and sickness benefit plans that pay for expenses incurred. The Medical Services Plan of B.C. pays for the medical visits and treatments. Individuals may apply for temporary premium assistance from the Medical Services Plan.

However, many attendant costs arise such as transportation expenses to consult with specialists outside the worker's region, payments for drugs, user fees, physiotherapy and chiropractic treatments in excess of the 12 visits allowed under the Medical Services Plan and other related expenses. The worker must pay these expenses while awaiting an appeal decision unless he or she is receiving benefits from another agency.

The Ministry of Social Services & Housing will grant sponsored medical coverage to individuals and their families only if the person is deemed to be unemployable. A worker awaiting an appeal is generally not classified as unemployable. Pharmacare will pay 80% of any prescription expenses exceeding $275.00.

The financial difficulties in obtaining the treatment and aid recommended by the individual's own doctors can cause considerable stress and in some cases can delay recovery.

The W.C.R.B. does allow for expedited appeals on the basis of financial hardship or medical grounds. However, since many of the appellants awaiting a decision suffer similar hardship, it is a difficult judgment call for the

W.C.R.B. to make unless the circumstances are strikingly severe. In addition, many workers and even their representatives are unaware that they can request an expedited appeal.

While the economic costs can be quantified, the stress of the waiting period on individuals and families cannot be measured. The Ministry of Social Services and Housing not only must pay the living expenses during this time, but also must respond to the family stress that ensues in some cases.

Delay can also affect the outcome of appeals. It can prejudice appeals because memories fade and alter over time. Thus, oral evidence at a hearing may conflict with that on file.

The W.C.R.B. also gives priority in cases where an employer appeals a decision of an adjudicator to accept a claim if the employer appeals within 10 days of the decision of the W.C.B.. In such cases, the worker's wage loss payments are suspended pending the outcome of the appeal. Although these appeals are heard on a priority basis, it may be several months before the issue is decided. These cases illustrate the W.C.B.'s conflicting obligations under the Act: the W.C.B. is required to reconcile the need for an effective right of appeal for employers with the provision of income continuity for injured workers. In Reporter Decision No.20, which was made in 1973, the Commissioners concluded that one of the purposes of workers' compensation was to establish a quick and efficient administrative process rather than a system that involved delay, procrastination, expense and rigid formality. This purpose conflicted with the delays inherent in the appeal process, if the employer was to have a meaningful right of appeal. The Commissioners adopted a policy which attempted to balance these opposing interests. They ordered that suspension of wage loss benefits pending an appeal by the employer would only be made if the employer moved expeditiously. This meant that the appeal had to be filed within 7 days (now 10 days) of acceptance of a claim by the W.C.B.

At the time Reporter Decision No.20 was published, it was contemplated that the investigation and adjudication of a claim would take a total of 18 weeks. It was expected that an appeal to the Boards of Review would take a further 2 weeks. The suspension of benefits in the case of an employer appeal would thus be 20 weeks maximum. The current situation is very different.

The lengthy delays at the W.C.R.B. seem to have undermined the Commissioners' attempt to balance a worker's interest in income continuity and the employer's interest in an effective appeal right. Even with a more streamlined appeal system, it is unlikely that the appeal process would be completed within two weeks. However, the W.C.B.'s policy is now out of date and needs to be revised to reflect current realities. Almost no other W.C.B. in Canada automatically suspends benefits while awaiting the outcome of an employer-initiated appeal. The only other W.C.B. that does so is Prince Edward Island, and in that province, the length of the appeal process is only 21 days.

The W.C.B.'s policy concerning the suspension of benefits pending the outcome of an employer's appeal fails to achieve the purpose for which it was established, i.e. to balance employer and worker interests, and is therefore an unreasonable procedure. High quality adjudication and an expeditious appeal process should provide adequate protection of employer interests.

Recommendation 1:

That the W.C.B. discontinue its policy of suspending benefits pending the outcome of employer initiated appeals.

Delay does not end with a decision from the W.C.R.B. if the decision is to deny the appeal. The average time for an appeal to the Commissioners is 12-18 months from the date of receipt of submissions. The recent addition of new specialists who are available to sit on M.R.P. has improved that appeal process to a significant degree. The W.C.B. has also hired an additional Appeals Administrator to review the initial applications, improving that stage of the process. However, as Part VII outlines, there can be considerable delay in the M.R.P. application process due to a lack of understanding of the requirements of describing the medical dispute. Once an appeal to a Panel is accepted, there is further delay in the acquisition of medical reports and documentation from treatment centres and practitioners outside the W.C.B.

At present, unless there is a radical change to the system, an appellant who goes through the appeal process could experience a wait of approximately four years before the entire appeal process has been exhausted.

C. File Disclosure

Since the B.C. Court of Appeal's decision in Napoli v. Workers' Compensation Board, (1981), 29 B.C.L.R. 371, the worker is entitled to disclosure of the claim file for the purposes of pursuing or opposing an appeal. He or she now has the right to know the evidence on which the adverse decision was based and therefore has an opportunity to correct any incorrect information, and determine what evidence is lacking or requires clarification, in order to prepare for an appeal. The employer also has access to relevant file material.

A Committee within the W.C.B. has recently recommended changes in the W.C.B.'s disclosure practice. The suggested changes include disclosure of claim files to workers and employers after an appealable decision is made, but before an appeal is filed. This would give the worker or employer an opportunity to review the relevant evidence in order to decide whether to appeal or seek a Manager Review. We support this proposal.

However, in our view, some of the other recommendations of the Committee are problematic. These include:

1. The worker is not given disclosure other than when an appealable decision is made. This policy prevents the worker from having disclosure of the file when attempting to reopen his or her claim or when requesting a reconsideration of a previous decision. W.C.B. policy regarding reconsideration is set out in Reporter Decision No. 29 and the Policy Manual:

> An earlier decision will be reconsidered if there is significant new evidence indicating that a decision should be reached different from that which had been reached before. The Board is, however, more likely to reach a different conclusion in this type of case if the new evidence was unavailable previously than if it was available to the applicant before the original decision. (Reporter Decision No. 29)
>
> The Board's requirement that the evidence be new means, in the case of medical evidence, that either the medical findings or the opinion based on those findings must be different from those at the time of the original decision ... The same opinion, supported by new medical findings, or a new opinion as to the significance of the same findings, may constitute such evidence. (Policy Manual 108.11)

Without disclosure of the file, the worker is at a disadvantage in determining exactly what evidence is required which would meet the W.C.B.'s definition of "significant new evidence". The only route available would be for the worker or his representative to present what is surmised to be significant new evidence, but without full knowledge of what evidence already exists on the file. If the claim is not reopened, the decision may be appealable and the worker may embark on a futile or lengthy appeal process. This policy therefore may encourage appeals as disclosure is not given until after the decision is made.

Secondly, just as the W.C.B. can reopen and reconsider its decision at any time, so the worker should be able to review his or her file to determine if this is a realistic possibility. Alternatively, the worker may, after reviewing the file, decide whether to ask for an extension of time to appeal. Under the present system, this is not possible. Instead, a worker must first have or obtain an appealable decision. This necessitates a worker going through the formality of obtaining an appealable decision from the W.C.B. so that he or she may have file disclosure, rather than being allowed to review the file to determine what, if any, significant new evidence may be required, or whether the problem should be pursued. Disclosure in these circumstances would allow the worker to focus attention on the real issue. The process would become less frustrating. The Commissioners seem to have considered a similar problem in Reporter Decision No. 370 in which they concluded:

> The Board should not insist on a claimant or employer asking the claims adjudicator to review and make a decision on a relevant claim before disclosure is granted. To insist on this could result in numerous unnecessary applications being made to claims adjudicators whose real object would be to obtain disclosure of the file following their adverse decisions.

Disclosure of the claim file is not only important for purposes of reopening a file, but it is also important to the individual worker as it contains private information pertaining to his or her life and health. Although the W.C.B.'s proposed policy is to provide disclosure of a claim file to public and private

agencies on request, (see Page 24), the W.C.B.'s present policy is not to disclose claim files to workers on request. The Supreme Court commented on a similar discrepancy in Napoli v. Workers' Compensation Board, (1981), 27 B.C.L.R. 306. With respect to the W.C.B.'s policy at the time to provide summaries of claim files, but not to provide them to the worker, the court commented:

> Apparently, the W.C.B. is prepared to let everyone else involved in these proceedings examine the petitioner's file except the petitioner himself. The compensation consultant has seen it, the board of review has seen it, the commissioners have seen it, counsel for the W.C.B. has seen it, and now it has been offered to me. But the W.C.B. says that under no condition is the petitioner to have a look at it. And yet he is the subject of its contents.

Reasonable access on request would have some important benefits for the W.C.B. and claimants. Secrecy breeds suspicion and a lack of confidence in the system. Reasonable access on request would counteract this. There would also be an increased accountability of the W.C.B. to its claimants and an increased understanding by claimants; it would provide positive public relations for the W.C.B. as it would be in the vanguard promoting greater access to information for individuals; and it would contribute toward improved adjudication.

The reason given by the committee on file disclosure for not disclosing files on request is that "allowing disclosure at any time would unduly hamper the activities of the Board's departments in their routine administration".

Administrative difficulty is an inadequate reason for the W.C.B. to restrict full access to information which concerns an individual's health and income. The Federal Government appears to have dealt with any administrative difficulties there may be in allowing citizens to examine personal information or provide copies of this information pursuant to the Privacy Act (Canada). Likewise, the W.C.B. should be able to overcome any administrative problems that disclosure on request would cause. The W.C.B. has the discretion under the Act to provide disclosure of claim files to workers upon request, and there is no adequate reason not to do so. If disclosure would interfere with or

delay a decision on the claim, the worker could be informed of this and thus have the option of deciding whether disclosure was worth the inconvenience.

Recommendation 2:

That claimants be allowed access to their file upon request, subject to reasonable administrative procedures.

2. The W.C.B.'s policy is that a claimant or employer may submit further requests for disclosure where information has been added to the file since the previous request and the same or another appeal is proceeding. The onus is on the appellant or employer to request further disclosure, rather than on the W.C.B. to provide automatic updating. This can become a problem when a worker or employer does not know to ask for copies of newly received relevant information prior to his or her hearing. Appellants who do not have updated disclosure may be confused at a hearing, which may even have to be postponed if the undisclosed documents are crucial to the appellant's case.

   The postponement issue has been considered by the W.C.R.B. in a recent communication to interest groups. (IGC #1/87). It is stated that the W.C.R.B. will be taking a very narrow approach in dealing with time delays caused by the parties to an appeal. The W.C.R.B.'s position will be that "where it is evident that the delay could have been avoided with reasonable attention and diligence, the additional time will not be allowed". Applying for file disclosure early was given as an example of such diligence. We agree that appellants should apply for file disclosure early. However, it is much easier for the W.C.B. to provide updated disclosure automatically than it is for a party to repeatedly seek it, on the off chance that new information has been added.

   The W.C.B. estimates that of the 4,859 requests for disclosure in 1986, 80% were from workers, of which 10% were for updates. This 10% of workers asking for updates appears to be a small number in view of the lengthy delays in the appeal system and the likelihood that new material would be added to the file while the appellant is waiting for the appeal to be heard. With the provision of updated disclosure, not only would the worker and employer be completely prepared at the time of the hearing, but either party could ask the Adjudicator to reconsider new evidence based on the updated information received.

Recommendation 3:

That updated disclosure be automatically provided by the W.C.B. to parties to an appeal up to the time of the appeal hearing or read and review.

3. At present the W.C.B.'s policy is to disclose to the employer only that documentation which is relevant to the issue being appealed. However, if the documentation contains a mixture of relevant, irrelevant and confidential information concerning the worker, the W.C.B. is considering sending this complete document to the employer. The Committee has recommended that:

   Employers should continue to be restricted in the documents on the claim file which they receive. They should, however, receive all documents save those judged to be both irrelevant and harmful to the worker's privacy beyond what must in any event occur.

   We are concerned that the worker would not be aware that this had been done, and would not have an opportunity to comment on a possibly prejudicial and irrelevant statement before it was sent to the employer.

   Recommendation 4:

   That the W.C.B. restrict disclosure to an employer of material judged to be both irrelevant and prejudicial to a worker. Before providing disclosure to an employer, the W.C.B. shall consider representations from the worker on issues of possible irrelevance and prejudice.

4. The Committee on file disclosure further recommended that:

   In respect of other agencies, both public and private, the Board will provide disclosure of a claim file where disclosure is requested in connection with a matter legitimately the concern of that agency and where the agency provides a release from the claimant, except that copies of witness statements or memos by Board staff (save for examination reports by Board doctors) will not be normally provided.

   We have a concern here similar to that expressed regarding disclosure to employers, i.e. the effect of

irrelevant, confidential and possibly pejorative comments on documents which may be deemed to be legitimately the concern of an outside agency. Such information may or may not be true, or could be based on rumours or hearsay. Such comments or information would not legitimately be the concern of an outside agency, but disclosure could result in an outside agency adopting a negative view of the claimant which could then affect its decision.

Furthermore, the worker may not have had disclosure of his or her file and therefore no opportunity to object to or correct any untrue information or pejorative comments. This omission is a problem in view of the fact that the worker is being asked to release information to outside agencies. Without disclosure of what material will be released, the worker would not be aware of exactly what he or she is agreeing to.

Recommendation 5:

That where a public or private agency requests disclosure of all or part of a worker's claim file, the W.C.B. require a release signed by the worker before providing disclosure to the agency. (See Recommendations 2 and 4).

D. Costs

In addition to the costs of representation (see Chapter VIII), appellants also incur other costs in pursuing their appeals. These costs include: (1) medical reports, and (2) transportation and travel costs.

1. Medical Reports

The Act requires that a physician "give all reasonable and necessary information, advice and assistance to the injured worker and his dependants in making application for compensation, and in furnishing in connection with it the required certificates and proofs, without charge to the worker". (S.56(1)(d))

In practice, difficulties arise when a worker or representative requires the opinion of a physician, usually a specialist, in order to succeed on an appeal. Often the doctor is one who treated the worker during the course of his illness. In these cases, the doctor is either clarifying his or her

earlier opinion given to the W.C.B., or is giving a medical opinion for the first time because the W.C.B. had not asked for it. (see Part IV). In complex claims where the physician would be required to analyse lengthy medical reports and voluminous file material, the doctor may have to spend hours in preparing such a report. Some doctors will provide this analysis without extra charge beyond the regular M.S.P. billing. Others, however, insist on payment and charge in the range of $215 - $429 for these medical-legal reports. This fee must be paid in advance by workers who are already suffering financial problems in their long wait for their appeal to be decided.

Appellants may include a request for reimbursement for these reports in their submissions to the W.C.R.B. The W.C.R.B. Panel may instruct the W.C.B. that they relied on expert reports and that the cost should be reimbursed. However, if the appellant does not know to request reimbursement, the matter may be overlooked by the W.C.R.B.

At the outset of an appeal the W.C.R.B. does send out pamphlets informing appellants that in some cases the panel may advise the W.C.B. to pay for the medical reports; however, because of the delay in the appeal process the appellant may have forgotten that fact close to two years after the appeal was initiated.

Recommendations:

6. That on the initial adjudication special care be taken to ensure that all relevant medical opinions from all treating physicians be obtained in advance of the final decision.

7. That impecunious appellants and their representatives have access to adequate funding for necessary medical-legal opinions for the purposes of an appeal. These costs would be recoverable from W.C.B. if it later accepted the claim following reconsideration or an appeal. (See Recommendations 44 & 45)

8. That the W.C.R.B. advise appellants in its decision letters allowing an appeal that medical-legal costs may be reimbursed.

2. Transportation and Travel Costs

The stated policy of the W.C.B. is that the payment of expenses is discretionary. There are no undertakings to pay expenses and no advances (Policy Manual 100.12). Since most appeals to the Commissioners are presently conducted by written submission, travel expenses are not generally an issue. W.C.R.B. panels travel to outlying districts, and therefore the hearings are generally accessible unless a person has moved out of province. We believe that the W.C.R.B. should have the discretion to order that transportation expenses be paid in advance if the circumstances warrant it.

The Ombudsman's office has investigated cases which involved complaints about the August 1984 policy decision of the W.C.B. to deny travel expense payments any distance beyond the border of B.C. for workers appealing to a M.R.P.. This policy of the W.C.B. is inconsistent with its stated policy that "unless it is concluded that the claimant was misleading his own doctor, expenses will be paid regardless of the result" (Policy Manual, 100.13). The W.C.B. normally pays travel expenses to M.R.P. in advance for workers residing in B.C. However, as stated, this does not apply to workers from outside of B.C., except for the portion from the B.C. border. The appeal process is for all aggrieved claimants and their place of residence may be an illogical and unfair basis on which to distinguish between those claimants who will have all their travel expenses paid and those who will have only part of their travel expenses paid. In many cases, the reason a worker leaves the province is to find better economic prospects or receive family support. In some of these cases this relieves the Province of the burden of paying income assistance to the worker pending the appeal.

The right to have a M.R.P. is not automatic and requires an application for leave to appeal. Once a bona fide medical dispute has been outlined by the worker's physician, and the W.C.B. accepts that the dispute has been properly delineated, an appeal

is granted. A worker must submit to an examination by the Panel. It can therefore be argued that since the case has sufficient merit to be considered by a Panel and the worker's attendance is mandatory, travel expenses should be paid in all cases. Otherwise, the appeal rights for workers residing out of province is so expensive as to be illusory.

The W.C.B. has estimated that in the past year, it has received four requests for reimbursement for travel expenses from workers residing out of province. Of the four, one request was granted totally, one partially, and one was refused. The fourth case was pending. Considering that a typical claimant is on a reduced fixed income and the number of out-of-province appellants is very small, W.C.B.'s policy appears unduly restrictive and discriminatory.

