

Extensions of Time at the Review Division and the Workers' Compensation Appeal Tribunal

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Overview

By the end of the session, you will have a better understanding of:

- ▶ Deadlines for filing for compensation claims
- ▶ Timelines for filing a review to the Review Division (RD)
- ▶ Timelines for filing an appeal to the Workers' Compensation Appeal Tribunal (WCAT)
- ▶ EOT process at RD
- ▶ EOT process at WCAT

Rules for Filing an Occupational Disease Claim

- ▶ Apply as soon as possible after the injury, onset of disability or psychological change
- ▶ Within 1 year of the DOI or when the worker was disabled from an occupational disease or the date they first experienced a psychological change after they were exposed to a traumatic event/significant stressor in the course of their work
- ▶ If it has been more than 1 year → show special circumstances
- ▶ If the application is within 3 years, compensation starts the day after the injury
- ▶ If the application is made after 3 years → it starts from the date of the late application

WORKSAFE BC DECISIONS

WHAT CAN BE DISPUTED?

What constitutes a WorkSafeBC decision?

- ▶ A decision is a determination of the Board to award, deny, reconsider or limit entitlement to benefits and services, or impose or relieve an obligation, pertaining to compensation or rehabilitation matters under provisions of the *Act* or policy. (Policy item #99.20)
- ▶ Who can request a review or appeal a decision?
 - ▶ An affected person (worker, dependant of a deceased worker or an employer or a person who claims to be an affected person who is directly affected by a decision.

When is a decision made?

- ▶ On the date it is communicated to the affected person
- ▶ This means either writing, verbally, payment or termination of compensation, referral of a worker for treatment/examination
- ▶ When a decision is communicated → triggers statutory timelines
- ▶ 75 days for reconsideration and 90 days to request for review

Finding of Facts

- ▶ A finding of fact is not a decision.
- ▶ It is the factual basis on which a decision is made.
- ▶ Findings of fact may change based on new information and are not subject to the 75-day time limit on the Board's reconsideration authority.
- ▶ A finding of fact may not be reviewed or appealed in the absence of an expressed or implied decision under review or appeal.
- ▶ WCAT #2007-00430: This decision is noteworthy as the panel considers whether a statement by a Board officer is merely a finding of fact that cannot be the subject of a review or appeal, or whether that statement is a decision that can be the subject of a review or appeal.
 - ▶ Found that a denial to refer to VR is a reviewable decision, but limitations and restrictions are not.

What is a reviewable decision?

- ▶ Informational letter vs. an adjudicative decision
 - ▶ the distinction between an informational letter which is not reviewable and an adjudicative decision which is reviewable
 - ▶ (WCAT noteworthy decision #2007-00798)

Decisions that are not reviewable:

- ▶ Letter that a Board decision was already provided (WCAT #2005-06541)
- ▶ Letter confirming a prior decision and noting the 75 day time limit on reconsiderations, is not reviewable, even if that previous decision is contrary to Board policy (WCAT #2004-03907)
- ▶ The 75-day time limit on the Board's reconsideration authority in s.96(4) and (5) of the *Act* does not apply if the Board made an internal determination that was not communicated to the parties. (WCAT #2004-03907)
- ▶ Refusal to review by the Review Division upheld where the statement in question in the case manager's decision letter did not constitute a decision, but is for information purposes only. (WCAT #2003-04167)

