

WORKERS' COMPENSATION APPEALS TRIBUNAL

PRACTICE MANUAL

(Revised March 6, 2023)

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1.00 THE WORKERS' COMPENSATION APPEALS TRIBUNAL (TRIBUNAL)

1.10 Introduction

Section 240(1) of the *Workers' Compensation Act*, S.N.S. 1994-95, c.10 (the "Act"), gives the Tribunal the authority to determine its own procedures and rules.

This Practice Manual is a summary of the current procedures of the Tribunal and is a reference tool for both the Tribunal and appeal participants. The Tribunal applies these procedures in a flexible manner when necessary to ensure all decisions, orders and rulings are based on the real merits and justice of the case.

The Practice Manual applies to appeals from Hearing Officer decisions and applications under s. 29 of the *Act*. An up-to-date version of the Practice Manual can be found on the Tribunal's Website: www.novascotia.ca/wcat/.

1.20 Definitions

The terms "Appeal Commissioner"; "Board"; "Chief Appeal Commissioner"; "Panel Chair"; "Registrar"; and "Tribunal" are defined in Appendix "A".

1.30 Role of the Tribunal

The Tribunal is established under s.238(1) of the *Act* as an independent appeal body that resolves appeals and s. 29 applications under the *Act*.

2.00 TRIBUNAL JURISDICTION

2.10 Scope of Jurisdiction

Appeals under s. 243 -- Any person entitled to be a participant before a Board Hearing Officer can appeal a final decision of the Hearing Officer to the Tribunal [243(1)]. Only written decisions that dispose of an appeal can be appealed to the Tribunal.

Applications under s. 29 -- The Tribunal has jurisdiction to determine if a right of action is barred. A party to an action must apply to the Chief Appeal Commissioner for a determination of whether the right of action is barred.

2.20 Tribunal Authority

The Tribunal may:

- confirm, vary or reverse the decision of a Hearing Officer [252(1)];
- refer an appeal back to the Hearing Officer, or to another Hearing Officer, when

there is new or additional evidence or other reasons that merit the referral [s. 251(1)];

- correct a typographical or clerical error made in a decision [252(3)];
- state a case in writing for the Nova Scotia Court of Appeal on any question of law [s. 206(1)];
- refer an appeal, which raises an issue of law and general policy that should be reviewed by the Board of Directors, to the Chair of the Board of Directors [s. 247(1)]. All appeals before the Tribunal that raise the same issues will be postponed under s.247(3). Participants will be advised in writing of the postponement which will usually not be longer than 3 months. In exceptional circumstances the postponement could last up to 12 months [s. 250]. The Tribunal may make an interim award while the matter is postponed [s.247(4)].

The Tribunal cannot reconsider, rescind, alter, amend or make any further order regarding any appeal decision which decides an appeal [s. 252(2)].

2.30 Board Policies and Regulations

The Board maintains a policy manual containing the policies adopted by its Board of Directors. These policies are binding on every officer and employee of the Board [s. 183(5)].

A policy is binding on the Tribunal if it is consistent with Part 1 of the *Act* and the regulations [s. 183(5A)]. The Tribunal may refuse to apply a policy if it is inconsistent with the *Act* or the regulations [s. 183(7)]. If, at any point in deciding an appeal, it appears that a policy may be inconsistent with the *Act* or regulations, all participants will be notified and provided with an opportunity for comment on the validity of the policy. To avoid delay, a participant should indicate in their notice of appeal to the Tribunal if they plan to argue a policy is inconsistent with the *Act* or regulations.

Notice to the Attorney General of Nova Scotia is also required under the *Constitutional Questions Act* if a participant wants the Tribunal to consider whether a Policy inconsistent with the *Act* or a Regulation. Also, the *Constitutional Questions Act* requires notice to the Attorney General of an argument that a Regulation is inconsistent with the *Act*. Failure to provide notice may result in the Tribunal not addressing the argument of inconsistency.

Notice to the Attorney General of Nova Scotia may be delivered to:

Edward A. Gores, Q.C., Senior Counsel,
 Department of Justice (NS),
 8th Floor, 1690 Hollis Street, Joseph Howe Building,
 Halifax, Nova Scotia, B3J 3J9.