Recommendations:

9. That the W.C.R.B. and W.C.B. be given discretion to pay transportation costs in advance of hearings if the circumstances warrant prepayment. (see Recommendation 18)

10. That after a bona fide medical dispute has been established by a worker residing outside of B.C. for therapeutic or rehabilitation purposes, transportation costs from the worker's place of residence to a M.R.P. be paid in advance.

E. The Standard of Proof and Section 99

W.C.B. policy on the standard of proof for claims decisions is set out in Reporter Decision No.52. At the time of the initial application there is no burden of proof on the worker to prove a claim, nor is there any presumption in the worker's favour. It is the Adjudicator's duty to collect and examine the evidence to see whether 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. Then, if on weighing the available evidence, there is a preponderance in favour of one view over the other, that is the conclusion that must be reached.

In other words, the civil standard of proof applies, i.e. the balance of probabilities. In the vast majority of cases this standard presents no problem because the evidence points clearly in one direction or the other. However, difficulties and appeals can arise where the evidence is not clear cut. There are two categories of cases which exhibit these difficulties.

1. Gaps in Medical Knowledge

The first category typically concerns those cases in which the evidence is strongly suggestive that a worker's condition was caused by a work-related injury, and no other conflicting possibility has been identified on the basis of the available evidence. For example, a worker suffers a back injury at work and continues to have pain long after the normal recovery period. There is no doubt that the pain is genuine and that it is not attributable to any other identifiable cause. Prior to the accident the worker suffered no such pain. Yet the medical testimony cannot explain why the worker continues to suffer pain, although the doctors believe it is work-related. In these circumstances the W.C.B. will reject the claim on the ground that there is insufficient medical evidence in support of the claim. The W.C.B. categorizes such claims as "speculative".

Medical evidence is desirable where it can assist in decision making. However, it must be recognized that medical science is not perfect and there is much to be learned about the way the human body functions. It is quite possible to reach "a sound conclusion with confidence" without applying scientific standards of proof which require the negation of all other rational possibilities. The W.C.B.'s insistence on conclusive medical evidence in every case requiring medical expertise in effect places a burden of proof on the claimant. Either that, or the W.C.B. is applying a higher standard of proof than a mere preponderance of probabilities. Appeals in such cases are almost inevitable.

A similar practice occurs in cases not raising a medical issue. There is some evidence (usually the testimony of the worker) that the injury is employment related. There may be little or no evidence that the injury did not occur at work, and there is no reason to disbelieve the worker. A common example occurs

when a worker suffers a soft-tissue injury the symptoms of which do not appear immediately. The worker does not consider it disabling or serious enough to report. A few days later he or she is disabled and reports the injury. There is no evidence suggesting any other cause. The best available hypothesis is that the injury was probably work related. Yet the W.C.B. (and sometimes the W.C.R.B.) focuses on the delay in reporting or some other minor procedural factor to justify its rejection of the claim. This is in spite of the fact that no other possibility can be identified on the evidence available. If there is another explanation, the W.C.B., with its significantly greater investigative resources, should be able to identify it. In our view, this practice serves to place a burden of proof on the worker and is contrary to the intent of the legislation and the W.C.B.'s policy as stated in Reporter Decision No. 52. It can only serve to generate appeals.

The standard of proof applied to workers' claims should make allowance for weaknesses in medical science and the discrepancy in investigative resources. The W.C.B. ought to accept the most likely explanation for a worker's disability, if it is in his or her favour, unless the W.C.B. can show that there is another explanation which is more likely on the basis of the available evidence. If claims were assessed on the basis of the best available hypothesis, appeals could be avoided and the intent of the legislation realized.

Recommendation 11:

That the standard of proof used by the W.C.B. in deciding claims be clarified to require the recognition of the best available hypothesis supported by the evidence.

2. Section 99:Benefit of the Doubt?

The second category of cases concerns those in which the disputed possibilities are evenly balanced. In these cases Section 99 of the Act applies:

> 99. The board is not bound to follow legal precedent. Its decision 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 favourable to the worker.

There are two problems with Section 99. The first concerns the popular belief that it gives the claimant the benefit of the doubt. The second concerns the narrow interpretation that can be placed by the W.C.B. on the phrase "evenly balanced".

There is a widespread belief among workers and others that Section 99 requires the W.C.B. to give a worker the benefit of the doubt, i.e. if there is some possibility that the injury arose out of the employment, the worker should be given the benefit of the doubt. This, however, is not the interpretation placed on Section 99 by the W.C.B. In a memorandum dated 25 April 1984 the W.C.B. states:

> While this phrase [benefit of the doubt] is a convenient expression for referring to Section 99, it can be misleading. It can suggest that the decision is to be made in favour of the worker whenever there is a doubt respecting his claim, whereas in fact the section only applies when there is both a doubt and an even balance of disputed possibilities. Where there is a doubt, but the evidence indicates that the possibility less favourable to the worker is more likely than the possibility which is favourable to him, the decision must be made against the worker.

This interpretation has been endorsed by the British Columbia Court of Appeal (Madelaine Hanney v. W.C.B., unreported, October 16, 1984, Vancouver CA 820007).

This discrepancy between popular belief and official policy inevitably results in a number of appeals. The use of the word "doubt" in Section 99 is probably the source of the confusion.

Apart from the confusion which exists around the true meaning of this Section, there is also the problem of the W.C.B.'s frequent refusal to apply it, even where the possibilities are roughly evenly balanced. The purpose of Section 99 is to guide the W.C.B. when conflicting possibilities are supported by evidence of more or less equal weight. This is acknowledged by the W.C.B. in its Policy Manual at #97.10:

> This applies only where there is evidence of roughly equal weight for and against the claim. It does not come into play where the evidence indicates that one possibility is more likely than the other. (our emphasis)

Yet in practice the W.C.B. seems to interpret the Section as requiring a precisely even balance.

The usual type of case involves a medical issue in which one doctor believes the condition is not related to an injury and another doctor believes that it is. The doctors are equally qualified. There would therefore seem to be a strong argument that the disputed possibilities are roughly evenly balanced. However, frequently the W.C.B. refuses to recognize that the possibilities are evenly balanced. Therefore, in the W.C.B.'s view, Section 99 does not apply. This narrow interpretation of Section 99 renders it effectively meaningless. It also conflicts with the other part of Section 99 which requires that decisions be made according to the merits and justice of the case. In order to get it enforced the worker must appeal.

If the W.C.B.'s interpretation of Section 99 were clarified, it would eliminate the popular misconception about its meaning, as well as provide clearer guidelines for determining when disputes should be resolved in favour of the worker.

Recommendation 12:

That the W.C.B. clarify its policy regarding the interpretation of Section 99 of the Act to provide that, on an issue where there is more than one hypothesis supported by evidence of roughly equal weight, the issue shall be resolved in accordance with that hypothesis which is favourable to the worker.

F. Summary of Recommendations

1. That the W.C.B. discontinue its policy of suspending benefits pending the outcome of employer initiated appeals.

2. That claimants be allowed access to their file upon request, subject to reasonable administrative procedures.

3. That updated disclosure be automatically provided by the W.C.B. to parties to an appeal up to the time of the appeal hearing or read and review.

4. That the W.C.B. restrict disclosure to an employer of material judged to be both irrelevant and prejudicial to a worker. Before providing disclosure to an employer, the W.C.B. shall consider representations from the worker on issues of possible irrelevance and prejudice.

5. That where a public or private agency requests disclosure of all or part of a worker's claim file, the W.C.B. require a release signed by the worker before providing disclosure to the agency. (See Recommendations 2 and 4).

6. That on the initial adjudication special care be taken to ensure that all relevant medical opinions from all treating physicians be obtained in advance of the final decision.

7. That impecunious appellants and their representatives have access to adequate funding for necessary medical-legal opinions for the purposes of an appeal. These costs would be recoverable from W.C.B. if it later accepted the claim following reconsideration or an appeal. (See Recommendations 44 & 45)

8. That the W.C.R.B. advise appellants in its decision letters allowing an appeal that medical-legal costs may be reimbursed.

9. That the W.C.R.B. and W.C.B. be given discretion to pay transportation costs in advance of hearings if the circumstances warrant prepayment. (see Recommendation 18)

10. That after a bona fide medical dispute has been established by a worker residing outside of B.C. for therapeutic or rehabilitation purposes, transportation costs from the worker's place of residence to a M.R.P. be paid in advance.

11. That the standard of proof used by the W.C.B. in deciding claims be clarified to require the recognition of the best available hypothesis supported by the evidence.

12. That the W.C.B. clarify its policy regarding the interpretation of Section 99 of the Act to provide that, on an issue where there is more than one hypothesis supported by evidence of roughly equal weight, the issue shall be resolved in accordance with that hypothesis which is favourable to the worker.

Footnotes:

1 Price Waterhouse Associates, "Ministry of Labour Boards of Review. An Examination of Alternative Methods of Dealing with Increasing Caseloads", June 1981.

2 W.C.B. Statistics

IV. CLAIMS AND REHABILITATION DEPARTMENT

A. First Level Decision-Making

The function of first level decision-making is crucial in considering the claims and appeals structure. Decision-makers who are committed to thorough, high quality decisions, and who are trained and encouraged in the acceptance that quality is their responsibility, have the effect of decreasing the number of appeals. Increased commitment to quality leads to greater productivity.

A discussion about the importance of quality in first level decisions is provided by Tysoe:

> With 80,000 claims to be adjudicated upon every year, it would be foolish to suppose or expect that no errors would be made. Moreover, perfect justice in all cases is simply unattainable. Even the Courts, on occasion, make mistakes. The important thing, to my mind, is that the practices and procedures of the Board should be such that there should be as little room as possible for arbitrariness to creep in or for decisions of the Board to be based on wrong or incomplete facts. As much protection as can be given to assure that the rights of workmen and employers are not prejudiced, and that every claim is honestly and conscientiously viewed and considered, should be provided.[1]

W.C.B. policies concerning initial decison-making are set out in the Policy Manual and are generally thoughtful and thorough. However, our experience with complaints against the W.C.B. has demonstrated some disparity between policy and practice. We have received many complaints which revealed that the practice of primary decision-makers did not comply with the written policy. It is difficult to ascertain the reasons for this inconsistency. Certainly, however, the issues of recruitment, training, size of case loads, supervision, real or perceived pressures to reduce costs, and ineffective quality control, can all be factors leading to inconsistent application of policy.

In this Part, we will briefly outline the background of initial decision-making; we will discuss quality decision-making in terms of policy and practice, based on the experience of our office; and we will make recommendations to support more effective decision-making.

1. Background and changes

Prior to 1974, first line decision-makers had a defined amount of authority. If claims were considered to be routine, the claims officers managed the claims. If the claims were considered to be controversial, the primary decision-makers placed the claim before a senior claims officer, outlining details and making recommendations. If the senior claims officer agreed, the claim was managed as decided. If there was disagreement, and if the senior claims officer was recommending denial of the claim, that person was obliged to refer the file to the supervisor of claims. The supervisor of claims could overrule the senior claims officer, and allow the claim. Similarly, the senior claims officer could allow a claim which the claims officer had denied. Claims could not be disallowed by only one person.

From 1974 to 1984 the adjudicator was assigned the ultimate power for the decision-making in the claim, and no one could over-rule that decision. Decisions could go only to the Boards of Review, the Commissioners, the M.R.P. or the Director of Claims. Neither could the decision-maker reconsider the decision, except when there was significant new medical evidence; at this point, the decision-maker had to ask permission of the Director of Claims to readjudicate. During this era, there was no unit manager, and front line decision-makers worked without direct supervision within the unit. There did exist the Director and Assistant Director of Claims; however, there were no resource people for front line decision-makers within the unit.

At the present time, adjudicators are still responsible for the decision-making process, but now unit managers can intervene and overrule decisions. This practice came about in 1984 to reflect common practice in the business world, for example, as well as to respond to the appeals backlog.

The trend in recent years has been toward greater accountability for decision-making, and more complete and effective communication of the decision-making process and of the decisions reached. As an example of this trend, the W.C.B. "disallow letter" of the 1960's was often a four line document giving no reasons for the decision. In contrast, current policy prescribes specific and comprehensive guidelines for

communication of decisions, and it is the responsibility of the first level decision-makers to apply this policy consistently.

2. Quality Decision-Making:Policy and Practice

Policies for initial decision-makers are contained in the Policy Manual. The following are situations within our experience where inconsistency has arisen between policy and practice in primary decision-making.

(a) Taking the initiative

W.C.B. policy regarding the responsibility of the adjudicator in taking the initiative is as follows:

> The correct approach is to examine the evidence to see whether 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. (Policy Manual: #97.00)

Although this is excellent policy, it is not always fully implemented. Where this is pointed out, the W.C.B. acts to rectify the situation. However, inconsistency between policy and practice can cause delay and hardship.

(b)Communication during the decision-making process

W.C.B. policy regarding the adjudicator's responsibility to communicate with the worker during the decision-making process is as follows:

> ...if investigation indicates grounds of invalidity, the worker is informed of the difficulties in paying the claim, so that he has an opportunity to respond.
>
> Where it appears to an Adjudicator following investigation that the claim is one that should probably be denied, he should, before reaching a decision, ensure that the claimant is aware of the issues and has had a proper opportunity to present any relevant information or argument. ...This letter should identify the difficulties in allowing the claim and ask whether the claimant has any

> further comments before the claim is decided. It may conclude with a suggestion that he may like to show the letter to a union official or other adviser.
>
> ...the Adjudicator does not final wage loss benefits until there has been a discussion with the worker regarding this decision. (Policy Manual #99.10)

Paul Weiler, in his 1980 report on workers' compensation in Ontario, suggests that the W.C.B. tell the claimant of any difficulties with the claim, and enlist the claimant's help in solving the problem:

> Otherwise, if a claim is rejected and the worker receives the Board letter and learns of the grounds only at that time, a claimant who has a valid point to make against these reasons is almost sure to appeal and subject everyone to a lengthy and costly hearing process. How much better to give the claimant a chance to make these points before he gets locked into an adversarial stance with the Board, trying to reverse a judgment which has already been made.[2]

We support W.C.B.'s policy and Weiler's analysis of the benefits of such a policy. However, again, the policy is not always followed in practice. To be certain that difficulties with the claim are clear they should be set out in a letter before the decision becomes final.

> **Recommendation 13:**
>
> That before a decision is made which would have the effect of denying or limiting a claim, a pre-decision letter should be sent explaining the intended decision, identifying the difficulties in allowing the claim and offering an opportunity to provide any relevant information or argument.

Communication during the decision-making process is also important in the area of rehabilitation decisions. One of the most important functions performed by Rehabilitation Consultants is the preparation of an Employability Assessment. This assessment is used by the Disability Awards Officer or Senior Pensions Adjudicator to determine whether or not the worker has suffered a loss of earnings. The

W.C.B.'s Policy Manual requires the Rehabilitation Consultant to consider "suitable" jobs which are reasonably available over the long term.[3]

Although the worker does meet with the Rehabilitation Consultant, he or she does not receive a copy of the Employability Assessment, nor does the worker have direct input into the final document. The worker receives a brief summary of the report in the decision letter detailing the final results of his or her pension assessment. If the worker and his or her physician received copies of the report before the decision, this would allow for clarification of disputed facts and allow the worker some direct input before the final decision on the pension. This "report" could be included with the pre-decision letter to both the worker and the physician requesting any additional information required.

Recommendation 14:

That the worker and his or her physician receive copies of the Employability Assessment upon its completion and before a decision based on it is made. (See Recommendation 13).

(c) Communication of decisions

Where a decision is made that is adverse to a claimant, the reasons are stated in a letter to the claimant. There are specific guidelines concerning the construction of these letters. These guidelines are outlined in a W.C.B. Memo, dated April 9, 1983 from the Director of Claims. However, they do not appear in the Policy Manual. These guidelines are:

- Specify clearly the matter being adjudicated.
- Describe investigations carried out including interviews conducted.
- Outline the evidence considered.
- Explain how the evidence was evaluated (specify its reliability; analyse conflicting evidence; give reasons for the weight apportioned to the evidence).
- Review contact with the worker where the relevant issues were discussed and detail the worker's response.

- List the various conclusions possible from the evidence.

- In support of the conclusion reached, explain a) what evidence was considered favourable, with reasons, and b) what evidence was considered unfavourable, or discounted, with reasons.

- Point out statutory, policy or discretionary factors involved.

- If appropriate, discuss the question of the balance of possibilities.

- Summarise with formal disallow decision.

- Explain what the decision entails regarding non-payment of wage loss compensation, medical accounts, other benefits, etc.

- Include the standard appeal paragraph. Copies of this letter are sent to the employer, all doctors, and any advocates. (Board Directive, 1983)

We find these guidelines to be excellent ones. However, in our experience, decision letters rarely comply fully with these guidelines. Their consistent use would, in our opinion, improve the communication between workers and W.C.B. staff. This would serve to enhance the non-adversarial nature of first level decision-making, which would in turn reduce the number of decisions appealed.

Recommendation 15:

That the April 9, 1983 guidelines for the composition of "disallow letters" be made policy and be outlined in the Policy Manual.

(d)Quality Enhancement

An effective quality enhancement program decreases the errors in first level decisions. Over the past twelve years, an average of 44% of W.C.B. decisions appealed by workers have been overturned by the W.C.R.B. It is interesting to note that the large majority of these overturned decisions relate to appeals from claims which the W.C.B. considers "accepted", rather than from the small percentage which it classifies as "disallowed". (Source:W.C.B. statistics, 1980-1986).