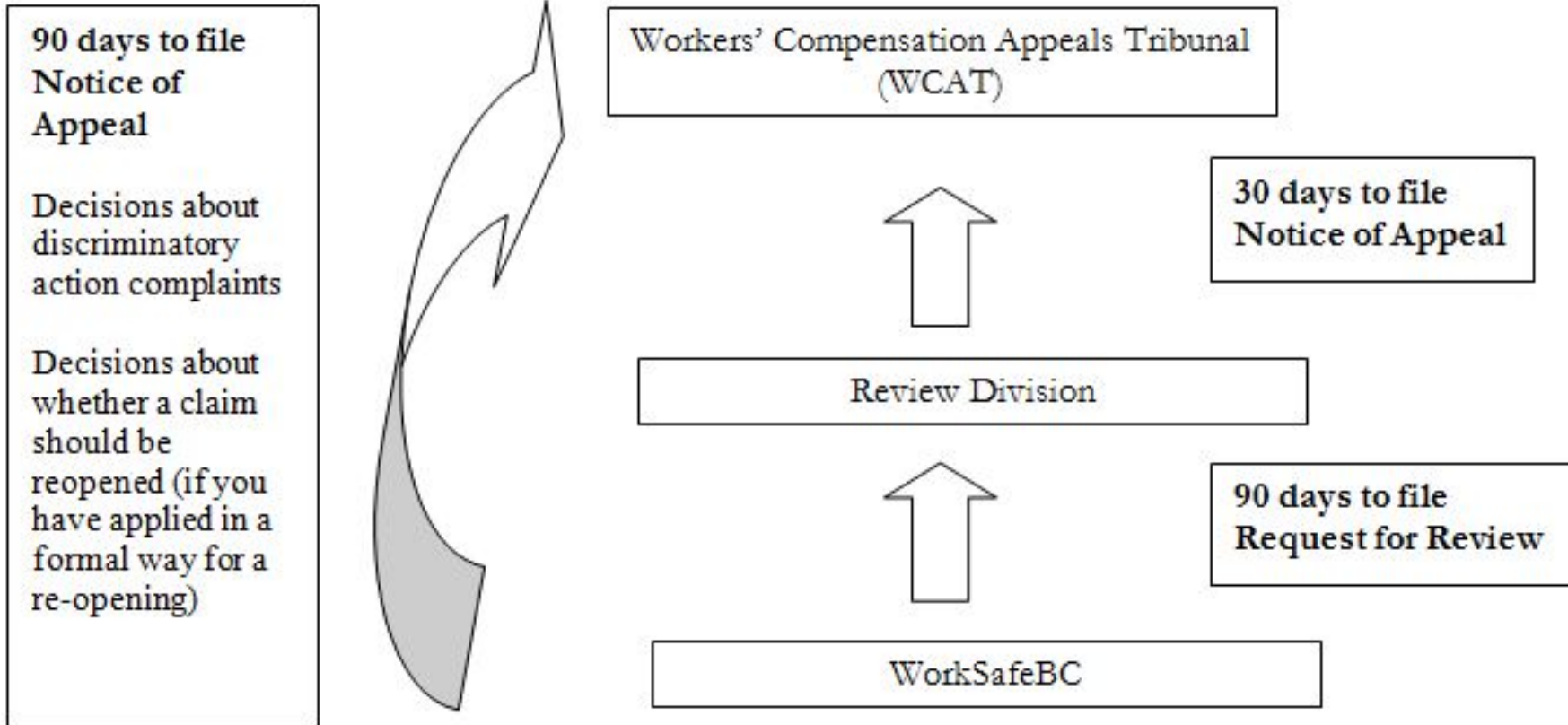
What types of issues can you RFR or Appeal?

- ▶ You can request a review of most decisions made by WorkSafeBC, including:
 - ▶ Whether your claim for compensation should be allowed;
 - ▶ The extent of compensation benefits you are entitled to (including vocational rehabilitation and medical assistance); and
 - ▶ Whether a claim should be reopened (if you have applied in a formal way for a re-opening).

Examples of issues you can dispute:

- ▶ What conditions should be accepted or denied;
- ▶ Wage Rates (amounts, time periods used, correct category of worker, etc.)
- ▶ Wage Loss Benefits (duration, start date/end date, etc.)
- ▶ Health Care Benefits (types, duration, etc.);
- ▶ Vocational Rehabilitation Benefits (suitability of plans, extent of benefits, etc.)
- ▶ Disability Awards (effective dates, wage rates, amounts, conditions referred, termination dates, etc.);
- ▶ Plateau / resolution / effective dates

Process for disputing decisions:



Important Deadlines to Remember:

- ▶ Within 75 days, WorkSafeBC can change/reconsider their decision;
- ▶ Within 90 days, you can request a review of the WorkSafeBC decision to the Review Division; (Section 270 of the WCA)
- ▶ Within 30 days, you can appeal a Review Division decision to WCAT; (Section 293 of the WCA)

Communicating Decisions (#99.20):

- ▶ A decision is made for the purpose of triggering the timelines for reconsiderations and reviews, on the date the decision is communicated to the affected person.
- ▶ If the decision is communicated to affected persons on different dates, the statutory timeline commences on the date the decision is first communicated to an affected person.