3.00 STARTING THE APPEAL

3.10 How to Appeal

An appeal to the Tribunal is started by filing a Notice of Appeal form or any other written notice that contains substantially all of the elements of the Tribunal's Notice of Appeal form. The form may be downloaded from the Tribunal's website or obtained by calling the Tribunal. The completed Notice of Appeal form or written letter of appeal may be delivered to the Tribunal by mail or fax. A copy of the appeal should be sent to any other participants, including the WCB Legal Department.

The Notice of Appeal should:

- identify the Hearing Officer's decision being appealed and attach a copy of the decision;
- state why the decision is incorrect and should be changed;
- state the outcome requested;
- be signed by the person making the appeal, or an authorized representative;
- be received by the Tribunal within 30 days from the date notification of the Hearing Officer's decision; and
- indicate if the appeal is ready to proceed.

3.20 Who May Appeal

Any participant before the Hearing Officer may appeal the Hearing Officer's decision to the Tribunal. The worker, or the worker's employer, may appeal a decision dealing with benefit entitlement. An employer may appeal a decision dealing with employer assessments. A deceased worker's dependent spouse, other dependent, or employer, may appeal a decision regarding death benefits or survivor benefits [s.60(1)].

3.30 Other Participants May Include:

- the Board [Section 245(1)(c)];
- any other person the Tribunal adds because they have a direct and immediate interest in the matter [s. 245(1)(d)];
- the Attorneys General of Nova Scotia and Canada if the appeal deals with constitutional questions or *Charter* arguments;
- the estate of a deceased worker in order to initiate or continue an appeal on behalf of a deceased worker concerning compensation up to the date of the worker's death, or death benefits;
- a director of the corporation if the employer is a corporation and the Board collects assessments from that director;
- contractors and sub-contractors who are deemed liable for assessments levied

- against an employer;
- the Attorney General of Nova Scotia if the appeal challenges the inconsistency of a Policy or Regulation.

3.40 Extension of Time to File an Appeal

Appeals to the Tribunal must be made within 30 days of the date the Hearing Officer's decision is received by mail or on-line. Receipt within 5 business days is assumed [s.189(1)]. If the 30-day time limit to appeal to the Tribunal is missed, a written extension request must be made to the Registrar. The Registrar can extend the limit when an injustice would result if the deadline is not extended [s.240(2)]. Requests must be made at the earliest opportunity and must include the reasons for missing the deadline. The request should also include any other supporting information and a completed Notice of Appeal form.

Persons entitled to participate in the appeal will be given an opportunity to respond to the extension request before the Registrar issues a written decision which will be distributed to all persons entitled to participate in the appeal. In determining whether to extend the time limit, considerations include:

- evidence of an intention to appeal within the 30-day time limit;
- the length of delay in filing the appeal;
- prejudice to the person requesting the extension if it is not granted;
- prejudice to other potential participants if the request is granted; and
- events which prevented the filing of the appeal within the 30-day limit.

4.00 APPEAL PROCESSING

4.10 Registrar

The Tribunal's Registrar manages the appeal process and facilitates timely and effective resolution of appeals.

4.20 Intake

The Registrar screens new appeals for compliance with preliminary requirements and assigns an appeal number. The Registrar may determine:

- if additional information is required;
- if the appeal is within the Tribunal's jurisdiction;
- whether an extension of time to appeal is required;
- if another participant should be notified of the appeal;
- the classification for appeal management purposes;
- if there are security concerns or accommodation needs;

- if it would be appropriate to hear multiple appeals for the same participants together.

4.30 Timely Resolution/Appeal Readiness

The participant who has filed the appeal should notify the Tribunal when the appeal is ready to proceed. Appeals proceed when all additional evidence has been filed and all participants are ready. Appeals from decisions under Board Policy 8.1.7R are handled differently. These appeals are immediately set down for written submission as the issue is whether evidence already filed with the Board is new evidence or whether that evidence changes an earlier final decision of the Board.

Appeals for which no hearing date or submission deadlines have been set will be monitored by the Registrar. If the appeal is not ready to proceed within 180 days of the date that the notice of appeal was received by the Tribunal, the Tribunal may:

- set dates for the appeal to proceed and, if appropriate, change the form of proceeding from oral hearing to written submissions;
- seek submissions and consider referring the appeal back to the Hearing Officer under s. 251(1); or
- schedule a pre-hearing conference.