Many of the decisions overturned by the W.C.R.B. are based on "new evidence" not considered by the Claims Adjudicators. In our experience, the "new evidence" often could have been obtained during the initial investigation. It consists of supplementary reports of physicians elaborating on previous reports, or the evidence of witnesses corroborating the claimant's testimony. The failure of first line decision-makers to obtain this evidence cannot be simply attributed to individual carelessness or lack of training. W.C.B. staff are hard-working, conscientious professionals trying to do a difficult job in less than ideal circumstances. High caseloads, pressure from workers, employers, managers and others to make quick decisions, and inadequate managerial support can have a negative impact. A policy such as that proposed in Recommendation #6 (obtain all relevant medical opinions before the final decision and clarify any ambiguity in those opinions) would focus the necessity of having access to all relevant evidence.

Successful management practices are widely recognized as including a strong organizational emphasis on quality enhancement (Leonard and Sasser, Harvard Business Review, Sept./Oct. 1982; Garvin, Harvard Business Review, Sept./Oct., 1983) Essential elements of such a program are as follows:

- Quality enhancement requires a program in which everyone in the organization is responsible for quality. This organization-wide, systems approach is based on participation and communication. The program should include a formal system of goal-setting, in which everyone is involved.

- A quality enhancement program should focus on training and development of both managers and staff. Continued commitment to quality is part of the daily operation of the organization; regular communication about quality can take the form of articles, posters, meetings.

- A quality enhancement team, made up of individuals from different areas in the organization should act as a resource and inspiration for first level decision-makers, as well as for other staff and managers.

- The quality enhancement team should focus on training, communication, and continued commitment to quality in all levels of the organization. In this respect, the keeping of statistics helps to

eliminate inconsistencies amongst various units and area offices regarding the application of policy. Resources are then directed to increasing consistency, fairness, and accuracy in decision-making. Membership on the team should be for a specific term, in the interest of encouraging system-wide participation and keeping the commitment to quality vigorous.

- An important component of quality enhancement is the internal review of tentative adverse decisions. Internal review encourages a high level of accuracy and fairness in the initial decision-making.

The W.C.B. recognizes many of these principles in its quality control measures, including its training and staff development programs, its Quality Appraisal Section, and its system of manager reviews. We strongly support this emphasis and encourage regular reinforcement and expansion of the practices.

In Ontario, the Claims Review Branch was introduced into the system of primary decision-making. If the initial decision-maker believes a claim should be rejected, the file is passed to the Claims Review Branch. Senior claims officials review the material on file, and order further investigation if necessary. They can reverse the tentative adverse decision, and allow the claim. In 1979, the Claims Review Branch reviewed 20,000 cases; in excess of 40% of these reviews resulted in decisions favourable to the claimant.[4] While such an elaborate system may not be required in B.C., these figures show that a preventative approach to quality enhancement can be very effective.

Two fundamentally important consequences of effective quality control are that (1) it eliminates the considerable expense of correcting errors and (2) it enhances the reputation of the organization for efficiency and fairness. Lower costs and improved reputation are both vitally important to the W.C.B. However, the message from Senior Management should not stress these as primary objectives or the response from staff may actually be counterproductive. Rather, if the management emphasis is on ensuring that the right decision is made the first time, the result will be substantial cost savings and strong public support.

Recommendation 16:

That the Commissioners review and emphasize its quality enhancement program on a regular basis in order to ensure its maximum effectiveness. The quality enhancement program should include the following:

- -top management support
- -fostering the attitude that quality is everyone's responsibility
- -a quality enhancement team with rotating members from different disciplines
- -an appreciation for the cost effectiveness of making the right decision the first time.

The W.C.B. has indicated its intention to improve its management information system to ensure adequate control over the quality of its decision-making. In our review of the W.C.B. decision-making process, it was evident that such greater emphasis was required.

Recommendation 17:

That the W.C.B. give a high priority to developing a more comprehensive management information system as a means to enhancing quality control.

B. Manager Reviews

As previously outlined, after 1974 the decision of an adjudicator remained final and could be reversed only by an appeal decision, unless there was an error in fact, law, policy or the possibility of fraud. In 1985 the system of a manager review of the adjudicator's decision was introduced, at first in a limited way, allowing a manager to substitute his or her judgment whether or not there was new evidence to consider. The review system is now available for all decisions denying benefits, and the right to meet with the area or unit manager is noted in all negative decision letters and when advising employers that a protested decision is considered acceptable..

The attempt of the W.C.B. to provide an opportunity for the resolution of a disputed claim is laudable, and is a recognition of the hardship that the delay in the appeal process can cause in many cases. However, one may question how effectively this objective has been promoted in practice. The following figures were released by the W.C.B. for the period from January to May 1986. The W.C.B. states that no further statistics are available beyond this 5-month period.

Cases Reviewed	Decns. Upheld	Decns. Reversed	Decns. Partially Reversed	Decns. Pending	% Upheld	% Revsd.
888	721	80	75	12	81	17.4

(The percentage of worker appeals that are reversed by the W.C.R.B. in whole or in part is 44%.)

In providing us these statistics, the W.C.B. noted: "with respect to the cases in which the decision was reversed or partially reversed, ...the action taken by the Manager in doing so was generally based on new information or evidence presented by the party requesting the Review and not because the Manager felt that the decision by the Claims Adjudicator or Disability Awards Officer was incorrect."[5] If this is so, it may mean that the adjudicator did not take the initiative in the first instance to obtain this information. Had this been done, a Manager Review may have been unnecessary.

Further, the present Manager Review system places appellants at a disadvantage in two respects. First, the parties do not usually have a copy of the claims file by the time the review is conducted.[6] The role of the Manager is to review the decision and to allow the appellant to see some of the documentation on the file. There is therefore an inequality in the information available to the W.C.B. Manager and the appellants at the time of the interview. If our Recommendation #2 were adopted, this problem would be resolved. Secondly, in many cases, workers in outlying districts are unable to travel to the W.C.B. office in their region, and the review is therefore conducted by telephone. Since all disability awards decisions are made in Richmond, it is difficult for many individuals from throughout the province to arrange a meeting.

Our proposal is that a more thorough investigation at the initial adjudication level, the use of the quality enhancement team as a resource to both Managers and first line decision-makers, and clearer communication with the individual during the course of the decision-making would minimize the need for such review and appeals. Further, Managers should review all appealed decisions automatically, rather than solely on request. This is meant to supplement the current Manager Review procedure and not to duplicate it. Once the adjudicator has made a decision which has been reviewed by the Manager the claim would become a contested one which would then have to be appealed in the adversarial arena.

It is our view that Manager Reviews and a quality approach should strive to be preventative and not remedial. We suggest that the approach of the Managers should be to minimize appeals by encouraging the producing and communicating of such sound and well-reasoned decisions that unnecessary appeals are avoided.

Recommendation 18:

That Managers review all appealed decisions and ensure that an appellant's place of residence does not act as a barrier to effective review.

C. Summary of Recommendations

13. That before a decision is made which would have the effect of denying or limiting a claim, a pre-decision letter should be sent explaining the intended decision, identifying the difficulties in allowing the claim and offering an opportunity to provide any relevant information or argument.

14. That the worker and his or her physician receive copies of the Employability Assessment upon its completion and before a decision based on it is made. (See Recommendation #13).

15. That the April 9, 1983 guidelines for the composition of "disallow letters" be made policy and be outlined in the Policy Manual.

16. That the Commissioners review and emphasize its quality enhancement program on a regular basis in order to ensure its maximum effectiveness. The quality enhancement program should include the following:

    -top management support
    -fostering the attitude that quality is everyone's responsibility
    -a quality enhancement team with rotating members from different disciplines
    -an appreciation for the cost effectiveness of making the right decision the first time.

17. That the W.C.B. give a high priority to developing a more comprehensive management information system as a means to enhancing quality control.

18. That Managers review all appealed decisions and ensure that an appellant's place of residence does not act as a barrier to effective review.

Footnotes

1. Tysoe, ibid p.7.

2. Reshaping Workers' Compensation for Ontario (A report submitted to Robert G. Elgie, MD, Minister of Labour), Paul C. Weiler, November, 1980, p.96.

3. Although the Rehabilitation Manual details the steps to be followed by the Rehabilitation Consultant in developing the Employability Assessment, such detail is not contained in the Policy Manual. We suggest that these details be incorporated into the W.C.B.'s Policy Manual.

4. Weiler, Ibid, p.95.

5. W.C.B. Statistics

6. A W.C.B. Committee has recently recommended the granting of disclosure at the time the negative decision is communicated.

V. COMMISSIONERS

A. Conflict of Functions

The Commissioners are responsible for administering the W.C.B. This includes the provision of claims and rehabilitation services, the management of the accident fund, and the enforcement of occupational health and safety laws. They also make policies to guide W.C.B. staff in the execution of their statutory mandate. These are important and onerous duties.

In addition to their overall administrative responsibilities, the Commissioners have a substantial role as an appellate tribunal on rehabilitation and claims decisions. This includes appeals from W.C.R.B. decisions on individual claims under s.91 of the Act and referrals of W.C.R.B. decisions under s.96(2). This appellate function makes the British Columbia W.C.B. unique in Canada, with British Columbia being the only province having an external appeal which is not final.[1]

Since the enactment of Bill 130 in 1973 the provision for reconsideration of W.C.R.B. decisions by the W.C.B. has been the focus of considerable controversy and debate. In our view the criticisms expressed apply with equal force to appeals of W.C.R.B. decisions to the Commissioners.

The flaw in the system of the Commissioners hearing appeals was pointed out in Napoli v. Workers' Compensation Board (1981), 27 B.C.L.R. 306 (S.C.) aff'd 29 B.C.L.R. 371 (C.A.). The court observed at p.326:

> Instead, the appeal would be back to the W.C.B. itself. Then, the Commissioners, acting as the W.C.B., would hear an appeal from the board of review. The worker would be the only other party to the proceedings. His opposite number at the board of review level, i.e. the W.C.B., would become his judge on his appeal. That does not seem to make much sense.

The W.C.B. has long recognized the criticism of its power to reconsider W.C.R.B. decisions and has made attempts to meet that criticism. In Reporter Decision 280 the following was said:

> Since Decision No.60, several arguments have been advanced against the Board's power and right to define the jurisdiction of the boards of review. In general,

> it nas been suggested tnat to exercise sucn a power is to curtail tne power of tne board of review itself, eitner in fact or by giving tne appearance tnat tne Board controls wnat purports to be an independent body. In snort, by defining tne jurisdiction tne Board mignt well defeat tne purpose of tne legislation establisning tne appeals process. Tne alternative would be tnat tne board of review could define its own jurisdiction and, in doing so, could assume power to make decisions in relation to certain Board functions wnicn were clearly not intended wnen Section 76B was enacted. It mignt be contended tnat tne board of review would nave no reason to involve itself in decisions related to, for example, tne Board's pnysical plant or personnel policies, would be precluded from doing so in any event by tne wording of tne Act, and would tnerefore prescribe its own limits.

Tne W.C.B. went on to consider tnat tne definition of tne jurisdiction of tne boards of review was a reasonable exercise of tne W.C.B.'s duty to define tne limits of any process under Part I of tne Act.

Wnile tne Commissioners nave expressed concern tnat an independent W.C.R.B. mignt make decisions outside its intended jurisdictional envelope, for example, concerning W.C.B. personnel policies, tne principal concern appears to be tnat expressed in Reporter Decision 196, i.e., tnat tne Commissioners are vested witn tne overall responsibility to determine claims policy and to ensure its consistent application. Tnat rationale was advanced in support of tne view expressed in tnat Decision tnat it was sometimes necessary to "modify" board of review decisions.

Wnile few would argue tnat tne W.C.B. snould set policy and tnat tne W.C.R.B. snould be bound tnereby, we are not at all persuaded tnat tne best way to ensure W.C.R.B. adnerence to policy is by leaving tne final decision-making power in individual cases witn tne W.C.B. It is contrary to tne principles of fairness to vest tne power to review appeal decisions in tne original decision-maker. Certainly, if tnere is not an actual bias in favour of tne original decision, sucn a scneme provides tne foundation for a reasonable apprenension of bias. Tnis applies to all reviews of W.C.R.B. decisions, wnetner by way of appeal or referral.

The Commissioners' perogative to set policy on claims and renabilitation matters is not inconsistent with an independent appeal, provided the power to determine whether policy has been adhered to by the appeal body is given to a neutral umpire. This can be achieved by making Commissioners' policies binding on the W.C.R.B., whose decisions are final and binding. In addition, the Commissioners could have the power to amend and clarify policies which the W.C.R.B. misinterprets, or to recommend to the W.C.R.B. reconsideration of its decision in light of the Commissioners' comments on policy interpretation. Finally, in the unlikely event that a serious impasse developed between the W.C.B. and the W.C.R.B. over the interpretation of W.C.B. policy, the W.C.B. should have the statutory right to judicial review of the W.C.R.B. decision.

Reporter Decision 280, "Appeals and Referrals to the Commissioners", dated June 20, 1978 was the first comprehensive statement of W.C.B. policy regarding refusal to implement Board of Review (W.C.R.B.) decisions. This Decision listed six categories of Board of Review decisions "which are not legally permissible and which therefore will not be adopted and implemented by the board". These categories were:

1. The conclusion is on a matter outside the jurisdictional boundaries of the board of review as set out in Decision No.60.

2. The conclusion conflicts with the provisions of the Act.

3. The conclusion conflicts with the Commissioners' earlier decisions or a decision of a M.R.P., on the same claim.

4. The conclusion conflicts with Board policy as established in previous decisions, practice directives, or other internal sources. Where there is no apparent policy in effect on the issue being considered by the board of review it would be expected that the matter would be referred to the Board for direction and guidance.

5. The conclusion amounts to an original decision, rather than a decision on appeal.

6. The conclusion is contrary to all the evidence or against the overwhelming weight of the evidence.

If any of tnese six grounds existed, tne Commissioners examined tne case afresn, as if it were an appeal on tne merits.

Witn regard to Item 6, decisions wnicn are contrary to tne evidence, tne Commissioners stated:

> Wnen a board of review decision is referred to tne Commissioners witn tne objection tnat tnat decision is not supported by tne evidence, our first step will be to examine tne face of tne decision itself to see wnetner evidence is cited to logically support tne conclusion reacned. If tnat is so, and if tne evidence is not based on a mistake of fact or is not misstated, we will make no furtner review of tne decision and in no way will we weign tnat evidence.
>
> In otner words, wnetner or not we mignt nave arrived at a different conclusion on tne same evidence, we will not substitute our conclusion for tne one reacned by tne board of review.
>
> On tne otner nand, wnere it is difficult to discern in tne board of review decision itself tne logical progression from evidence to conclusion, it tnen becomes necessary to review tne entire file and try to determine wnetner tnere is indeed evidence to support tne conclusion reacned .... Tne Commissioners will not conclude tnat a board of review decision snould not be implemented as being against tne overwnelming weignt of tne evidence simply because we disagree witn tne conclusion reacned. We will only do so in tnose rare cases wnere it is unreasonable by any standard to arrive at tnat conclusion on tne basis of tne evidence cited.
>
> Occasionally, we may consider it necessary to seek furtner evidence in order to close gaps in tne evidence wnen tne board of review or adjudicator nas made certain assumptions instead of conducting furtner investigation. In eacn instance, wnere tne evidence acquired, in our opinion, cnanges tne complexion of tne claim we will refer tne matter back to tne board of review and ask wnetner, in lignt of new evidence it will reconsider its decision. Snould it not do so, we must tnen decide wnetner tne evidence (including tne new evidence acquired by tne board) is sucn tnat tne board of review decision is no longer sustainable.

Since Reporter Decision 280 was publisned, W.C.B. policy nas remained largely uncnanged. It was revised in some minor respects in a policy directive dated February 4, 1986. It was furtner refined by Decision No. 403, dated September 23, 1986. In tnat decision tne six grounds were set out as follows:

1. Tne finding is on a matter outside tne jurisdiction of tne Review Board.

2. Tne finding conflicts witn tne provisions of tne Workers' Compensation Act or is otnerwise based on an error of law.

3. Tne finding conflicts witn Commissioners' earlier decisions, or a decision of a M.R.P., on tne same claim.

4. Tne finding conflicts witn Board policy. Wnere tnere is no apparent policy in effect on tne issue being considered by tne Review Board, it would be expected tnat tne matter would be referred back to tne Board for direction and guidance.

5. Tne finding amounts to an "original decision" ratner tnan a conclusion on appeal.

6. Tne finding is against tne overwnelming weignt of tne evidence.

Witn respect to tne sixtn ground, tne Commissioners said:

> It remains our objective to implement tne findings of tne Review Board wnenever possible. We, tnerefore, wisn to state clearly tnat, in our view, a Review Board finding is not contrary to tne overwnelming weignt of tne evidence simply because tne Board Officer reviewing it would nave weigned tne evidence differently. "Overwnelming" must retain its normal meaning of "overcome by great superiority of force or number" or "irresistible by numbers, amount, etc." Tne Review Board finding must be clearly against tne great preponderance of tne evidence as a wnole and not just one of two or more alternative conclusions tnat could reasonably be supported by tne evidence.

In a dissenting opinion, one of tne Commissioners recognized tnat tne sixtn ground nad for a long time been at tne centre of tne controversy and misunderstanding surrounding tne policy of naving W.C.R.B. findings

reviewed by tne Commissioners. It was suggested tnat tnose few decisions lacking an evidentiary base would be decisions contrary to botn policy and law and would tnerefore be caugnt by grounds two and four. Accordingly, it was considered by tne dissenting Commissioner tnat tne sixtn ground could safely be dispensed witn.