Communicating decisions

1. Written Communication
2. Verbal Communication
3. Other Communication

1.) Written Communication (Policy item #99.20)

- ▶ The Board will communicate the following decisions through a decision letter:
 - ▶ Decisions on whether a claim is accepted, denied or rejected;
 - ▶ Decisions on initial entitlement to temporary disability benefits, a permanent disability award, benefits for a fatality and vocational rehabilitation assistance;
 - ▶ Decisions on initial and long-term average earnings;
 - ▶ Decisions that deny or limit benefits to a worker;
 - ▶ Decisions regarding the re-opening of a matter previously decided;
 - ▶ Decisions resulting from the reconsideration process;
 - ▶ Decisions regarding the acceptance of a compensable consequence;
 - ▶ Decisions that have been protested by the employer; and
 - ▶ Decisions on whether an employer may be granted a relief of costs.

Continued...

- ▶ The communication of the above decisions in writing triggers the timeline for reconsideration and review.
- ▶ The fact that a decision was not communicated in writing does not void the decision.
- ▶ If one of the above decisions is not communicated in writing, the Board will determine whether the decision was satisfactorily communicated through other means, for example, verbally, through the payment or termination of compensation, or the referral of a worker for medical treatment or examination, in order to determine the timelines for reconsideration and review.

2.) Verbal Communication (Policy item #99.20)

The Board may also communicate decisions such as health care decisions or administrative actions, verbally.

Examples of the types of decisions the Board may communicate verbally include:

- ▶ a decision to award an additional two weeks of physiotherapy benefits beyond the initial entitlement period; or
- ▶ a referral to a specialist.

Verbal Communication of a decision

- ▶ When a decision is communicated verbally, an explanation of the rights of review and/or appeal will be verbally provided to the affected person.
- ▶ The verbal communication also should, where appropriate, include an explanation of the decision
- ▶ Documentation is sufficient evidence that verbal communication of the decision, including the reasons for the decision and notice of review and appeal rights, has occurred.
- ▶ A copy of the written record of the decision is provided upon request following the verbal communication of a decision; however, it does not constitute a new decision. The statutory timelines for reconsiderations and reviews commence from the date of the verbal communication.

3.) Other Communication

- ▶ The Board may communicate decisions through the ongoing payment of temporary or permanent disability benefits, the payment of health care invoices, or the final payment of temporary disability or health care benefits, where the decision is uncontested and/or is in favour of the worker.
- ▶ For example, where a claim is allowed for ongoing wage-loss benefits and there has been no protest from the employer, the Board does not provide a letter outlining the reasons for the continued payment of benefits.

Does disclosure constitute communication of a decision?

- ▶ **WCAT-2009-00149 - noteworthy decision**
- ▶ claim log entry recorded a “decision”, no written or verbal communication of the decision to accept depression was ever made to either party, and disclosure of a claim file was not an appropriate method for communication of a decision

What triggers the time period?

- ▶ WCAT #2008-03567:
- ▶ Decision: Time period commenced for worker on Oct 26/07 but for the employer in Feb 2008 because the decision was not copied or communicated to the employer until then.
- ▶ This decision is noteworthy as it provides an analysis of what triggers the time period for requesting a review where a decision by the Board is communicated to the parties at different times.

Oral communication of a decision with a subsequent written decision

- ▶ **WCAT-2008-03461 - noteworthy decision**
- ▶ This decision is noteworthy as it provides an analysis of whether an oral communication of a Board decision declining to accept a claim precludes a worker or employer from proceeding with a review of a subsequent written decision.

Reconsiderations:

- ▶ S 1 “reconsider” means to make a new decision in a matter previously decided such that the new decision confirms, varies, or cancels the previous decision or order
- ▶ The Board can reconsider their decision within 75 days, unless a request for review or notice of appeal has already been filed
- ▶ After 75 days, the decision must contain an obvious error or omission.