All appeals should be resolved within one year from the date the Tribunal received the notice of appeal. The Tribunal may set an appeal down for decision following written submissions if an appeal is not set down for hearing within one year, even if the participants do not wish it set down.

4.40 Self-Represented Participants

Self-represented participants should review the Tribunal's pamphlet titled, "The Appeal Process: A Guide to Oral Hearings and Written Submissions" available on the Tribunal's website or by calling the Tribunal.

The Tribunal will attempt to telephone all self-represented participants prior to setting down an appeal to discuss the appeal process.

4.50 Appeals involving more than one Participant

A telephone conference is scheduled approximately six months after the appeal is filed to ensure that disclosure issues are raised and dealt with early in the process. The appeal may be assigned to an Appeal Commissioner instead of the Registrar for case management.

4.60 Joining Related Appeals

Two or more appeals may be joined together when the Tribunal has multiple appeals involving the same general issue(s) and it would help resolve them in a cost-effective, timely, and consistent manner.

If an oral hearing is conducted, common issues raised by all of the appeals may be dealt with in one hearing. The Appeal Commissioner(s) assigned to hear the appeals may take steps to ensure a fair hearing and to protect the privacy of information particular to the individual appeals.

Depending on the circumstances, the Tribunal will:

- issue a generic decision addressing all the joined appeals;
- issue a generic decision dealing with the common issue(s) raised by the joined appeals, together with individualized decisions for each particular appeal; or
- issue an individual decision on each appeal, taking into account common issues, evidence and submissions.

4.70 Closure of Appeals by the Tribunal

The Tribunal may deem an appeal to be withdrawn if the participant who filed the appeal does not respond to communications or fails to keep the Tribunal informed of their current address and phone number. The Tribunal uses the Board's electronic records for contact information for workers. If a worker keeps the Board informed of their current contact information, the Tribunal has access to that information. The Tribunal will wait 90 days after being unable to contact a worker before deeming an appeal to be withdrawn. A withdrawn appeal cannot be reopened by the Tribunal.

The Tribunal may deem an appeal to be withdrawn if the conduct of the participant bringing the appeal merits a summary dismissal. Only extraordinary bad conduct will merit a summary dismissal, such as failing to obey contact restrictions placed on a participant due to a pattern of abusive or unacceptable behaviour.

4.80 Withdrawals

A participant who has appealed to the Tribunal may withdraw the appeal at any time before the appeal is decided.

5.00 PARTICIPATION IN APPEALS

5.10 Notice of Intention to Participate

In a worker appeal, the worker's employer is advised when the Tribunal receives notice

of an appeal and must complete a 'Notice of Intention to Participate' form if they wish to participate. If the employer does not return a completed form by the date set by the Tribunal, the Tribunal proceeds under the assumption that the employer does not wish to participate in the appeal. If an employer indicates that they do not wish to participate or does not return a completed form, no further information will be provided, except for a copy of the final decision.

Failure to notify the Tribunal of an intention to participate does not preclude subsequent participation. If, for example, the employer attended an oral hearing, the employer would have the right to be heard. However, the Tribunal will not notify the employer of the oral hearing date unless the employer has indicated an intention to participate. The Notice of Intention to Participate form, which includes a Request for Access to Documents form, is available on the Tribunal's website.

When an appeal is filed by an employer regarding a worker's claim, the worker or their representative will be contacted to determine if the worker intends to participate in the proceedings. If the worker indicates that they do not wish to participate or does not advise the Tribunal of their intention, the appeal may be decided without involvement by the worker with no further notice other than being provided with a copy of the Tribunal's decision.

5.20 Access to Documents

All participants in an appeal before the Tribunal are entitled to receive a copy of all evidence and submissions filed with the Tribunal and all relevant portions of the Board claim files.

The Board is responsible for providing a copy of relevant claim files to workers. The Tribunal is responsible for providing vetted copies of relevant claim files to employers.

The Tribunal will vet files to ensure only relevant portions of the claim file are disclosed and the Tribunal may make rulings regarding the disclosure of documents.

Prior to receiving copies of documents from the Tribunal, the employer must agree, in writing, not to use or disclose the documents for any purpose other than pursuing or responding to the appeal before the Tribunal. The employer must also agree to keep the documents confidential and secure.