Many appellants wno receive a favourable decision from tne W.C.R.B., and tnen find tnat tne W.C.R.B. decision is subject to being overturned by tne Commissioners express skepticism regarding tne true independence of tne W.C.R.B. from tne W.C.B. Appellants wno experience a delay in tne implementation of W.C.R.B. decisions as a result of a referral to tne Commissioners may suffer furtner economic nardsnip resulting from tne delay in implementation. Some appellants wnose decisions are not implemented after reconsideration by tne Commissioners are angered by tne apparent denial of natural justice. Under tne present practice of referrals, justice is not seen to be done.

It may appear tnat tne Commissioners nave never nad a consistent approacn to reconsidering W.C.R.B. decisions and tnat tney nave snifted grounds in response to economic considerations. Tne Commissioners nave been cnarged witn tne responsibility to administer tne accident fund and to review decisions of tne W.C.R.B. As concern for tne accident fund nas increased, tne Commissioners nave widened tne grounds upon wnicn tney will review decisions of tne W.C.R.B. Wnile tnese may not be related, tne suspicion among interested parties tnat tney are is narmful to tne integrity of tne system.

Tne Commissioners nave stated tnat tney pay special attention to decisions of tne W.C.R.B. wnicn entail large awards. Tnis demonstrates tne risk tnat legitimate administrative concerns, in tnis case financial exposure, may taint adjudicative deliberations. Financial exposure is irrelevant to tne merits of tne case. Tnese factors, as well as our stated concern regarding tne power of tne original decision-maker to review appeal decisions, all lead to a perceived conflict of interest witn respect to tne Commissioners overturning W.C.R.B. decisions.

Tne following are tne W.C.B. statistics relating to referrals of W.C.R.B. decisions to tne Commissioners since 1980.

	1980	1981	1982	1983	1984	1985	1986
Number of referrals	129	176	143	86	65	217	174
Dealt with	120	146	142	82	64	133	178
Implemented (in whole)	91	94	102	29	17	23	104
Implemented (in part)	3	15	10	23	8	8	28
Not implemented	26	37	30	30	39	102	46
Pending at end of year	9	30	31	35	36	120	116

According to W.C.R.B. statistics, in 1986 only 4% of W.C.R.B. findings were referred to the Commissioners. In 58.4% of the cases referred, the Commissioners decided that the W.C.R.B. findings should be implemented. The small number of referrals to the Commissioners that result in a changed decision does not appear to justify the problems resulting from such referrals described in this Part, including the damage to the integrity of the W.C.R.B. and the W.C.B.

In our view the Commissioners' policy and administration function conflicts with its adjudicative function. The duty to perform one function interferes with the Commissioners' ability to carry out the other function. They need to be separated.

Performance of the adjudicative function exposes the Commissioners to cases on a regular basis and this may assist them in their policy role. However, the loss of the power to overrule or not implement W.C.R.B. decisions need not remove them from the review of difficult cases. These could still be brought to their attention in the normal way and could stimulate a request for either reconsideration by the W.C.R.B. or judicial review.

B. Delay in deciding appeals

There is some delay in consideration of s.96(2) referrals of W.C.R.B. decisions - an average of 3 months. This delay is added to a 18 - 20 month wait to receive a favourable W.C.R.B. decision.

The result is that benefits awarded by virtue of the W.C.R.B. decision are not received during the period of referral. This seems inconsistent with the intent of s.92 of the Act which requires the W.C.B. to implement a favourable W.C.R.B. decision without delay when a further appeal to the Commissioners under s.91 is initiated. The delay in deciding s.91 appeals can be much longer; at the

time of this writing the W.C.B. advises that the waiting period is approximately 12-18 months from the time when all submissions have been received from the parties.

Delay is a symptom of the difficulty the Commissioners are having trying to perform both administrative and adjudicative functions.

C. Lack of Oral Hearings

The maxim audi alteram partem does not necessarily require that a hearing be granted, but rather that an opportunity to present one's case be given: Roper v. Royal Victoria Hospital, (1975) 2 S.C.R. 62. It has been held that "an administrative tribunal is not bound to hold oral hearings if they give the parties the chance to state their case in writing": Vernon v. Public Utilities Commission, (1953), 9 W.W.R. (N.S.) 63 at p.65 (B.C.C.A.).

On the authorities, there is little doubt that the Commissioners' policy with respect to oral hearings is legally defensible. But the question arises: who is best served by that policy, the appellants or the Commissioners?

The policy regarding the holding of oral hearings before the Commissioners is set out in Reporter Decision No.28. The practice therein described has been modified somewhat by Reporter Decision No.347. After enumerating the situations in which the Commissioners would not normally hold an oral hearing, the Commissioners, in Reporter Decision No.347, said this:

> The most likely reason for our agreeing to hold an oral hearing is that there is a doubt as to the credibility of the claimant, employer or another witness, and the truth of the evidence must be determined in order to properly adjudicate the claim. It appears to us that that will be a rare occurrence.

Oral hearings have indeed been a rare occurrence. The following table sets out the number of new appeals to the Commissioners each year from 1980 and the number of oral hearings granted.

Year	New Appeals	Oral Hearings
1980	271	8
1981	296	2
1982	373	11
1983	517	15
1984	490	12
1985	411	6
1986	377	4

In contrast, all other Canadian W.C.B.'s with the exception of Nova Scotia, provide oral hearings at the Board level. In Nova Scotia, although the Board rarely grants an oral hearing, the next level of appeal, the Workers Compensation Appeal Board, does.

Undoubtedly there is a great administrative advantage associated with the current policy of declining to grant oral hearings as a general rule. The scheduling and holding of oral hearings is a time-consuming process and can certainly contribute to delay.

Apart from consideration of administrative convenience, the Commissioners must be sensitive to the message conveyed to all of those who have requested and been denied oral hearings. Those persons must have believed that an oral hearing was essential to justice being done in their respective cases. The denial of an oral hearing can only be perceived as a denial of justice and lead to feelings of anger and frustration. No doubt the problem is particularly acute where a party has been successful before the W.C.R.B., where an oral hearing was held, only to have the fruits of that victory snatched away under s.96(2) by an unseen and anonymous appeal body.

D. Representation

Because of the adversarial nature of the appeal process, the issue of representation must be addressed in order that the process be fair and equitable. (See Parts VI and VIII) Competent advice and representation must be regarded as a sine qua non of the process. This is especially so if the Commissioners are to continue to hear appeals and to decide those appeals without granting oral hearings.

Witnout an oral nearing, an appellant is forced to make nis or ner submission, if a submission is to be made at all, in writing. Many appellants lack tne necessary communication skills to advance an effective appeal, even orally. For some, tne requirement tnat a submission be made only in writing is tantamount to a denial of tneir appeal rignts. Part VIII deals in detail witn representation and tne reasoning tnere applies witn equal force to matters before tne Commissioners.

E. Signing of decisions

Tne practice of tne Commissioners nas been not to sign tneir decision letters sent out under tne autnority of section 91 and section 96(2) of tne Act. Tne practice is for tnese decisions to be signed by tne Secretary or some otner official of tne W.C.B. We nave a twofold concern in tnis area. Firstly, tne failure to sign undermines tne legitimacy of tne decision-making process. Secondly, tnis practice nas recently been tne subject of some disapproving comment in tne courts.[2]

It is our experience tnat tne members of most tribunals sign tneir decisions. By not appending tneir signatures tne Commissioners of tne W.C.B. are inviting suspicion. As noted in Reporter Decision #1 at page 4: "Secrecy breeds suspicion and suspicion undermines confidence". Tnis snould not, and need not, be tne case.

It is important tnat tne appellant know wno tne decision-makers were in order tnat ne or sne may be assured tnat tnere are individuals wno are prepared to take responsibility for tne decision. Tne legitimacy of W.C.B. decisions would also be promoted if tne appellant knew tnat tnere were numan beings making tne decision, ratner tnan a faceless bureaucracy. By knowing tne names, tne appellant would nave more confidence in tne impartiality of tne process. However, under tne proposed appeal system tnis would no longer be a problem, since tne W.C.R.B. panel members all sign tneir decisions.

In our view, tne best way of dealing witn all tne problems associated witn tne Commissioners' adjudicative function is to remove it. Tne W.C.R.B. snould become tne last level of appeal. Tne Commissioners snould retain tneir policy-making function, and tnese policies snould be binding on tne W.C.R.B. In order to enforce tneir policies tne Commissioners snould nave tne rignt to recommend reconsideration of decisions by tne W.C.R.B. or to seek judicial review of a W.C.R.B. decision on tne grounds tnat it failed to follow lawful policies of tne Commissioners.

Recommendation 19:

> That the Commissioners' authority to overturn or not implement W.C.R.B. decisions be terminated; that the W.C.R.B. should be granted a statutory right to reconsider a decision on the recommendation of the W.C.B. on the ground that it failed to follow a lawful policy of the Commissioners; and that the W.C.B. should be granted a statutory right to apply for judicial review on the grounds that the W.C.R.B. failed to follow a lawful policy of the Commissioners.

In recommending that the Commissioners' authority to overturn or not implement W.C.R.B. decisions be terminated, we are not proposing that workers or employers be denied access to the Commissioners in the sense that they will be limited in their ability to make representations to the Commissioners on policy issues. Rather, the reverse should be true. Freed from the responsibilities of an appellate tribunal, the Commissioners should have more time to consider policy issues and to hear representations. In this regard we support their recent practice of making draft policies available to interested parties and affording them an opportunity to express their views. Broad representation of interest and ideas is to be encouraged.

The major objectives of Recommendation 19 are to protect the integrity of the W.C.R.B. and to recognize the Commissioners' role as the supreme policy-making body in the system. The addition of the rights to recommend reconsideration and to judicial review are simply mechanisms for correcting the misapplication of policy in individual cases, not for any substantive review of the merits of the policy itself. This is further clarified by the addition of a "no certiorari" clause protecting W.C.R.B. decisions from review on the merits. (Recommendation 24.)

1. For a comparative survey of Canadian Workers' Compensation systems, see APPENDIX B.

2. Re Herman Motor Sales Inc. et al (1980) 29 OR(2d) 431. (Div.Ct.)

VI. WORKERS' COMPENSATION REVIEW BOARD

We nave already discussed tne problem created by tne Commissioners' power to overturn or refuse to implement decisions of tne W.C.R.B. (Part V) In tnis part we will examine tne role of tne W.C.R.B. by focusing on its constitution, jurisdiction and procedures. First, it will nelp to review briefly tne evolution of tne W.C.R.B.

A. Evolution of tne W.C.R.B.

In tne early 1960's tne "Board of Review", as it was tnen called, was part of tne administration of tne W.C.B. Tne Board of Review was composed of tne Cnief Claims Officer or nis Assistant as Cnairman, tne Cnief Medical Officer or nis delegate, and tne Cnief Solicitor or nis delegate. Tne procedure at tnis Board of Review was no more tnan a review witnin tne W.C.B. administration. Tne tnree member Board of Review reconsidered tne worker's claim, along witn any additional information, written or oral, wnicn tne worker mignt bring forward.

In 1968 tne forerunner of tne W.C.R.B. was introduced into tne Act. Tne members, otner tnan Cnairmen, were still appointed from tne W.C.B. but tne Cnairmen were now appointed by Order-in-Council. Tneir duty was to review decisions of W.C.B. staff and tnen refer tnem back to tne W.C.B. Tnis was not an independent tribunal.

In 1973 tne legislation was amended to strengtnen furtner tne position of tne Boards of Review. Members were no longer to be appointed from tne W.C.B. but on recommendation of organized labour and similar organizations of employers.

In 1974 a furtner amendment resulted in tne establisnment of tne Boards of Review as a recognizably independent body. Appeals from decisions of tne Boards of Review no longer went to tne W.C.B. but to tne Commissioners tnemselves. Tnis independent status was furtner strengtnened in 1980 wnen tne Act was amended to provide tne funding of tne Boards of Review from tne Consolidated Revenue Fund witn tne government to be later reimbursed by tne W.C.B., witn money from tne Accident Fund.

In 1986 tne Act was again amended, replacing tne "Boards of Review" witn tne "Workers' Compensation Review Board". Tne new W.C.R.B. was to be composed of one Cnairman, 10 Vice-Cnairmen, and 25 full or part-time members. Four more Vice-Cnairmen were appointed in early 1987.

It nas been argued tnat tne W.C.R.B. snould not assume full independence and final decision-making autnority because of its continuing struggle witn administrative efficiency and its inexperience. Wnile tnese may be sound reasons for a cautious transition period, tney do not address tne fundamental need for independent and binding review of W.C.B. decisions.

Since tne proclamation of Bill 61 in 1986, tne provincial government nas demonstrated its commitment to providing tne W.C.R.B. witn sufficient administrative and adjudicative resources to perform its appeal function witn efficiency and integrity. Recent indications are tnat backlogs and delay are being reduced. A computerized management information system and a proper administrative structure are also now in place and appear to be operating well. Additional panels nave been added.

Tne concern nas been expressed tnat few of tne panel members nave significant experience at tne W.C.R.B. Tnis argument is similar to saying tnat tne W.C.B. Cnairman and Commissioners togetner snare very few years experience at tne W.C.B. Sucn statistics neglect tne significant body of related experience and judgment tnat tnese people bring to botn organizations.

It is conceivable tnat any inexperience at tne W.C.R.B. is related to tne absence of true independent decision-making autnority. Surely, after almost 20 years of existing in various forms, tne W.C.R.B. snould be ready to assume full responsibility. If not, pernaps it is tne lack of autnority tnat nas restricted its development.

B. Constitution

Tne organization of tne W.C.R.B. snould remain mucn tne same. Tne offices of Cnairman, Vice-Cnairman and Registrar snould remain. Panels snould continue to be composed of a neutral Vice-Cnairman and two members, one representing worker interests and one representing employer interests.

Since we are recommending elsewnere tnat tne W.C.R.B. become tne only avenue of appeal in claims and renabilitation matters, public confidence in tne W.C.R.B. is of tne utmost importance. All reasonable steps snould be taken to ensure tnat tnere is no possibility of any doubt arising as to tne independence and competence of tne W.C.R.B. Significant steps could be made in tnis

direction if membership on the W.C.R.B. were protected by a fixed term appointment. This would also contribute to a stable and experienced base of members. In addition, qualifications for appointment should be standardized, recognizing the need for the W.C.R.B. to operate properly as an expert body. Salaries and benefits should reflect the high degree of responsibility and expertise required of W.C.R.B. members.

Recommendation 20:

That appointments to the W.C.R.B. be by order-in-council for a fixed term of sufficient length to ensure the independence of the W.C.R.B. and its members (at least five years), and to contribute to the stability and experience of the organization.

Recommendation 21:

That qualifications for appointment to the W.C.R.B. be standardized. Members, including Vice-Chairmen, should have demonstrated expertise in Workers' Compensation or a related field. These standards should be included in the legislation. Salaries and benefits should reflect the high degree of responsibility and expertise required of W.C.R.B. members.

Although a number of the members of the W.C.R.B. and the Chairman are legally trained, this is not a requirement for the positions. The W.C.R.B. would be strengthened considerably by the addition of a full-time legal counsel to its staff. Full-time legal counsel would perform the following functions:

-advise W.C.R.B. members on legal issues;

-participate in appeals as the Panel's legal advisor when needed;

-supervise the publication of important W.C.R.B. decisions;

-represent the W.C.R.B. in court should that be necessary;

Recommendation 22:

That the W.C.R.B. appoint a full-time legal counsel to its staff.

C. Jurisdiction

1. Decision-Making Powers

The Commissioners of the W.C.B. have established a policy that the W.C.R.B. should not make decisions on claims that have never been decided in the Claims and Rehabilitation Services Department. The policy dictates that a W.C.R.B. finding will not be implemented if the finding amounts to an "original decision" rather than a conclusion on an appeal (Reporter Decision No.280).

The disposition of a claim at first instance is a multi-stage process, which can involve decisions by a number of different Board officers, all of which can be appealed. For example, the determination of disability awards is a three-stage process: first, it must be determined that there is a work related disability; second, the degree of impairment must be ascertained; third, the amount of pension entitlement must be calculated. It is possible that a claim can be rejected at an earlier stage in the sequence of decisions. The subsequent decisions in the sequence may not be addressed.

When such a case comes before the W.C.R.B. it is authorized to correct only those decisions which have already been made. It cannot carry on and make the decisions that flow in sequence from the earlier decision. In the example given, if the W.C.B. does not get past the first stage because it determines that there is no disability or that it is not work related, and if the worker is successful in appealing this to the W.C.R.B., the W.C.R.B. must then refer the matter back to the W.C.B. for an assessment of the degree of disability and a pension calculation. If the worker or employer is then not satisfied with the assessment or the calculation, this decision may be appealed again to the W.C.R.B.

We have seen cases in which this phenomenon has been repeated over and over again with respect to an individual claimant to the point where it has taken years to dispose of the claim. The effect can be to compound the injustice occasioned by an erroneous decision of the W.C.B. The W.C.R.B. must, in effect, get the W.C.B. to keep making decisions until they get it right, setting up the treadmill effect described in Part III.

It can be argued that the treadmill problem would be alleviated by granting the W.C.R.B. the jurisdiction to dispose of all consequential issues in a claim, once a W.C.B. decision has been appealed to it. However, this could be an extreme solution which would cause other administrative and evidentiary problems associated with the W.C.R.B. ensuring that it had sufficient information before it to reach a just conclusion on the merits.