Grounds for reconsideration

- ▶ New evidence indicating that the prior decision was made in error
- ▶ There has been a mistake of evidence:
 - ▶ Material evidence was overlooked
 - ▶ Facts were mistakenly taken as established which were not supported by any evidence or by any reasonable inference from the evidence
 - ▶ There has been a policy error such as applying an applicable policy incorrectly
 - ▶ There has been error of law

What happens after 75 days?

- ▶ Errors and omissions
 - ▶ Error is a mistake that something is wrong/incorrect
 - ▶ Omission = failure to do something that is required by law/policy
- ▶ Correction of administrative errors
 - ▶ Clerical error
 - ▶ Typo
 - ▶ Math calculation
- ▶ Fraud or misrepresentation (s 124)

Review Division

- ▶ Review Officers are decision makers that must apply law and policy
- ▶ Can change WSBC decisions if:
 - ▶ Original decision is inconsistent with law/policy
 - ▶ Evidence not properly weighed or
 - ▶ Significant new evidence that supports a change in the original decision

Request for review form

WORK SAFE BC Request for Review Review Division For office use only

Important: A request for review of a WorkSafeBC decision or order on a:
 • Claim or assessment matter must be submitted within 90 days of the date the decision was made.
 • Occupational health and safety or claims cost levy matter must be submitted within 45 days of the date the decision or order was made.

RESET

Worker's last name First name Middle initial WorkSafeBC claim number

Contact Information (Please contact the Review Division in writing if this information changes.)

I am the
 Worker Employer Please describe title/position Other Please describe

Last name First name Employer's name

Mailing address

City Province Postal code Email address

Work phone number (include area code) Home phone number (include area code) Fax number (include area code)

What pronouns do you use (for the purpose of future communications with the Review Division)?
 He/Him/His She/Her/ Hers They/Them/Their Ze/Zir/Zirs Other

The purpose of this question is to clarify our understanding about the background of Review Division's clients as part of implementing the calls to action of the Truth and Reconciliation Commission (TRC).
 Are you an Indigenous person (includes a person of Indigenous ancestry: Inuit, Métis, First Nations, status and non-status)?
 Yes No

If you self-identify as an Indigenous person, please indicate if you would like to be contacted by an Intake Officer to help you navigate the review process. These experienced staff members can offer neutral support and make sure that cultural sensitivities are respected.
 Yes No

I request a review of the following WorkSafeBC decision:
 (Please attach a copy of the decision(s) to this application.)
 Please check (✓) one and fill out the requested information in that row.

Claim decision WorkSafeBC claim number(s) Decision date (yyyy-mm-dd)

Employer assessment decision Employer account number(s) Decision date (yyyy-mm-dd)

Prevention decision Employer account number(s) Report number Order number Order date (yyyy-mm-dd)

Reason for review
 (If there isn't enough space below, additional pages may be attached.)
 Please be specific about your reason for review and the outcome you are seeking.

Are more pages attached?
 Yes No

WORK SAFE BC Request for Review Review Division

Worker's last name First name Middle initial WorkSafeBC claim number

Review method
 Read and review is the standard method of review. The review officer reads all submissions received from you and other parties to the review, as well as the WorkSafeBC decision and file, and obtains any additional information in order to make a decision. This method may involve telephone contact with you and other parties in order to clarify issues and gather more information.
 In most cases, reviews are decided without an oral hearing. However, in some cases, the review officer may decide that an oral hearing is required, in order to make a decision.
 If you believe an oral hearing is necessary or that telephone contact is required, please advise below and provide your reasons.

Disclosure (copy of WorkSafeBC file)
 Once it is confirmed that you have a valid reviewable matter, you will receive an email notification when the WorkSafeBC file is available online for downloading from worksafebc.com. If you have a representative, the notification will be sent to the representative's email address. Videos, photographs, and audio statements will be delivered by Canada Post on a DVD up to two weeks after your claim file is available online.
 No access to email Please check (✓) the box if you are a worker without email access. If you select this box, your claim file will be delivered by Canada Post.

Representation (Please contact the Review Division if this information changes.)
 Please check (✓) one
 I will represent myself in the review process I have a representative who will handle this review
If you are represented, fill in responses below.