5.30 Pre-Hearing Conferences

The Tribunal may require participants to participate in a pre-hearing conference to discuss procedural and substantive issues relating to the conduct of the appeal. The Registrar, or the Appeal Commissioner(s) assigned to the appeal, will decide if a pre-hearing conference should be held and notify the participants. The conference may be

conducted over the phone, and generally is not recorded.

Typical topics discussed at a pre-hearing conference include:

- identification of the issues and whether there is some agreement on the issues;
- determination of any new or additional evidence required;
- disclosure of evidence, and timeframes for document exchange;
- determination of whether an oral hearing will be convened and, if so, when and for how long the hearing should be scheduled;
- determining the number of witnesses who may attend the hearing;
- determining if special equipment or facilities are required;
- setting pre-hearing submission deadlines; and
- determining if any summons or orders for production may be required.

5.40 Postponements

Once an appeal has been set down by the Tribunal, in all but exceptional circumstances, the appeal will proceed as scheduled. However, if a participant cannot attend a scheduled hearing or meet submission and evidence deadlines, the participant must call or write the Tribunal immediately to request a postponement.

Except when time does not allow, postponement requests should be made in writing. They should be made at the earliest opportunity and should include reasons for the request and the length of the postponement being sought. Prior to contacting the Tribunal, participants should contact other participants to determine if they agree to a postponement and advise the Tribunal if there is agreement with or an objection to the proposed postponement.

When dealing with a postponement request, the Tribunal may consider a variety of factors including:

- the opportunity for a fair hearing without a postponement;
- safety, if the request is due to weather conditions;
- whether other participants agree with the request;
- whether granting or denying the request would prejudice any participant;
- any previous postponements;
- whether the request is made at the earliest opportunity;
- the availability of witnesses;
- how long the appeal has been with the Tribunal;
- whether reasonable efforts were made to avoid the postponement; and
- the amount of time available to prepare for the appeal.

Postponement requests may result in:

- rescheduling the date for the hearing or setting new submission and evidence deadlines;
- postponement without new dates or deadlines;
- denying the request, even if all participants have consented; or
- a change from an oral hearing to written submissions.

If a postponement request is granted at a hearing, the Tribunal will ensure that all participants are notified of the postponement.

5.50 Notice of Constitutional Questions and Charter Arguments

The Attorney General of Nova Scotia must be given notice if an appeal raises a question about the constitutional validity or applicability of legislation, a regulation, or a by-law; a violation of the *Canadian Charter of Rights and Freedoms*; or a violation of Human Rights Legislation. [Section 10 of the *Constitutional Questions Act*, R.S.N.S., c.89, s.1(as amended)]. Notice must also be given to the Attorney General of Canada, the other participants to the appeal, and the Tribunal as soon as possible. Notice can be given when the notice of the appeal is filed with the Tribunal.

Notice to the Attorney General of Nova Scotia may be delivered to:

Edward A. Gores, Q.C., Senior Counsel,
Department of Justice (NS),
8th Floor, 1690 Hollis Street, Joseph Howe Building,
Halifax, Nova Scotia, B3J 3J9.

Notice to the Attorney General of Canada may be delivered to

David Hansen, Regional Director,
Department of Justice (Canada),
Duke Tower, 1400-5251 Duke Street,
Halifax, Nova Scotia, B3J 1P3.

The Attorney General of Canada and the Attorney General of Nova Scotia are entitled to file evidence and make submissions to the Tribunal. Failure to provide timely notice may result in the Tribunal not addressing the argument.

5.60 Abeyance

Generally, appeals before the Tribunal are not put on hold in anticipation of legislative changes, Board decisions or decisions from the Nova Scotia Court of Appeal. However, a participant in an appeal may request that it be put on hold. The Tribunal will

determine whether to grant the postponement and will monitor the appeal with the participants and, if applicable, with the Board, to ensure the earliest possible resolution.

6.00 APPEAL HEARINGS

6.10 Form of Hearing

The Registrar or the Appeal Commissioner assigned to the appeal will determine whether it proceeds by oral hearing or written submission. Requests for oral hearings for appeals which have been with the Tribunal for more than twelve months are less likely to be granted as reliability of testimony generally decreases with distance from events. Factors that may be considered include:

- whether there are significant factual issues to be resolved;
- circumstances affecting a participant's opportunity to present their case;
- the request of one or more participants;
- whether there was an oral hearing before the Hearing Officer whose decision is on appeal to the Tribunal;
- whether there are issues of credibility;
- whether there are security concerns;
- the quantity and nature of the documentary evidence on file;
- whether the appeal involves novel or complex issues of law or fact; and
- whether the participants are represented.