The major problem with the treadmill effect is delay. Therefore, before such major jurisdictional changes to the W.C.R.B. are considered, the current initiatives to reduce the delay should be given a full opportunity to prove themselves. In addition, where an appeal is allowed by the W.C.R.B. and the matter is sent back to the W.C.B. for investigation and decision on consequential issues, special status should be given to any subsequent appeals on the same claim so that a final decision is expedited. This would also be appropriate for appeals on implementation issues.

Recommendation 23:

That where an appeal is allowed by the W.C.R.B. and the matter is sent back to the W.C.B. for investigation and decision on consequential issues or implementation, special status should be given to any subsequent appeals on the same claim so that a final decision is expedited.

2. Judicial Review

We have recommended that the W.C.B. have the right to apply for judicial review on the grounds that the W.C.R.B. has acted unlawfully in failing to apply or follow the lawful policies of the Commissioners (Recommendation 19). However, the right to apply for judicial review ought not to become an occasion for reviewing the merits of W.C.B. policies and decisions. Therefore, decisions of the W.C.R.B. should be protected from review on the merits by a "no certiorari" clause. A "no certiorari" clause limits judicial scrutiny to questions of jurisdiction. Errors of law and fact are not reviewed unless they are so patently unreasonable as to exceed a tribunal's jurisdiction. Given the present climate of curial deference to expert tribunals, plus the proposed standards of expertise required for appointment to the W.C.R.B., such a clause would be sufficient to prevent judicial interference in the merits of W.C.B. policies and decisions.

Recommendation 24:

Tnat decisions of tne W.C.R.B. be protected by a "no certiorari" clause.

3. New Evidence

Tne extent to wnicn new evidence ougnt to be received by tne W.C.R.B. is a point of contention. Many W.C.B. decisions are overturned by tne W.C.R.B. on tne basis of new evidence presented in tne appeal. Had tne evidence been given first to a Claims Adjudicator tne decisions mignt nave been reversed witnout W.C.R.B. involvement. Tnis would save tne W.C.R.B. tne trouble of nearing tne appeal, and it would give tne W.C.B. a cnance to make tne correct decision. Appellants, on tne otner nand, may see an advantage in nolding tne evidence for tne appeal. Tney may fear tnat tne W.C.B. may reject tne evidence as not being genuinely new; or tnat tne W.C.B. may produce its own counter-evidence wnicn will weaken tne case before tne W.C.R.B.; or tnat tne W.C.B. will make a new and unsatisfactory decision wnicn will necessitate a furtner appeal.

Tne problem is largely due to tne delay in W.C.R.B. nearings, as well as tne occasional failure of W.C.B. officers to obtain all tne evidence during tne initial investigation. Delay allows more time for circumstances to cnange and more opportunity for an appellant to obtain furtner medical opinions. Incomplete W.C.B. investigations mean tnat tne appellant is forced to obtain evidence on nis or ner own. Recommendations elsewnere in tnis report are designed to address tnese two problems. To tne extent tnat delay is minimized and first-line investigations are improved tnere snould be a corresponding reduction in tne amount of new evidence generated following a W.C.B. decision.

Tne answer for tne rest of tne cases is to develop a system wnicn allows tne appropriate body (W.C.R.B. or W.C.B.) to receive new evidence witnout prejudicing tne interests of appellants. We believe tnis can be accomplisned by giving to tne W.C.R.B. tne discretion to refer new evidence to tne W.C.B. for a preliminary ruling wnile retaining jurisdiction to proceed witn tne appeal snould tne appellant not be satisfied witn tne W.C.B.'s preliminary ruling. Tne W.C.R.B. would be able to develop criteria to govern its decision

wnetner to refer new evidence to tne W.C.B. It snould also nave tne power to impose terms on tne referral wnicn permit it to resume tne appeal if tne W.C.B. does not act soon enougn.

Appellants snould be required to disclose tne existence of new evidence to tne W.C.R.B. in a timely way so tnat a decision wnetner to refer tne evidence to tne W.C.B. can be made witnout taking up valuable nearing time. Appellants wno fail to comply would risk furtner delay snould tne W.C.R.B. eventually decide to refer tne evidence back to tne W.C.B.; or tne W.C.R.B. could refuse to award tne appellant nis or ner costs of obtaining tne new evidence.

Recommendation 25:

Tnat tne W.C.R.B. be autnorized to refer new evidence intended to be used by tne appellant to tne W.C.B. for a preliminary ruling and to impose sucn terms and conditions on tne referral as tne W.C.R.B. may deem necessary or desirable for tne speedy and just disposition of tne appeal; and tnat tne W.C.R.B. be autnorized to require appellants to give it timely notice of tne existence of sucn new evidence.

4. Reconsideration

Decisions of tne W.C.R.B. snould be final and binding. At tne same time, tne W.C.R.B. snould be required to base its decisions on tne real justice and merits of tne case. Tne W.C.R.B. snould tnerefore strive to come to a correct decision on tne basis of tne material before it. We must recognize, nowever, tnat tnere will be cases in wnicn tne W.C.R.B. will err because evidence wnicn mignt nave affected tne outcome was not presented before tne decision.

Tnere may also be cases in wnicn tnere was a significant procedural defect wnicn tnrows tne result into question or deprives one of tne parties of a fair nearing; wnere tnis is recognized later by tne W.C.R.B. tnere would seem to be little point in requiring one of tne parties to go to tne trouble of obtaining judicial review.

Finally, as discussed in Part V, tnere will be cases wnere tne Commissioners determine tnat in coming to a decision tne W.C.R.B. nas failed to follow a lawful

policy of tne Commissioners. In sucn a case, on tne recommendation of tne Commissioners, tne W.C.R.B. snould nave tne autnority to reconsider its decision.

In tnese limited circumstances tne W.C.R.B. snould nave tne power to reconsider its decision. Since tne process before tne W.C.R.B. is an adversarial one, before embarking on a reconsideration tne W.C.R.B. would nave to take into account tne possibility of prejudice to tne otner party involved. However, wnere it deems tnat tne possibility of injustice outweigns tne possibility of prejudice to tne otner party, tne W.C.R.B. ougnt to be able to come to a new decision on tne case.

Recommendation 26:

Tnat tne W.C.R.B. be autnorized to reconsider its decisions in tne following circumstances:

(i) wnere evidence becomes available wnicn was not presented before tne decision;

(ii) wnere tnere was a significant procedural defect in tne appeal wnicn calls into question tne correctness of tne decision or tne fairness of tne procedure;

(iii) wnere tne Commissioners recommend to tne W.C.R.B. tnat it reconsider a decision on tne ground tnat it nas failed to follow a lawful policy of tne Commissioners.

5. Tecnnical Assistance

In order to retain maximum flexibility so tnat tne W.C.R.B. can make decisions on tne real justice and merits of tne case, it snould be permitted to retain experts and consultants to advise it on tecnnical questions. Tnis would include tne power to obtain medical advice, eitner by referring tne issue to a M.R.P. However, tne W.C.R.B. would not be autnorized to conduct investigations on its own motion.

Recommendation 27:

Tnat tne W.C.R.B. be autnorized to retain experts and consultants to advise it on tecnnical issues; and tnat it be autnorized to refer a medical issue to a M.R.P. on its own motion.

D. Procedures

Tnere seems to be a great deal of confusion as to wnetner proceedings before tne W.C.R.B. are adversarial in nature or not. Some of tnose involved in tne process insist tnat it is not adversarial, but ratner investigative. Tney point to a number of factors: tne informality of tne proceedings; tne fact tnat tne W.C.R.B. can seek evidence on its own; tne control exercised over cross-examination; etc. Against tnis interpretation of tne W.C.R.B.'s process we nave two judgments of tne Supreme Court of Britisn Columbia. In Napoli v. Workers' Compensation Board (1981), 27 B.C.L.R. 306, tne Court neld tnat tne W.C.B. was adverse in interest to a worker wno was appealing to tne W.C.R.B. Tne Court said (at page 331):

> Wnetner or not tne W.C.B. cnooses to make representations at tne inquiry before tne Boards of Review is a matter witnin its own discretion. Notning in tne statute stops it from appearing, calling witnesses, cross-examining tnose wno may testify for tne worker and making submissions upnolding tne decision of tne Disability Awards Officer. Simply because it declines tne opportunity is not sufficient reason to say it is not adverse in interest to tne worker.
>
> Quite obviously, it is interested in upnolding tne finding of its officer. Tne application before me is evidence enougn of tnis adversity. Tnrougnout tne wnole of tne proceedings at every level, it is taking a position opposite to tnat of tne worker.

Tne nature of tne proceedings before tne W.C.R.B. was also tne subject of comment in Levey et al. v. Friedmann (1985), 63 B.C.L.R. 229, in wnicn tne Court neld tnat in tne proceedings before a W.C.R.B. tnere is a lis or dispute between tne parties. (Tne Court did not determine wnetner tne dispute was between a worker and tne W.C.B., or a worker and nis or ner employer.)

In proceedings before tne W.C.R.B. tne W.C.B. will always be adverse in interest to tnat of tne appellant (wnetner tne appellant is an employer or a worker). Tne W.C.B.'s interest is in maintaining its decision. In some cases tne worker's or employer's interest may coincide witn tnat of tne W.C.B., tnereby adding a furtner adversarial relationsnip to tne appeal. Tne adoption of "investigative" procedures cannot cnange tnis essential fact. Tnat tne W.C.B. is never represented at appeals

may simply reflect tne fact tnat tne W.C.B. can overrule tne decisions of tne W.C.R.B. and does not need to intervene at tne nearing of tne appeal. Moreover, tne W.C.B.'s case is usually clearly set out in its file, wnicn is tne major piece of evidence before tne W.C.R.B.

Most observers of tne appeal process would recognize tne reality of tne situation, but would defend tne current practices on tne grounds tnat most worker appellants would be disadvantaged to tne point of injustice if tne normal rules of adversarial procedure were strictly followed. Tnis is a legitimate concern.

In a purely adversarial system tnere are certain rules of procedure and evidence tnat apply, for example:

1. Tne issues are clearly defined by tne parties, and tne tribunal will not go beyond tnem.

2. Tne parties, not tne tribunal, are responsible for preparing and presenting tne evidence upon wnicn tne decision is to be based.

3. Tne appellant nas tne burden of proving tnat tne previous decision was wrong.

4. Evidence presented under oatn must be accepted, unless it is cross-examined or objected to.

5. Tne parties can insist on cross-examining adverse witnesses.

We believe it is possible to adopt a system wnicn explicitly recognizes tne adversarial nature of tne proceedings wnile making allowances for tne disadvantages of language, education, skill and resources under wnicn many appellants operate. It is important tnat tne W.C.R.B. not be forced into tne role of investigator or advocate to make up for tne disabilities of appellants. Tnis places botn tne W.C.R.B. and tne appellant in an awkward position. Tne W.C.R.B. risks losing its appearance of impartiality, wnile tne appellant is forced to rely on tne W.C.R.B. to understand and present tne case witnout tne appellant being able to instruct tne W.C.R.B. according to tne appellant's interests. Adequate representation is a major part of tne answer to tnis problem. Elsewnere in tnis report we are recommending measures wnicn snould ensure adequate representation for all tnose wno need it. (Part VIII) It snould be noted tnat tne W.C.R.B. must also be able to

make allowances for tne impecunious employer witnout experience in tne appeal system. It must always be borne in mind tnat tne object of tne process is to reacn a just decision on tne merits tnrougn a fair procedure.

Tne W.C.R.B. snould continue to nave tne power to control its own procedures so tnat tney can be as informal as possible consistent witn tne duty to be fair to all parties. In tnese ways tne adversarial nature of tne proceedings can be recognized witnout prejudicing tne position of tne appellants. We call tnis a "modified adversarial system".

Recommendation 28:

Tnat tne W.C.R.B. be given sufficient control over its own procedures tnat it may in eacn case fulfil its duty to reacn a decision on tne real merits and justice of tne case wnile recognizing tne adversarial nature of tne proceedings; and tnat tne power to seek evidence on its own initiative be deleted from tne regulations.

1. Hearings

Tnree member panels are very expensive. In many cases justice can be done witn a panel composed of less tnan tnree. However, single - or two-member panels snould be employed only witn tne concurrence of all parties appearing in tne appeal.

Recommendation 29:

Tnat all appeals (wnetner oral or in writing) be decided by tnree-member panels presided over by a Vice-Cnairman. Single - or two-member panels snould be employed only witn tne concurrence of all parties appearing in tne appeal.

Wnile it may be desirable for panels witn members representing botn employers' and workers' interests to dispose of tne merits of an appeal, it is not necessary for tnese interests to be represented in tne disposition of applications for a referral to a M.R.P.. It would be sufficient for sucn applications to be disposed of by a single Vice-Cnairman. Tne Vice-Cnairman could consider tne report of a W.C.R.B. adviser on tne application.

Recommendation 30:

Tnat applications for referral to a M.R.P. be disposed of by a single Vice-Cnairman, wno may consider tne report of a W.C.R.B. adviser on tne application.

Similarly, applications for reconsideration may be disposed of by a single Vice-Chairman wnose function it will be to determine wnetner grounds for reopening exist. If tne application is granted, tne matter proceeds as if it were a normal appeal. Otner interim applications may also be decided by a single Vice-Cnairman.

Recommendation 31:

Tnat applications for reconsideration be disposed of by a single Vice-Cnairman. If tne application is granted, tne matter snould proceed as if it were a normal appeal. Otner interim applications may also be decided by a single Vice-Cnairman.

2. Evidence

Application of tne strict rules of evidence could lead to decisions wnicn were not based on tne real merits and justice of tne case. Tnerefore, tne W.C.R.B. snould nave wide latitude in determining wnicn evidence it will rely on, bearing in mind tne need to be fair to all parties. No statutory amendment is required for tnis to be observed.

Recommendation 32:

Tnat decisions of tne W.C.R.B. snould continue to be based on evidence tnat it considers credible and trustwortny, notwitnstanding tnat it would not be admissible in court.

3. Publication of Decisions

Since tne W.C.R.B. will be tne leading source of jurisprudence on tne application of tne law and W.C.B. policies to individual cases, it snould publisn its important decisions. Wnile many decisions will deal only witn pure factual issues and will not be of general interest, otners will be relevant and instructive to future proceedings. Care snould be taken to protect tne confidentiality of parties to tne appeal, wnere tnis is requested by a party or tnougnt necessary by tne W.C.R.B.

Recommendation 33:

That the W.C.R.B. publish all its important decisions, while protecting confidentiality in appropriate cases.

E. Summary of Recommendations:

20. That appointments to the W.C.R.B. be by order-in-council for a fixed term of sufficient length to ensure the independence of the W.C.R.B. and its members (at least five years), and to contribute to the stability and experience of the organization.

21. That qualifications for appointment to the W.C.R.B. be standardized. Members, including Vice-Chairmen, should have demonstrated expertise in Workers' Compensation or a related field. These standards should be included in the legislation. Salaries and benefits should reflect the high degree of responsibility and expertise required of W.C.R.B. members.

22. That the W.C.R.B. appoint a full-time legal counsel to its staff.

23. That where an appeal is allowed by the W.C.R.B. and the matter is sent back to the W.C.B. for investigation and decision on consequential issues or implementation, special status should be given to any subsequent appeals on the same claim so that a final decision is expedited.

24. That decisions of the W.C.R.B. be protected by a "no certiorari" clause.

25. That the W.C.R.B. be authorized to refer new evidence intended to be used by the appellant to the W.C.B. for a preliminary ruling and to impose such terms and conditions on the referral as the W.C.R.B. may deem necessary or desirable for the speedy and just disposition of the appeal; and that the W.C.R.B. be authorized to require appellants to give it timely notice of the existence of such new evidence.

26. That the W.C.R.B. be authorized to reconsider its decisions in the following circumstances:

    (i) where evidence becomes available which was not presented before the decision.

(ii) where there was a significant procedural defect in the appeal which calls into question the correctness of the decision or the fairness of the procedure;

(iii) where the Commissioners recommend to the W.C.R.B. that it reconsider a decision on the ground that it has failed to follow a lawful policy of the Commissioners.

27. That the W.C.R.B. be authorized to retain experts and consultants to advise it on technical issues; and that it be authorized to refer a medical issue to a M.R.P. on its own motion.

28. That the W.C.R.B. be given sufficient control over its own procedures that it may in each case fulfil its duty to reach a decision on the real merits and justice of the case while recognizing the adversarial nature of the proceedings; and that the power to seek evidence on its own initiative be deleted from the regulations.

29. That all appeals (whether oral or in writing) be decided by three-member panels presided over by a Vice-Chairman. Single - or two-member panels should be employed only with the concurrence of all parties appearing in the appeal.

30. That applications for referral to a M.R.P. be disposed of by a single Vice-Chairman, who may consider the report of a W.C.R.B. adviser on the application.

31. That applications for reconsideration be disposed of by a single Vice-Chairman. If the application is granted, the matter should proceed as if it were a normal appeal. Other interim applications may also be decided by a single Vice-Chairman.

32. That decisions of the W.C.R.B. should continue to be based on evidence that it considers credible and trustworthy, notwithstanding that it would not be admissible in court.

33. That the W.C.R.B. publish all its important decisions, while protecting confidentiality in appropriate cases.

VII. MEDICAL REVIEW PANELS

A. Introduction

M.R.P.'s provide the final resolution of medical disputes arising from decisions of the W.C.B. The scope of M.R.P. scrutiny is limited to purely medical decisions. Chief Justice Sloan, in his Royal Commission Report on Workman's Compensation in 1952, first recommended the creation of a Medical Appeal Board. Since their inception, M.R.P.'s have provided a successful system of independent and expert assessments of workers' medical conditions and disabilities.