Representative's name Name of representative's organization

Representative's mailing address

City Province Postal code Representative's email address

Representative's phone number (include area code) Representative's fax number (include area code)

Authorization
 "I request a review under the Workers Compensation Act. I acknowledge the Review Division may obtain or view, for the purposes of review, only and from any source whatsoever, a copy of records respecting the matter under review. I also acknowledge that WorkSafeBC will disclose information related to this review to the other party to this review for the express purposes of this review, including providing evidence and making submissions. I understand that it is a serious offence to knowingly provide false information in order to induce WorkSafeBC to make a particular decision."

Applicant's name (please print) Applicant's signature Date signed (yyyy-mm-dd)

Please send this form to - Review Division via mail or fax - not both.

Review Division Phone 604.274.5411 Toll-free in B.C. 1.888.922.8804 worksafebc.com
Fax 604.232.7747 Toll-free 1.888.433.9728

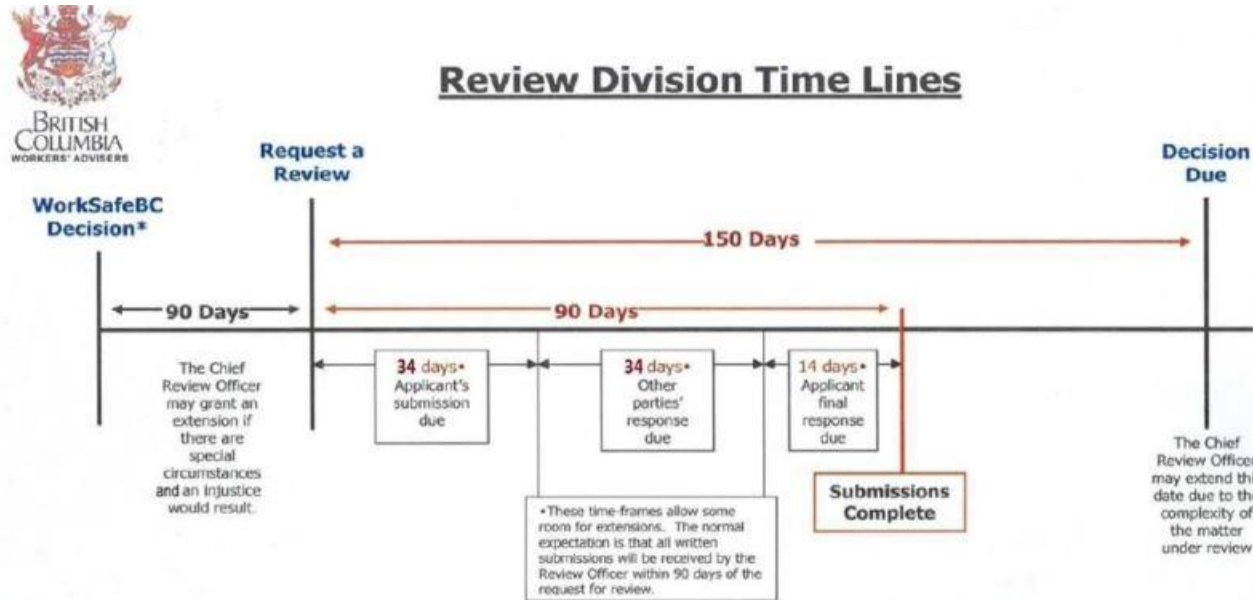
Mail Review Division WorkSafeBC PO Box 2075 5th Terminal Vancouver BC V6B 3S3

WorkSafeBC collects information on this form for the purposes of administering and enforcing the Workers Compensation Act. That Act, along with the Freedom of Information and Protection of Privacy Act, confers the authority to collect such information. To learn more about the collection of personal information, contact WorkSafeBC's Privacy Office, at PO Box 2075 5th Terminal, Vancouver BC, V6B 3S3, or email FOIP@worksafebc.com, or call 604.274.8131.

How to request a review?

- ▶ File the RFR within 90 days
- ▶ Must be in writing through the paper form/online portal
- ▶ Who can request a review?
 - ▶ A worker/dependant of deceased worker, employer, rep can RFR
 - ▶ Other affected parties can participate in a review

Review Division Time Lines



What to do if deadlines are missed?

- ▶ The best course will depend on the context of the situation:
 - ▶ The worker missed the deadline and is only a few weeks outside the timeline for filing
 - ▶ The worker missed the day deadline and is well outside this timeframe (i.e. months/years)
 - ▶ The representative missed the deadline

Extension of time application to Review Division

- ▶ RD Practices and Procedures Manual (A2.4.2 through A2.4.2.6)
- ▶ If you are past the 90 days to file the RFR → there is an extension of time request that can be made to the RD
- ▶ 8 day mailing period
- ▶ Process
 - ▶ File the RFR
 - ▶ Explain why it is late (include all evidence)

Extension of time at Review Division

- ▶ The Act sets out the legal criteria for granting an extension of time as:
 - ▶ (a) special circumstances existed that preclude or precluded the filing of a request for a review within the applicable time period required by subsection (1), and
 - ▶ (b) an injustice would otherwise result. (Section 270(2) of the WCA)

How has “Precluded” been defined?

- ▶ In the application for an EOT, a worker must demonstrate that they were precluded from filing their Request for Review within the 90-day timeline.
- ▶ The Review Division Practice and Procedures manual defines precluded as:
“...something less than “prevented”, but similar to “hindered” or “made difficult.”

Special Circumstances

- ▶ Examples vary from each case
- ▶ Some common factors include:
 - ▶ Family illness/death
 - ▶ Worker's illness (either physical or psychological)
 - ▶ Difficulty reading/understanding English (second language)
 - ▶ Lack of experience with WorkSafeBC and the appeal system
 - ▶ New evidence that was not reasonably available before the deadline
 - ▶ Did not receive the decision letter in the mail
 - ▶ Representative not copied on decision
 - ▶ No notification of review rights

Special Circumstances

- ▶ Other possible grounds:
 - ▶ Acts/omissions by the Representative
 - ▶ Non-copying of Representative
 - ▶ Non-notification of review rights by WorksafeBC
 - ▶ Discrepancy in language in the decision letter
 - ▶ Errors

Injustice

- ▶ The Chief Review Officer will consider the following factors:
 - ▶ The seriousness of the issue
 - ▶ The impact to the worker, if the extension is not allowed
 - ▶ The length in time between the 90 day timeline and when the worker filed the Request for Review
 - ▶ A clear and significant error of fact, law or policy
 - ▶ Essentially how important is the issue? How much compensation is at stake? How long was the delay in filing? Reason for delay? Did you file as soon as reasonably possible in the circumstances?
 - ▶ Does the delay prevent the other party from presenting their case properly?
 - ▶ Does the delay prevent the RD from making a fair determination due to the loss of potential evidence?

Discretion of the Chief Review Officer

- ▶ Even if special circumstances and an injustice exist, the Chief Review Officer has discretion whether to grant an extension.
- ▶ Normally, this discretion will be exercised in favour of granting an extension.
- ▶ However, this discretion may be exercised not to grant an extension.

What if the extension is denied?

- ▶ If your application for an extension of time is denied, you can seek a reconsideration by sending your request to the Chief Review Officer.
- ▶ However, an application for a new decision is more likely to be successful if made without unreasonable delay and supported by the provision of new information or an error in the previous decision. (A2.4.2.6 of the RD Practice and Procedures Manual)

Review Division Decisions

- ▶ Allow
- ▶ Refer back/return to the Board (cant appeal refer backs but can appeal directions)
- ▶ deny
- ▶ Must file a notice of appeal within 30 days
- ▶ **Note:** Review division decisions that cannot be appealed to WCAT can be reconsidered by the Review Division in limited cases where there is new evidence

Decisions that cannot be appealed to WCAT

- ▶ VR matters
- ▶ Commutations
- ▶ EOT to RFR
- ▶ Extending the time for a RO to make a decision
- ▶ Decisions that are referred back

WCAT Decisions

- ▶ Are final and conclusive
- ▶ The Manual of Rules of Practice and Procedure (MRPP)
- ▶ Appeals are considered and decided by a “panel”
- ▶ A panel is usually one vice chair