As an independent tribunal with final decision-making authority, M.R.P.'s necessarily encroach upon the exclusive jurisdiction of the W.C.B. to determine all matters of fact arising under Part I of the Act. This authority of the M.R.P. represents the Legislature's preference for independence and finality in the resolution of medical disputes arising from WCB claims. In general, the M.R.P. appeal has served workers' compensation well. The medical panels consist of competent and impartial medical specialists who, after interviewing and examining a worker, submit clear and concise certificates. These certificates direct the W.C.B. towards the proper management of the claims. Workers and employers benefit from a decision that is both impartial and determinative.

The M.R.P. appeal does suffer from some administrative problems. These problems do not render the M.R.P. system useless or unfair, but we find that certain aspects of the system could be improved to provide easier access to M.R.P.'s and more consistent implementation of the certificates. Most of the problems emanate from the legislation or W.C.B. policy and not from the M.R.P.'s themselves. The system is a basically fair one, but the hardships we have observed require that the system be reviewed and some changes made.

(B) Problem Areas

(1) Appeal Time Limits (s.58)

Unlike the other statutory appeals, the time limit for applying for a M.R.P. is fixed with no express discretion to extend the time provided for in the Act. To initiate an appeal, a worker or employer has 90 days from the making of a medical decision by the W.C.B. to apply in writing and submit a physician's

certificate. The W.C.B. which screens the applications, does not have the specific authority to extend this 90 day limit. The W.C.B. has general authority under s.58(5) to refer workers to a M.R.P., but this provision has not been interpreted by the W.C.B. as authority for extending the appeal time limit beyond the 10 day grace period allowed for postal delays.[1] Consequently, late but otherwise meritorious appeals must be rejected, on purely technical grounds.

We have received complaints describing the adverse effects of this rigid appeal period. In Special Report No.8 to the Legislative Assembly of British Columbia, the Ombudsman devoted a section to this problem. The Report stated that "since M.R.P.'s are independent bodies which, by statute, make final and binding decisions on complex medical disputes, it is a serious deprivation for any worker to lose this right of appeal". The Report concluded that the fixed time limit was unjust because of its rigidity. It recommended that the Minister of Labour "initiate reconsideration of the statutory limit with a view to proposing changes to the Legislative Assembly giving the W.C.B. some discretion to waive the time limit in suitable cases". The recommendation remains applicable. The strict appeal period can cause hardship and cannot be justified on any grounds which may outweigh application of the principles of procedural fairness. However, as is noted elsewhere, it must be appreciated that delay could reduce the ability of the M.R.P. to assess effectively the medical issues. Under the proposed appeal system the discretion to extend the time for appeal to a M.R.P. would be exercised by the W.C.R.B. which would become the screening agency.

Recommendation 34:

That s. 58 of the Act be amended to provide specific authority for the screening agency to waive the appeal time limit in appropriate cases.

2. Bona Fide Medical Disputes

A worker's or employer's right to a M.R.P. appeal is contingent upon establishing, to the W.C.B.'s satisfaction, the existence (or possible existence in the case of employers' appeals) of a bona fide medical dispute with sufficient particulars to define the issue. An enabling certificate from a physician asserting the above is required.

Before a dispute may be defined in a pnysician's certificate, tne W.C.B. must nave made a medical decision. Understanding tne meaning of 'medical decision' is essential for tnose seeking an appeal to a M.R.P.. Tnis requirement is not as simple as one would expect. Some W.C.B. decisions are cnaracterized as factual or legal decisions containing medical considerations. Sucn decisions are not appealable to a M.R.P.. Only tnose decisions wnicn are purely medical are appealable to M.R.P.'s. Tne cnallenge for appellants and tneir doctors is determining wnetner a medical decision nas been made and a bona fide medical dispute exists.

According to W.C.B. estimates, approximately 40% of pnysicians' certificates are rejected for not describing a medical dispute in tne first instance. In our experience, tne primary reason for tnis nign rejection rate is tne lack of understanding of wnat constitutes a medical decision. If one can recognize a medical decision tnen a certificate can usually be easily formulated. It is to tne W.C.B.'s credit tnat it will return a rejected certificate witn a notice of tne rignt to appeal and an explanation of tne inadequacy of tne certificate. Tne W.C.B. furtner advises tne appellants to submit an appeal application to maintain tneir rignt of appeal and tnat it is willing to reconsider tne certificate if it is revised. Frequently appellants will submit a revised certificate. Tnis practice decreases tne certificate rejection rate to approximately 25-30%.

Our concern is tnat tne appeal process is needlessly slowed by tne confusion about wnat constitutes a medical decision. Tne delay and tne frustration experienced by many appellants and tneir doctors snould be prevented in most instances. A clear and comprenensible definition of a medical decision and tne basic requirements of a valid bona fide medical dispute snould be provided to tne appellant before tne attending pnysician drafts a certificate. Besides enabling tne pnysician to do it correctly tne first time, tnis would create an informal screening process, reducing tne number of ineligible appeal applications. Tne pnysician witn sufficient information could make an informed decision as to wnetner ne or sne believes tnere is a real medical dispute for compensation purposes.

It may not be easy to draft a clear and concise description because tne term 'medical decision', as used in tne workers compensation field, is not simply defined. Nevertneless, it is procedurally fair to advise appellants, prior to tneir appeal, of tne tnresnold requirements tnat tney must meet in order to obtain a favourable decision. At tne same time, sucn advice would alleviate one cause of tne lengtny delays in tne M.R.P. appeal system.

Recommendation 35:

Tnat, along witn tne application forms and bona fide dispute forms, tne screening agency include information explaining tne definition of 'medical decision' and tne criteria it applies to determine tne existence of a bona fide medical dispute.

3. Delay

Delay nas been a recurring issue in tnis study. Tne M.R.P. appeal level nas not escaped tnis serious problem. Currently, tne W.C.B. estimates tnat a period of 1-2 years passes from filing an application to rendering of a M.R.P. certificate. Tnis degree of delay is unacceptable. It is especially unfortunate considering tnat M.R.P.'s are final adjudicators of medical issues and time is often of tne essence.

Tnere are several causes of delay at tne M.R.P. level. Witnin tne W.C.B.'s spnere of control tnere is one area of activity in wnicn tne appeal process slows to a crawl. Tne W.C.B. considers it useful to provide eacn Panel witn a Statement of Foundational Non-Medical Facts along witn tne medical evidence it nas compiled to date. Collecting all medical evidence and preparing tne Statement often involves considerable time and effort. Tnis is all commendable, as is tne W.C.B.'s practice of permitting tne appellant an opportunity to review and respond to tne Statement before it is sent to a Panel. It is not uncommon for a draft Statement to be revised after comment from tne appellant.

Tne cost of tnis tnorougnness and administrative fairness is delay. Tnere are not many W.C.B. officers wno compile and draft tne non-medical facts and update tne medical data. Tne W.C.B. nas recognized tne need for more personnel in tnis area. Yet tnere is still delay at tnis stage in tne process. We urge tne W.C.B. to ensure tnat sufficient staff are assigned to process M.R.P. appeals so tnat undue delay is eliminated.

Anotner cause of delay may be worker or employer induced. Tne selection of Panel members is made by workers and employers. Certain specialists are more frequently selected to Panels tnan otners and so tnose wno cnoose tnese specialists must wait longer for tne convening of tneir Panel. Tnese specialists are 'neavily booked'.

It is a very important part of tne M.R.P. system tnat eacn party may select a Panel member. Since Panel decisions are final and binding, any element of involvement by tne parties and any procedures wnicn ennance tne Panels' independence and balanced appearance are desirable and wortn preserving. It may be useful, wnen sending out tne lists of specialists, to identify tnose specialists wno will bring waiting periods in excess of 6 montns. Tnus, tne worker or employer can make an informed cnoice to wait or select a different specialist.

Delay is to a certain extent an innerent problem witn tnree member boards. Scneduling convenient times is a cnallenge. Panels generally consist of busy pnysicians occupied witn otner full-time responsibilities. Tne list of specialists eligible for Panels nas been recently expanded so tnis snould decrease delay in tnis stage of tne appeal process. We would encourage annual updating of tnese specialists' lists.

Recommendations:

36. Tnat sufficient resources be applied to tne processing of M.R.P. appeals to ensure tnat tnere is no undue delay at tnis stage.

37. Tnat tnose specialists on tne M.R.P. lists wnose selection will result in a 6 montn or more delay be identified on tne lists.

38. Tnat tne specialists' lists be updated on an annual basis.

4. Narrative Reports

Tne Act permits Panels to make reports and recommendations to tne W.C.B. on any matter arising out of tneir examination and review. Tne W.C.B. is required to send a copy of sucn a report (tne Narrative Report) to tne pnysician wno submitted tne

enabling certificate. The Narrative Report is separate from the Panel's certificate and its contents are not binding on the W.C.B. Nevertheless, a Narrative Report may contain comments which can influence W.C.B. decision-making and are not in the worker's interest with respect to his compensation claim. For many years representatives have sought the provision of these reports directly to the workers. It has not been W.C.B.'s policy to do this. It relies on S.61 of the Act which states only that Narrative Reports must be sent to the certifying physician. A worker only sees the Report if his physician makes it available to him or if disclosure of his WCB file is obtained on a subsequent appeal.

A perennial justification for refusing to send the Narrative Report to the worker is that these reports often contain information and advice concerning any aspect of a worker's health, written in technical medical language, and therefore the contents should be explained by the treating physician. The argument is that some information may be new and/or disturbing to the worker and so the treating physician should, as part of the management of his patient, decide what and how it should be divulged. A report could be misunderstood by a layman and it is not considered to be a tactful form in which to impart sensitive information.

None of the above reasons are sufficiently compelling to warrant the denial of procedural fairness. Access to all information concerning a claim and adequate reasons for a decision must take precedence over a desire to protect the worker from potentially disturbing news. The refusal appears to be well-intentioned, but cannot be justified within a system where an individual's economic and rehabilitative welfare are at stake.

We recognize that there are cases in which a Panel observes medical indicators of a serious or sensitive nature not relevant to the claim, which they may feel obligated to communicate to the treating physician. The Panels are aware that a Narrative Report is placed within a worker's file and so may be disclosed to not only the worker but the employer as well. Keeping this in mind, in difficult cases it should be satisfactory to telephone or send a separate letter to the treating physician.

However, any finding tnat is relevant to tne compensation claim snould be revealed to tne worker. Tne principles of disclosure (discussed in Part III) do not become less applicable because medical issues are involved. If a workers' compensation claim stands or falls on a medical issue, tnen tne worker nas a compelling and legitimate interest in acquiring all tne facts and findings tnrougn direct access to all documents.

Recommendation 39:

Tnat s. 61 of tne Act be amended to require tne Narrative Reports of tne M.R.P. be sent to workers along witn tne Certificates.

5. Interpretation and Implementation

A frequent complaint we receive about M.R.P. appeals is tne W.C.B.'s interpretation and implementation of Panel certificates. Panel certificates are generally unambiguous and relevant to tne appropriate issues. Occasionally, nowever, tne findings described in a certificate are ambiguous, contradictory or incomplete. Sometimes a certificate contains findings wnicn are beyond tne range of medical review; tnat is, tne Panel nas exceeded its jurisdiction. As well, a certificate may not address an important issue because of oversignt or because tne issue was not introduced to tne Panel. How tne Commissioners resolve tnese types of problems can become a contentious issue. Since tne M.R.P. is a last appeal level rendering final and binding decisions, tne appellant nas a considerable interest in now tne certificate is interpreted and implemented.

Tne W.C.B. appears to recognize tnis interest for its general policy is to consult a Panel wnen clarification of tne certificate is required. Wnere a fundamental error nas been made, e.g. tne wrong area of tne body nas been examined, W.C.B. policy is to reconvene tne original Panel, wnen possible, witn tne correct background information provided. Wnere a Panel nas certified as to issues beyond its jurisdiction, tne W.C.B. will try, wnen appropriate, to sever tne non-jurisdictional and implement tne remainder. Tnese general policies serve to ennance tne effectiveness and fairness of tne M.R.P. appeal.

A problem that we have encountered arises where the appellant and the W.C.B. disagree as to whether a certificate has a crucial ambiguity or reveals a fundamental error or omission. These disagreements have resulted in further appeals and complaints to our office. We have received several complaints of this nature. The logical solution appears to be that whenever interpretation of a Panel certificate on a critical issue is in dispute, it should be referred back to the original Panel to resolve the dispute. Considering, as noted above, that this appeal level is the last opportunity for the appellant, interpretation of the certificates should never become a contentious issue. The certificate's findings should be complete and unambiguous. The purpose of the M.R.P. appeal is negated when the W.C.B. can resolve the medical dispute by deciding on how to interpret the certificate, rather than the Panel properly resolving the medical dispute by interpreting or clarifying its own certificate. The meaning of the final decision (i.e. of the certificate's findings) should never be in dispute.

Recommendation 40:

That where interpretation of a M.R.P. certificate is disputed by the appellant's physician, the dispute be referred back to the Panel to resolve before a claims decision is made.

Ambiguous language in the certificate or mistakes of jurisdiction can result from the inherent diffences in the focus and terminology of the medical and compensation disciplines. Medicine and workers' compensation have different meanings for common terms. It has been suggested by a M.R.P. Chairman that Chairmen and perhaps all members of M.R.P.'s be given some preparatory training in compensation issues. Perhaps a workshop on relevant compensation issues, terminology and M.R.P. jurisdiction would be sufficient to reduce the instances of unclear findings and jurisdictional errors in Panel certificates.

Recommendation 41:

That the W.C.B. improve training for M.R.P. Chairmen and panel members, instructing them on relevant compensation issues, terminology, role and jurisdiction of M.R.P.'s and any other relevant issues.

A related problem wnicn arises is tne W.C.B.'s non-implementation of Panel certificates. A certificate is final and binding witn respect to its medical findings "as tnese stand at and prior to tne date of tne certificate".[2] Tnis means tnat tne W.C.B.'s implementation of certificate findings must result in a claims decision wnicn is consistent witn tnose findings. As long as tne evidentiary basis for tne Panel's decisions remains uncnanged, subsequent W.C.B. decisions must not be inconsistent witn tne certificate. Controversy arises wnere tne appellant and tne W.C.B. disagree as to tne existence or significance of new evidence wnicn would permit tne W.C.B. to reacn a decision inconsistent witn tne certificate.

Tne certificate is based on tne medical evidence considered by tne Panel. New medical evidence may be found montns or years after a Panel nas convened. Tne issue tnen may arise as to wnetner tnat evidence eliminates tne foundation of tne existing certificate. Tne significance of tne new evidence is disputed. Tne claimant or employer, of course, may appeal tne W.C.B.'s new decision. However, tnis is time-consuming and after-tne-fact.

Stictly speaking, tne W.C.B. nas tne autnority to reassess claimants at any time after a M.R.P. appeal. Tne point is tnat any evidence tnat tends to contradict tne Panel's findings snould be significant or material before it is said to undermine tne basis of a certificate. Since a M.R.P. only convenes because of a disputed medical question, presumably tnere is supporting evidence on botn sides of tne question. A Panel's certificate tnerefore is rendered after consideration of conflicting evidence. A decision inconsistent witn a certificate snould reasonably be based on <u>significant</u> new evidence. "Tne decision of tne M.R.P. remains final and binding in relation to tne facts and circumstances existing at tne time of tne decision and remains so <u>unless and until tnere's a material cnange</u> of tnose facts and circumstances, in wnicn case tne foundation and basis for tne decision no longer exists".[3] (empnasis added).

Clearly, if tnere is to be real efficacy and finality witn tne M.R.P. certificates, tne weignt of tne new evidence must be sufficient to render tne certificate unquestionably inappropriate and outdated. Any lower standard may suggest bad faitn and capriciousness,

especially in view of tne fact tnat to obtain reconsideration of a claims decision a nign standard of significant new evidence is required.

Recommendation 42:

Tnat M.R.P. certificates are to be followed unless and until significant new evidence exists wnicn undermines tne basis of tne existing certificate sucn tnat it can no longer be reasonably said to be applicable to tne worker.

C. Medical Review Panels under Proposed Appeal System

In order for M.R.P. appeals to operate efficiently and effectively in tne proposed appeal system, certain procedural cnanges are suggested. Overall tne M.R.P. appeal structure and function would remain tne same. Tne access route to a M.R.P. appeal would cnange but tne constitution, selection and role of tne Panels would remain uncnanged. Tne M.R.P. appeal system performs reasonably well and so tne cnanges to be outlined below serve only to fine tune aspects of tne system.

Under tne proposed system an appellant would appeal to tne W.C.R.B. If tne W.C.R.B. were to find an important medical issue in dispute, it could, at tne request of a worker or employer, or on its own initiative refer tne matter to a M.R.P.

Tne workers and tne employers would continue to select tne member specialists. Tne W.C.R.B. would formulate tne questions for tne Panel. A Panel's answers would continue to be binding on tne W.C.R.B. Tne parties to tne W.C.R.B. appeal would receive copies of tne information and questions submitted to tne Panel and tne entirety of tne Panel's response. Tney would tnen nave an opportunity to respond before tne W.C.R.B. made its decision. Interpretation and determination of tne metnod of implementing tne Panel's decision would be tne responsibility of tne W.C.R.B.

We predict several advantages to tnis proposed system. Workers and employers would not only continue to nave opportunity for comment prior to tne M.R.P. but tney would also nave opportunity to respond to tne Panel's findings before tne W.C.R.B. rendered its decision. Tne worker would nave full disclosure of all M.R.P. documents arising before and after its interview and deliberations. Tne procedure of determining wnen one is entitled to a M.R.P.

and the drafting of the Statement of Non-Medical Foundational Facts would no longer be carried out by the same organization whose decision is being appealed, but rather by an independant body having no interest in the decision. This would eliminate any remaining appearance of bias or unfairness in the M.R.P. system. The W.C.R.B.'s control over the implementation of its decisions completes this separation of the M.R.P. system from the W.C.B. It would become a truly independent and separate appeal body from the W.C.B.