Notice of Appeal Procedure

- ▶ File a NOA within 30 days of the date of the RD letter
 - ▶ oral hearing/written submission
 - ▶ Include the change you want
 - ▶ Briefly include reasons
 - ▶ Add the decision and authorization form
 - ▶ Online portal/paper form

Extension of time at WCAT

- ▶ The Act sets out the legal criteria for granting an extension of time as:
 - ▶ (a) special circumstances existed which precluded the filing of a notice of appeal within the time period required in subsection (1) or (2) and
 - ▶ (b) an injustice would otherwise result

How WCAT has defined “special circumstances precluded”

- ▶ The (MRPP) provides the following definition for “special circumstances precluded”
 - ▶ The dictionary definition of “special” includes “unusual”. “uncommon”, “exceptional” and “extraordinary”.
 - ▶ “Preclude” does not mean “absolutely prevent” it may include “hinder”, “impede” or “delay”.
 - ▶ When deciding an extension of time for an application, panels will not consider the merits of the appeal.
 - ▶ When did you receive the RDDDL?
 - ▶ Was there a delay?
 - ▶ Is there new evidence that supports your appeal?
 - ▶ Did someone else agree to appeal the decision for you?
 - ▶ Did something happen that prevented you from filing your notice of appeal?

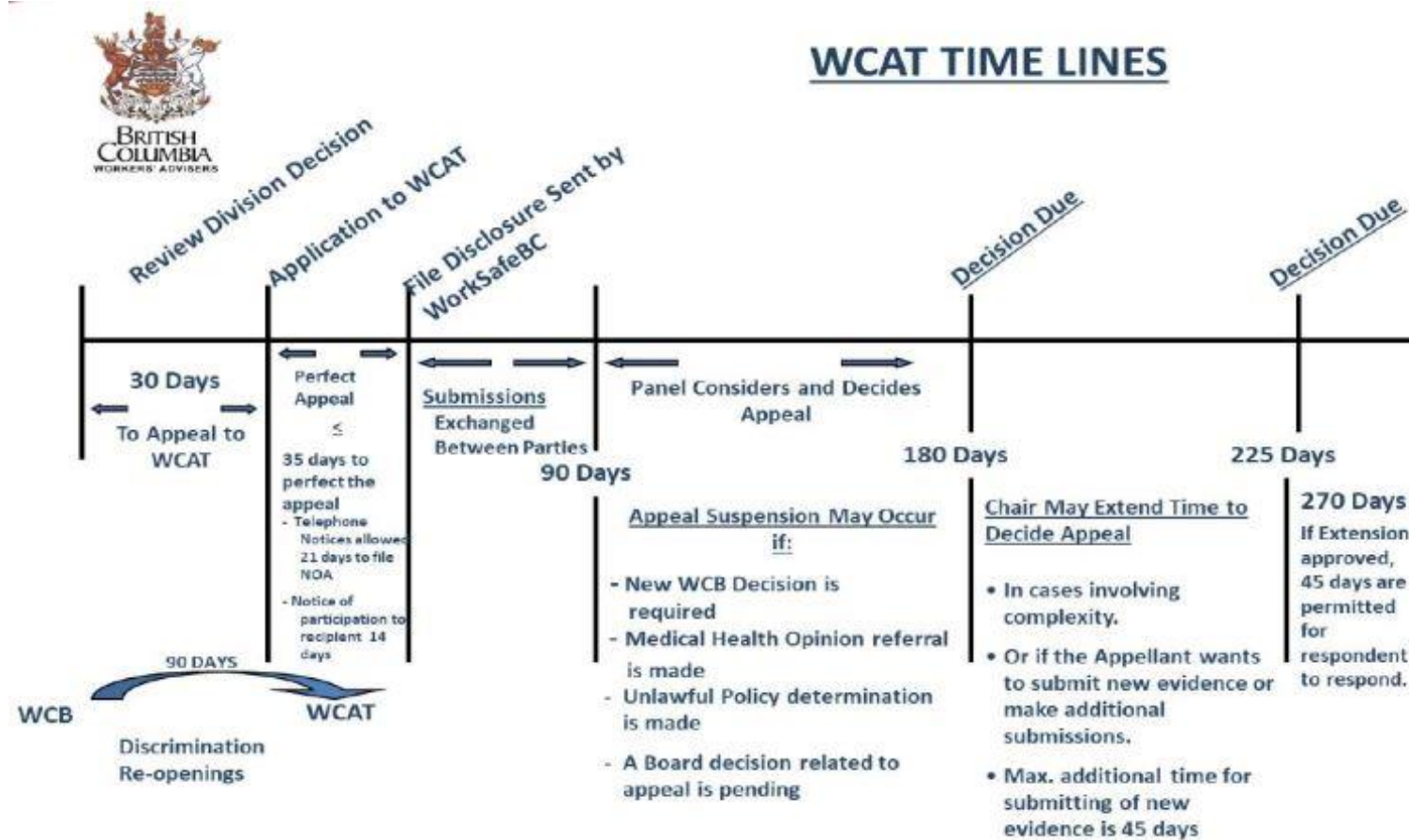
Injustice

- ▶ In order to extend the time to appeal, an injustice must result from the refusal to grant the extension.
- ▶ Injustice is given a wide meaning, including “unfairness”, “lack of justice” or “wrong”.
 - ▶ Explain what will happen if the appeal is not allowed to proceed
 - ▶ Relevant evidence?
 - ▶ What delayed you in filing your appeal after the time to appeal ended?
 - ▶ Will it be unfair if your appeal proceeds?
 - ▶ Did you act quickly to file the appeal once the deadline passed?
 - ▶ If you cannot appeal, how will the decision affect you?

Injustice

- ▶ Factors considered when an injustice occurs:
 - ▶ The significance of the matter under appeal;
 - ▶ The length of the delay;
 - ▶ The reasons for any delay beyond the expiry of the time limit to appeal;
 - ▶ The relevance of the new evidence that would support the appeal;