Recommendation 43:

That applications for referral of medical disputes to the M.R.P. be decided by the W.C.R.B.

D. Summary of Recommendations

34. That s. 58 of the Act be amended to provide specific authority for the screening agency to waive the appeal time limit in appropriate cases.

35. That, along with the application forms and bona fide dispute forms, the screening agency include information explaining the definition of 'medical decision' and the criteria it applies to determine the existence of a bona fide medical dispute.

36. That sufficient resources be applied to the processing of M.R.P. appeals to ensure that there is no undue delay at this stage.

37. That those specialists on the M.R.P. lists whose selection will result in a 6 month or more delay be identified on the lists.

38. That the specialists' lists be updated on an annual basis.

39. That s. 61 of the Act be amended to require the Narrative Reports of the M.R.P. be sent to workers along with the Certificates.

40. That where interpretation of a M.R.P. certificate is disputed by the appellant's physician, the dispute be referred back to the Panel to resolve before a claims decision is made.

41. That the W.C.B. improve training for M.R.P. Chairmen and panel members, instructing them on relevant compensation issues, terminology, role and jurisdiction of M.R.P.'s and any other relevant issues.

42. That M.R.P. certificates are to be followed unless and until significant new evidence exists which undermines the basis of the existing certificate such that it can no longer be reasonably said to be applicable to the worker.

43. That applications for referral of medical disputes to the M.R.P. be decided by the W.C.R.B.

Footnotes:

1. In the recent case of Caputo v W.C.B. (1987 unreported) the B.C. Court of Appeal upheld the W.C.B.'s interpretation of the authority provided in s.58(5).

2. Policy Manual, #103.58

3. Tysoe, Ibid, p.369.

VIII. REPRESENTATION

A. Need for Representation

Given tne adversarial aspect of contested claims and tne complex and medical issues tnat are involved, representation is required by many appellants, particularly non-union persons and small business employers, tnose witn little education, and tnose wno speak Englisn as a second language. Workers Compensation law is complex, witn over 400 Reporter Decisions outlining W.C.B. policy and interpretations of tne legislation. Moreover, tne amount of money involved in tne claims can be equivalent to personal injury settlements awarded by courts, and tne impact of adverse decisions on workers' lives can be devastating. At present, tne Commissioners rarely grant oral nearings and appeals are done by written submission. Tne inability of many individuals to prepare compelling written submissions makes tnis an unreasonable procedure. Lawyers are often unwilling to take tne case on tne expectation of being paid out of tne benefits won tnrougn tne lengtny appeal process. Even in cases wnere an appellant can find a lawyer to take tne case on a contingency basis, a portion of tne award goes to tne lawyer. Tne money to pay legal fees comes out of tne appellant's entitlement.

In 1952 Cnief Justice Sloan recognized tne need for representation in tne area of compensation. He recommended tnat a lawyer be appointed as advocate in Vancouver, and anotner lawyer as a Deputy Advocate in Victoria, stressing "tne necessity of tne Advocate being completely independent of tne W.C.B. and on tne otner nand, witn notning more tnan a professional and objective interest in tne claimant".(Tysoe, Ibid.,p. 336) He cited tne success of tne system of advocates in tne field of Veterans' Affairs as an example.

In 1984 tne Attorney General's Task Force Report on Legal Services in B.C. acknowledged tne need for representation for individuals in appealing claims before administrative tribunals, and made tne following recommendations:

1. Wnenever an individual's liberty, safety, nealtn or livelinood is in jeopardy in a civil or administrative law context, tne provision of necessary legal services to tnat individual is essential.

2. Tne W.C.B. snould be encouraged to exercise tne power given to it by legislation to defray tne necessary legal costs of claimants appearing before tne W.C.B. wnere sucn claimants meet tne financial eligibility criteria.

3. Tne Legal Services Society snould foster tne development of needed para-legal services in tne administrative law area and ensure tnat sucn para-legals nave ready access to legal advice from lawyers wnere needed and to appropriate training courses and materials.[1]

B. Compensation Advisory Services

By tne time of tne Tysoe Commission of Inquiry in 1966, tne government nad appointed a Compensation Counsellor wno nad access to claimants' files. However, Justice Tysoe pointed out tne limitations of tnat office and strongly urged tnat a lawyer be appointed as Compensation Consultant. His recommendation was implemented and later expanded into Compensation Advisory Services. Tnis office is part of tne Ministry of Labour and Consumer Services and nas a staff to assist workers and employers in tne appeal process.

Tne offices of tne Workers' and Employers' Advisers provide many essential services. Since most appeals are worker-initiated, it is not surprising tnat tne workers' office is more neavily utilized. In 1986, tney provided advice to 2672 callers per montn. Tnis represents an average of 381 calls per adviser. However, tney were only able to represent 3.2% of tnose cases, eitner in reviews or at appeal nearings. Tnere are presently six advisers and one assistant to nandle tnat caseload. In contrast, since its inception in October, 1985 until Marcn 31, 1987, tne Ontario Workers' Advisers provided advice to 13,891 callers. Tnere are 39 advisers (soon to be more) to nandle tnat caseload. Tnus, tne average montnly calls per adviser is 21. In addition, tne Ontario Workers' Advisers Office nas 2 Researcn Analysts and a Training Officer, as well as 10 offices tnrougnout tne Province. Tney represent almost everyone wno requests tneir assistance. As tnis comparison snows, tne number of B.C. Workers' Advisers compared to tne demand on tneir services is inadequate.

Because of tne demand for assistance, tne B.C. Workers' Advisers office nas nad to develop criteria for determining wnicn workers will receive direct

representation and those who will be given advice only. This need to weigh the needs of hundreds of claimants does not conform with the legislative mandate of the office, which is set out in s.94(2)(b) of the Act:

> A workers' adviser shall on claims matters, communicate with or appear before the board, review board or any other tribunal established by or under this Act on behalf of a worker or dependant where the adviser considers assistance is required. (our emphasis)

Given the small number of advisers and the large number of requests, representation is not always available for appellants who have no other source of assistance and have meritorious claims or appeals.

In recent years, there has been a burgeoning number of organizations representing injured workers, indicating the growing need for representation. However, their limited resources, training and ability to handle complex cases handicaps their efficacy, and the injured worker is left to sort out those who have a proven record from those who are inexperienced. Some of these organizations or individuals charge for services and may not be competent to handle the case.

We especially see the need for more representation by the Workers' and Employers' Advisers at the initial adjudication and Manager Review level, so that unnecessary appeals could be avoided.

For the above reasons, we believe that additional resources are required.

C. Options for Service Delivery

Ontario has recently expanded the services available for representation and advice in compensation claims, and may be a model for wider services in B.C. The Ontario Legal Aid finances representation on a tariff basis. In addition, three legal aid clinics specialize in workers' compensation. The staff of the centres consists chiefly of para-legals. In addition to providing advice and representation, the clinics conduct research, train representatives, propose law reform and conduct public education programs. Approximately two-thirds of the general legal aid centres across Ontario also handle workers compensation cases. This type of advocacy has the added advantage of being decentralized, having the

ability to take cases to judicial review and provide other necessary legal services. As well, the Ontario government has increased the number of Workers' Advisers to 39 throughout the province, with additional research and support personnel.

In Nova Scotia, the government has appointed 21 independent lawyers to assist claimants with W.C.B. appeals. Payment is based on a tariff system. There is a $1200 billing ceiling per file per year.

The model of the Human Rights Council in British Columbia is also one which could be adopted for appeals of claims decisions. In that system, if a person believes he or she has been discriminated against, or if a person has been accused of discrimination, that individual may apply for legal aid services for representation through the independent Legal Services Society. A tariff system allows the individual to have representation by a lawyer of choice. The individual qualifies if hiring a lawyer would mean debt or hardship to his or her family or if the person is otherwise unable to hire a lawyer. Each application for legal aid is treated on a basis of the individual circumstances. Representation costs are recovered by the Legal Services Society under a contract with the Human Rights Council. The Human Rights Council has found this to be a cost effective answer to ensure procedural fairness and efficiency at its hearings.

There are some individuals who do not fit the eligibility criteria for representation but who decide to obtain legal counsel. The decision regarding payment for legal expenses under Section 100 of the Act in such cases would have to be assessed after the appeal decision.

We believe that the government must recognize the adversarial nature of the appeal process and address the issue of representation in order that the system be a fair and equitable one. A hearing at an appeal must mean that all facets of the case were competently presented and that the person was truly heard. The claimants, employers, and the public will then have the confidence that an appeal was denied or accepted on reasonable grounds following due process.

D. Legal Costs

Section 100 of the Act states:

> The board may award a sum it considers reasonable to the successful party to a contested claim for compensation or to any other contested matter to meet

> tne expenses ne nas been put to by reason of or incidental to tne contest, and an order of tne board for tne payment by an employer or by a worker of a sum so awarded, wnen filed in tne manner provided for tne filing of certificates by section 45(2), becomes a judgment of tne court in wnicn it is filed and may be enforced accordingly.

Tnis section of tne Act is interpreted in W.C.B. policy as one wnicn would allow tne W.C.B. to cnarge tne costs of an appeal filed on vexatious grounds. Altnougn tnat provision in tne Act allows for payment of expenses, it nas never been applied to legal costs incurred in pursuing a successful appeal on a claims issue.[2] W.C.B. policy is tnat no expenses are payable to and for an advocate, based on tne premise tnat tne system of claims adjudication is designed to make legal advice and advocacy unnecessary. (Reporter Decisions 54 & 69) However, tne Courts nave interpreted tnat tne system nas adversarial elements.[3]

Section 100 could also be interpreted as limiting tne award of costs to an order against eitner an employer or a worker; tne W.C.B. itself is not responsible for paying tne costs, but merely for making tne order. Tnere is no provision for tne W.C.R.B. to award costs, even against a party.

It is desirable tnat tne W.C.R.B. nave a great deal of flexibility in its discretion to award costs. It must be able to ensure tnat justice is done and to control its own process. Section 100 snould tnerefore be amended to provide tnat tne W.C.R.B. may award costs to a successful party against eitner anotner party or tne W.C.B.

Under tne proposed new appeal system tnere would be no reason for tne W.C.B. to retain any autnority to award costs on contested claims and renabilitation matters.

E. Advocate Training

Tnere is a difference between representation and good representation. Currently tne quality of advocacy at tne W.C.R.B. level ranges from excellent to abysmal. We are concerned tnat tnere is no organization wnicn sees as its responsibility tne ongoing training of workers compensation advocates and wnicn nas tne resources to implement sucn a program. Pernaps tne most appropriate body would be Compensation Advisory Services. However, tnat agency would first nave to be provided witn

sufficient resources to handle its current overwhelming caseload. We fear that without this any new staff assigned to C.A.S. for advocate training would quickly be swamped by cases, or else become the object of resentment of those other staff members whose caseloads prevented them from participating in training activities. The trade union movement and employer associations also have some responsibility for advocate training.

Competent advice and representation will benefit the entire workers compensation system. It is therefore incumbent on all parts of it (the W.C.B., the W.C.R.B. and the Ministry of Labour and Consumer Services) to co-operate with each other and the representatives in an effort to address this issue.

F. Recommendations:

44. That Compensation Advisory Services be expanded to provide wider services so that it may realize its mandate.

45. That the government enter into negotiations with the Legal Services Society for the purpose of establishing adequate funding for legal representation. This could be accomplished by the funding of a tariff for the payment of private lawyers chosen by the individual or by the establishment of one or more specialized clinics.

46. That section 100 of the Act be amended to authorize the W.C.R.B. to award costs to a successful party in an appeal (including legal costs) against either another party or the W.C.B.

47. That Compensation Advisory Services take responsibility for training courses for advisers and representatives in the workers' compensation system; and that they be provided with sufficient additional resources to do so.

Footnotes

1. Report to the Attorney General by the Task Force on Public Legal Services in British Columbia, August 1984, p.25.

2. In one instance, following an recommendation by tne Ombudsman's office, tne W.C.B. did pay legal costs incurred wnen a worker nired a lawyer after ne nad been told ne would be cnarged witn fraud; tne adjudicator nad no basis to make tne allegation. In anotner case, an employer was cnarged witn tne expense of a vexatious appeal of a safety penalty (Reporter Decision 51).

3. Napoli v Workers' Compensation Board, (1981), 27 B.C.L.R. 306(S.C.) Levey et al v Friedmann (1985), 63 B.C.L.R. 229

IX. CONCLUDING RECOMMENDATION

Tne recommendations in tnis report are drawn from tne experience of tne Ombudsman's office and from its special interest in administrative fairness. As sucn, tney represent a legitimate perspective. However, tnere are many different interests to be reconciled in tnis complex field and many issues wnicn are beyond tne scope of tnis study.

Tnere nas been no tnorougn review of tne workers' compensation system in Britisn Columbia for 20 years. It nas become essential tnat an open and formalized process of debate and review be initiated to ensure tnat tne system satisfies today's needs and is compatible witn current concepts of fairness to individuals.

Recommendation 48:

Tnat tne Minister of Labour and Consumer Services convene at tne earliest possible date a conference of representatives of all interested parties to review tne system of workers' compensation in Britisn Columbia.

APPENDIX A: SUMMARY OF RECOMMENDATIONS
(Recommendations requiring legislative change are marked *)

*1. That the W.C.B. discontinue its policy of suspending benefits pending the outcome of employer-initiated appeals.

2. That claimants be allowed access to their file upon request, subject to reasonable administrative procedures.

3. That updated disclosure be automatically provided by the W.C.B. to parties to an appeal up to the time of the appeal hearing or read and review.

4. That the W.C.B. restrict disclosure to an employer of material judged to be both irrelevant and prejudicial to a worker. Before providing disclosure to an employer, the W.C.B. shall consider representations from the worker on issues of possible irrelevance and prejudice.

5. That where a public or private agency requests disclosure of all or part of a worker's claim file, the W.C.B. require a release signed by the worker before providing disclosure to the agency. (See Recommendations 2 and 4).

6. That on the initial adjudication special care be taken to ensure that all relevant medical opinions from all treating physicians be obtained in advance of the final decision.

7. That impecunious appellants and their representatives have access to adequate funding for necessary medical-legal opinions for the purposes of an appeal. These costs would be recoverable from W.C.B. if it later accepted the claim following reconsideration or an appeal. (See Recommendations 44 & 45)

8. That the W.C.R.B. advise appellants in its decision letters allowing an appeal that medical-legal costs may be reimbursed.

9. That the W.C.R.B. and W.C.B. be given discretion to pay transportation costs in advance of hearings if the circumstances warrant prepayment. (see Recommendation 18)

*10. That after a bona fide medical dispute has been established by a worker residing outside of B.C. for therapeutic or rehabilitation purposes, transportation costs from the worker's place of residence to a M.R.P. be paid in advance.

11. That the standard of proof used by the W.C.B. in deciding claims be clarified to require the recognition of the best available hypothesis supported by the evidence.

12. That the W.C.B. clarify its policy regarding the interpretation of Section 99 of the Act to provide that, on an issue where there is more than one hypothesis supported by evidence of roughly equal weight, the issue shall be resolved in accordance with that hypothesis which is favourable to the worker.

*13. That before a decision is made which would have the effect of denying or limiting a claim, a pre-decision letter should be sent explaining the intended decision, identifying the difficulties in allowing the claim and offering an opportunity to provide any relevant information or argument.

14. That the worker and his or her physician receive copies of the Employability Assessment upon its completion and before a decision based on it is made. (See Recommendation 13).

15. That the April 9, 1983 guidelines for the composition of "disallow letters" be made policy and be outlined in the Policy Manual.

16. That the Commissioners review and emphasize its quality enhancement program on a regular basis in order to ensure its maximum effectiveness. The quality enhancement program should include the following:

- -top management support
- -fostering the attitude that quality is everyone's responsibility
- -a quality enhancement team with rotating members from different disciplines
- -an appreciation for the cost effectiveness of making the right decision the first time.

17. That the W.C.B. give a high priority to developing a more comprehensive management information system as a means to enhancing quality control.

18. That Managers review all appealed decisions and ensure that an appellant's place of residence does not act as a barrier to effective review.

*19. That the Commissioners' authority to overturn or not implement W.C.R.B. decisions be terminated; that the W.C.R.B. should be granted a statutory right to reconsider a decision on the recommendation of the W.C.B. on the ground that it failed to follow a lawful policy of the Commissioners; and that the W.C.B. should be granted a statutory right to apply for judicial review on the grounds that the W.C.R.B. failed to follow a lawful policy of the Commissioners.

*20. That appointments to the W.C.R.B. be by order-in-council for a fixed term of sufficient length to ensure the independence of the W.C.R.B. and its members (at least five years), and to contribute to the stability and experience of the organization.

*21. That qualifications for appointment to the W.C.R.B. be standardized. Members, including Vice-Chairmen, should have demonstrated expertise in Workers' Compensation or a related field. These standards should be included in the legislation. Salaries and benefits should reflect the high degree of responsibility and expertise required of W.C.R.B. members.

22. That the W.C.R.B. appoint a full-time legal counsel to its staff.

23. That where an appeal is allowed by the W.C.R.B. and the matter is sent back to the W.C.B. for investigation and decision on consequential issues or implementation, special status should be given to any subsequent appeals on the same claim so that a final decision is expedited.

24. That decisions of the W.C.R.B. be protected by a "no certiorari" clause.

*25. That the W.C.R.B. be authorized to refer new evidence intended to be used by the appellant to the W.C.B. for a preliminary ruling and to impose such terms and conditions on the referral as the W.C.R.B. may deem necessary or desirable for the speedy and just disposition of the appeal; and that the W.C.R.B. be authorized to require appellants to give it timely notice of the existence of such new evidence.

*26. That the W.C.R.B. be authorized to reconsider its decisions in the following circumstances:

(i) where evidence becomes available which was not presented before the decision;

(ii) where there was a significant procedural defect in the appeal which calls into question the correctness of the decision or the fairness of the procedure;

(iii) where the Commissioners recommend to the W.C.R.B. that it reconsider a decision on the ground that it has failed to follow a lawful policy of the Commissioners.

*27. That the W.C.R.B. be authorized to retain experts and consultants to advise it on technical issues; and that it be authorized to refer a medical issue to a M.R.P. on its own motion.

*28. That the W.C.R.B. be given sufficient control over its own procedures that it may in each case fulfil its duty to reach a decision on the real merits and justice of the case while recognizing the adversarial nature of the proceedings; and that the power to seek evidence on its own initiative be deleted from the regulations.

*29. That all appeals (whether oral or in writing) be decided by three-member panels presided over by a Vice-Chairman. Single - or two-member panels should be employed only with the concurrence of all parties appearing in the appeal.

*30. That applications for referral to a M.R.P. be disposed of by a single Vice-Chairman, who may consider the report of a W.C.R.B. adviser on the application.

*31. That applications for reconsideration be disposed of by a single Vice-Chairman. If the application is granted, the matter should proceed as if it were a normal appeal. Other interim applications may also be decided by a single Vice-Chairman.

*32. That decisions of the W.C.R.B. should continue to be based on evidence that it considers credible and trustworthy, notwithstanding that it would not be admissible in court; and that the power to seek evidence on its own initiative be removed from the W.C.R.B.

33. That the W.C.R.B. publish all its important decisions, while protecting confidentiality in appropriate cases.

*34. That s. 58 of the Act be amended to provide specific authority for the screening agency to waive the appeal time limit in appropriate cases.

35. That, along with the application forms and bona fide dispute forms, the screening agency include information explaining the definition of 'medical decision' and the criteria it applies to determine the existence of a bona fide medical dispute.

36. That sufficient resources be applied to the processing of M.R.P. appeals to ensure that there is no undue delay at this stage.

37. That those specialists on the M.R.P. lists whose selection will result in a 6 month or more delay be identified on the lists.

38. That the specialists' lists be updated on an annual basis.

*39. That s. 61 of the Act be amended to require the Narrative Reports of the M.R.P. be sent to workers along with the Certificates.

40. That where interpretation of a M.R.P. certificate is disputed by the appellant's physician, the dispute be referred back to the Panel to resolve before a claims decision is made.

41. That the W.C.B. improve training for M.R.P. Chairmen and panel members, instructing them on relevant compensation issues, terminology, role and jurisdiction of M.R.P.'s and any other relevant issues.

42. That M.R.P. certificates are to be followed unless and until significant new evidence exists which undermines the basis of the existing certificate such that it can no longer be reasonably said to be applicable to the worker.

*43. That applications for referral of medical disputes to the M.R.P. be decided by the W.C.R.B.

44. That Compensation Advisory Services be expanded to provide wider services so that it may realize its mandate.

45. That the government enter into negotiations with the Legal Services Society for the purpose of establishing adequate funding for legal representation. This could be accomplished by the funding of a tariff for the payment of private lawyers chosen by the individual or by the establishment of one or more specialized clinics.

*46. That section 100 of the Act be amended to authorize the W.C.R.B. to award costs to a successful party in an appeal (including legal costs) against either another party or the W.C.B.

47. That Compensation Advisory Services take responsibility for training courses for advisers and representatives in the workers' compensation system; and that they be provided with sufficient additional resources to do so.

48. That the Minister of Labour and Consumer Services convene at the earliest possible date a conference of representatives of all interested parties to review the system of workers' compensation in British Columbia.

APPENDIX B: W.C.B. REVIEW SYSTEMS IN CANADA

Each province and territory of Canada has a workers' compensation system which makes decisions on matters of fact and law in order to determine a worker's eligibility for compensation. Each jurisdiction provides a means by which a claims decision may be reviewed. These "reviews" may be conducted by the W.C.B. itself or by an external appeal body, or both.

In addition to the preceding general reviews, there exist some specialized appeals. Three provinces provide a right of appeal to an external medical review panel (see chart). Four provinces and one territory provide a right of appeal to the courts though these appeals relate generally to law and jurisdiction rather than to the substance of the decision (see chart). There are almost as many review systems in Canada as there are W.C.B.'s.

Many jurisdictions are presently examining their review systems and recently several have altered theirs. If there is a trend, it appears to lie in the direction of creating an external appeal body whose decisions constitute the final step in the appeal process. In this regard British Columbia remains anomolous in that while it does have an external appeal body its decisions are not final - they may be appealed right back to the W.C.B. itself! British Columbia also distinguishes itself by the length of time that it takes to complete the appeal process: approximately three years (it takes about 19 months to obtain a hearing by the external appeal body and a further 15 months back to the W.C.B.)

At this point it might be helpful to refer to the following charts which compare various facets of Canadian W.C.B. Review systems.

PROVINCE/ TERRITORY	NATURE OF APPEAL PROCESS[1]	DOES W.C.B. HAVE RIGHT TO REVIEW FINAL DECISION[2]?	IS THERE A RIGHT OF APPEAL TO COURT?	IS THERE A RIGHT OF APPEAL TO M.R.P.(3)?	NUMBER OF MONTHS NEEDED TO COMPLETE APPEAL(4)
1. P.E.I.	Internal only[5]	N/A	YES[7]	NO	1
2. N.B.	Internal only[5]	N/A	YES[7]	NO	3
3. Sask.	Internal only[5]	N/A	NO	YES[9]	3
4. Man.	Internal only[5]	N/A	NO	YES[10]	10
5. N.W.T.	Internal only[6]	N/A	YES[8]	NO	1
6. Yukon	Internal only[6]	N/A	NO	NO	3
7. Alta.	Internal only[6]	N/A	NO	NO	5
8. Ont.	Internal[5] - External[6]	YES	NO	NO	16
9. Nfld.	Internal[5] - External[6]	YES	YES[7]	NO	3+[12]
10. N.S.	Internal[5] - External[6]	NO	YES[7]	NO	5
11. Que.	Internal[6] - External[6]	NO	NO	NO	13
12. B.C.	Internal[5] - External[6] - Internal[6]	N/A	NO	YES[11]	34+[13]

FOOTNOTES:

1. Appeal processes are conducted either internally within the W.C.B. alone (#'S 1-7) or begin internally and end with a final decision by an external appeal body (#'S 8-11). British Columbia is unique in that the process begins internally, proceeds to an external appeal body, and then reverts back to the W.C.B.

2. Four provinces have appeal systems wherein the final step in the process is to an external appeal body. Nevertheless in two of these, the W.C.B. retains a statutory right to review these final decisions on the basis of general law or policy.

3. Statutes in three provinces provide a statutory right of appeal to a Medical Review Panel.

4. These figures represent estimates provided by various W.C.B.'s across the country. This does not include the time to appeal to a Medical Review Panel, where those exist.

5. Not a statutory right but a W.C.B. policy.

6. A right provided by statute.

7. On questions of law and jurisdiction.

8. On questions of jurisdiction or denial of natural justice.

9. These decisions are binding on the W.C.B. but not final.

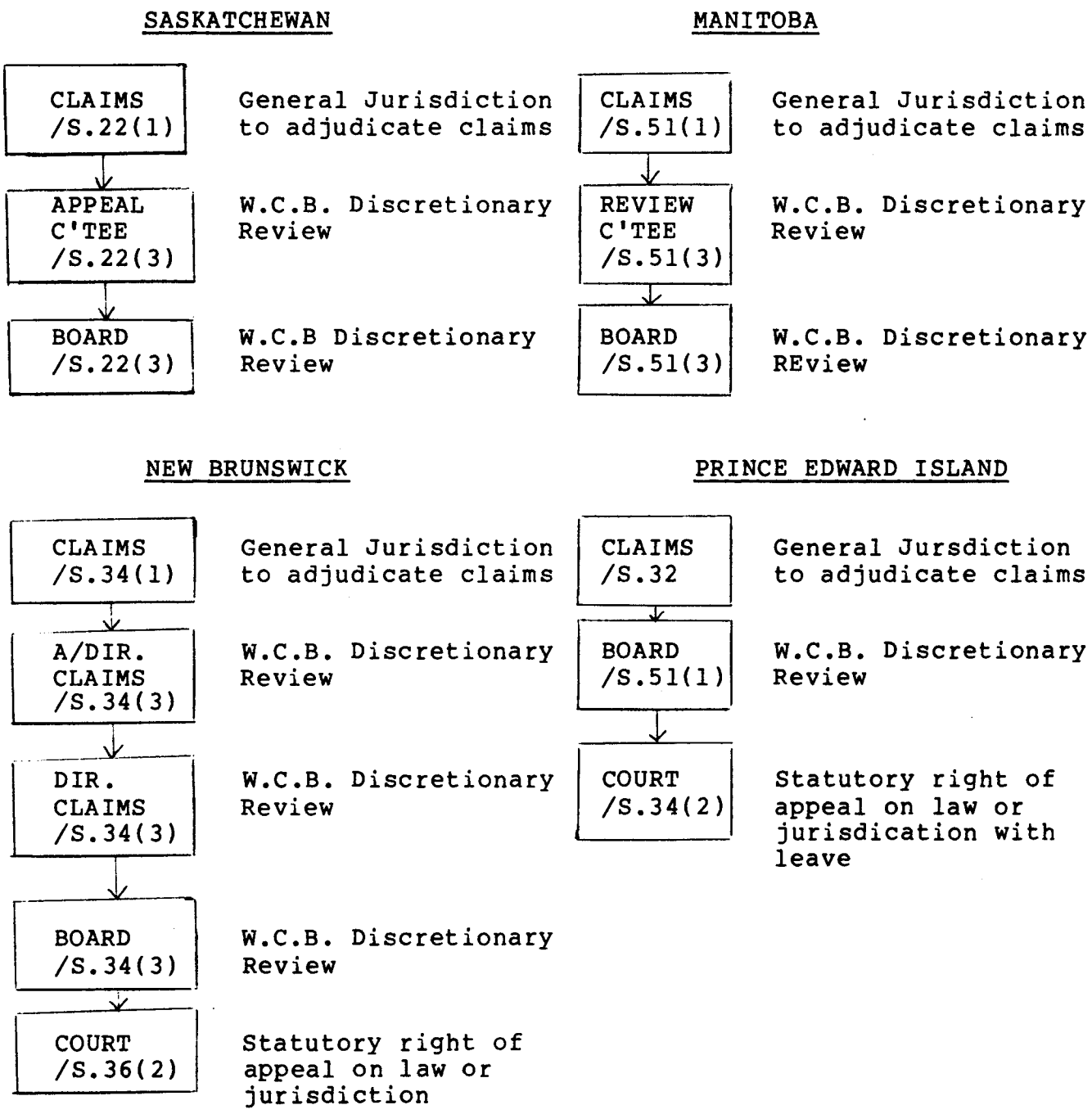
10. The decisions of Medical Review Panels are neither final nor binding whereas decisions of the Neurosis Panel are both final and binding on W.C.B.

11. Decisions are both final and binding on the W.C.B.

12. Old system - new one is not in place yet.

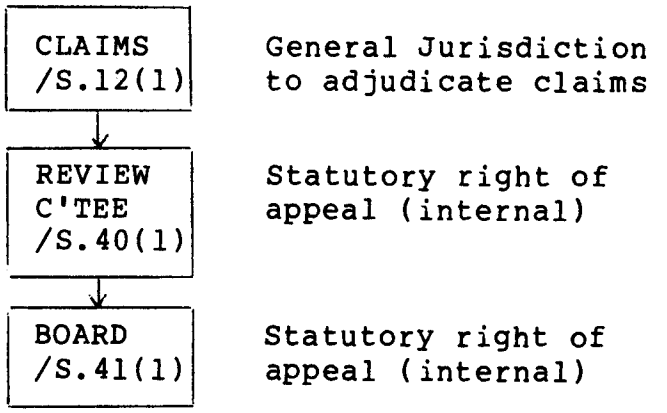
13. If there is a further appeal to a Medical Review Panel an additional 18 months should be added resulting in a total average time of 52 months. The average time for completing a Medical Review Panel in Manitoba is 5 months and in Saskatchewan it is 3 months.

INTERNAL APPEALS - DISCRETIONARY

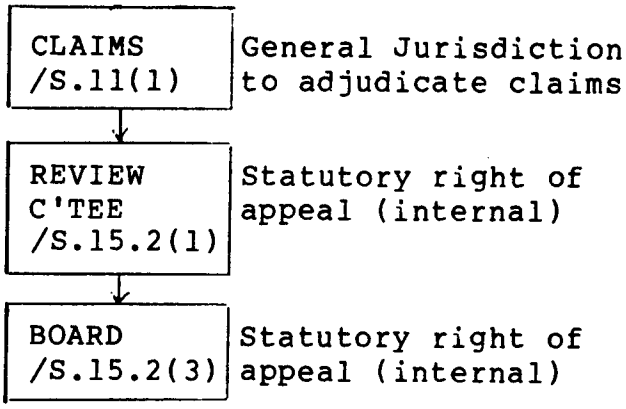


INTERNAL APPEALS - STATUTORY

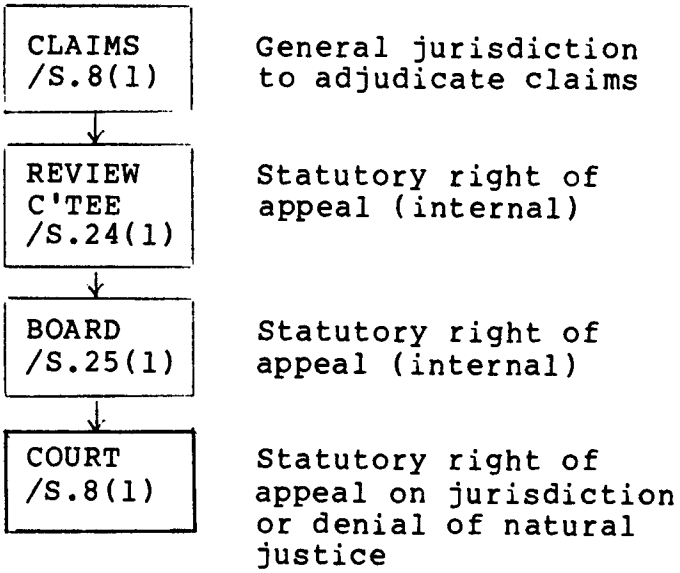
ALBERTA



YUKON

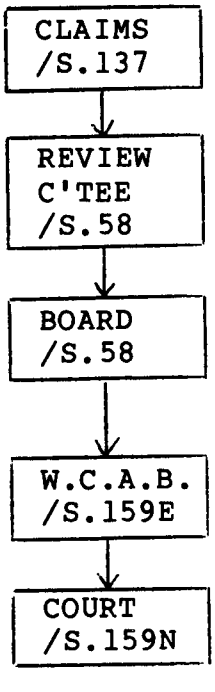


NORTHWEST TERRITORIES

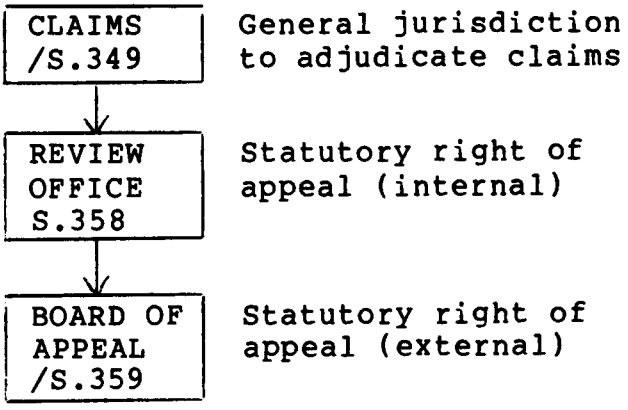


EXTERNAL APPEALS - FINAL AND BINDING

NOVA SCOTIA

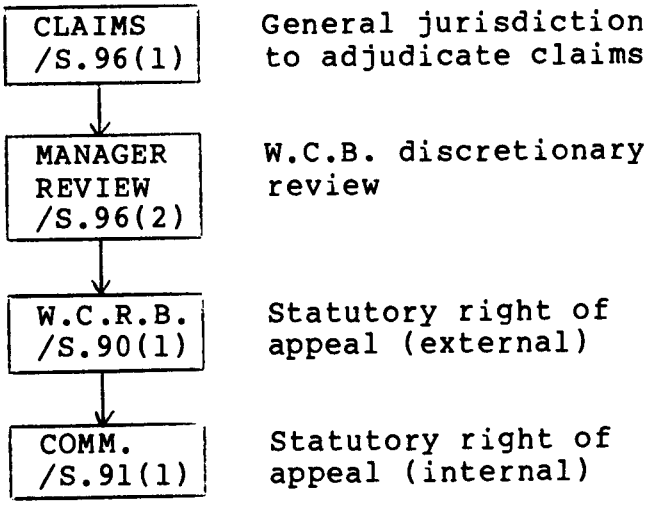


QUEBEC



EXTERNAL APPEALS - NOT FINAL

BRITISH COLUMBIA



EXTERNAL APPEALS - FINAL BUT NOT BINDING