 - ▶ Any other relevant circumstances particular to the appeal.

WCAT Time Lines



WCAT decisions

- ▶ Allowed/varied (goes back to the Board for implementation)
- ▶ Denied/confirmed
- ▶ Reconsideration application (no time limit)
 - ▶ New evidence is available that became available after the appeal and did not exist before or the worker did not know about it and was unable to find it with reasonable efforts (must be substantial and relevant)
 - ▶ Jurisdictional error (WCAT decided a matter outside its jurisdiction in that appeal)
- ▶ Judicial review process
 - ▶ 60 day time limit to Supreme Court of BC
 - ▶ Decision contained a patently unreasonable error of fact/law
 - ▶ Made a true jurisdictional error

What if the Extension is denied?

- ▶ WCAT's MRPP allows for parties to apply for a reconsideration of their decisions in *limited circumstances*:
 - ▶ New evidence; or
 - ▶ To cure a jurisdiction error
 - ▶ Breach of the duty of procedural fairness; or
 - ▶ Narrow jurisdictional errors

Reconsiderations at WCAT

- ▶ Additional rule applicable to reconsiderations:
 - ▶ There are no time limits for filing for a reconsideration
 - ▶ A party can only apply once on each of the two grounds for a reconsideration
 - ▶ #20.2.2 and #20.2.5 of the MRPP

Jurisdiction

- ▶ where a decision of the RD is appealed to WCAT, WCAT has jurisdiction to address any issue determined in either the RD decision or the Board decision which was under review, subject to the statutory limits on WCAT's jurisdiction.
 - ▶ WCAT generally restricts its decision to the issues raised by the appellant
 - ▶ Panel may address an issue raised by the respondent but ensure, a cross-appeal should be filed.
- ▶ WCAT may take jurisdiction over an issue the Board has identified and investigated but not formally communicated in its decision letter, even if the RD declined jurisdiction. A potential breach of natural justice at the RD may be remedied on appeal to WCAT (WCAT #2004-03709)

Final Notes on Decisions:

- ▶ Evaluating whether a decision is worth appealing
 - ▶ Cost/Benefits Analysis
 - ▶ Risks of appeal
- ▶ Consequences of appealing or not appealing

Questions/Comments?