Once the form of hearing has been determined, the Tribunal will notify the participants regarding: the form; scheduling; deadlines; and preliminary matters. Once an Appeal Commissioner is assigned an appeal, they can overrule the initial decision of the Registrar regarding form of hearing.

6.20 Panels

Appeals are usually decided by a single Appeal Commissioner. The Chief Appeal Commissioner can assign an appeal to a panel of three Appeal Commissioners. One member of the panel is made the panel chair. If, prior to the hearing of an appeal, a panel member is unable to continue, the member may be replaced with another Appeal Commissioner.

7.00 APPEAL PARTICIPANTS' RIGHTS AND RESPONSIBILITIES

All persons who participate in hearings before the Tribunal must be respectful to all participants, their representatives and the people who work at the Tribunal.

7.10 General

All participants in an appeal before the Tribunal have the right to:

- be treated with respect;
- receive notice that an appeal has been filed with the Tribunal;
- make representations on the form of hearing;
- receive a copy of documents in the Tribunal's possession which are relevant to the appeal or application;
- provide the Tribunal with written submissions and evidence;
- receive copies of written submissions and evidence provided to the Tribunal by the other participants;
- receive notice of the date, time and location if there is an oral hearing;
- participate in the hearing by making submissions and bringing witnesses to testify at the hearing; and
- receive a copy of the Tribunal's decision.

7.20 Representation

Participants before the Tribunal may be assisted by the representative of their choice. A representative is anyone who assists a participant with an appeal before the Tribunal. Assistance may include: giving advice about the participant's rights or responsibilities; selecting, drafting or completing documents; representing the participant at a hearing; acting on behalf of the participant; and explaining procedures and decisions.

Workers may be entitled to free representation through the Workers' Advisers Program. Employers may be entitled to free assistance through the Office of the Employer Advisor.

7.30 Representatives' Code of Conduct

The Tribunal has a Code of Conduct for Representatives which is available on the website or by calling the Tribunal. The Code sets out the Tribunal's expectations for representatives.

If a representative fails to comply with the Code of Conduct, the Tribunal may: exclude the representative from a hearing; restrict the representative's access to Tribunal staff; direct compliance; place conditions on representation; and in cases of serious or repeat violations, the Tribunal may prohibit the representative from involvement with the Tribunal.

Generally, the Code does not apply to friends or family who are present as "moral support".

7.40 Interpreters

The Tribunal provides independent interpreters when required. The Tribunal should be notified of the need for an interpreter as soon as possible. Friends or relatives are generally not permitted to act as interpreters, although the Tribunal has the discretion to allow this in appropriate circumstances. The Tribunal normally requires interpreters to affirm their ability to translate and the truthfulness of their translation. If an Appeal Commissioner determines that an interpreter is needed at an oral hearing, but one is not present, the Appeal Commissioner will reschedule the hearing.

8.00 APPEALS PROCEEDING BY ORAL HEARING

8.10 General

If an appeal proceeds by oral hearing, there is an opportunity for all participants to present oral evidence and make oral arguments. It is not necessary to file written submissions. An oral hearing may be conducted with the participants present, by teleconference, or by videoconference.

Prior to the hearing, the Tribunal will send a letter confirming the time, date, place, and length of the hearing. Hearings are held in various locations around the province, usually close to the community where the worker resides in appeals involving compensation.

8.20 Hearing Procedures

The procedures to be followed at a hearing may vary, depending on the circumstances, but in every case, the Appeal Commissioner or panel will greet the participants and explain the hearing procedure and identify the decision under appeal.

Usually the participant who has appealed, or their representative, is the first to begin each stage of the hearing. A participant may, but is not required to, make an opening statement. Following opening statements, the Tribunal usually receives testimony from the participants and their witnesses. Witnesses may be questioned by the other participants and by the Appeal Commissioner. The participants may summarize their case at the end of the hearing and may wish to reference the *Act*, relevant policies or prior Tribunal decisions.

At the close of the hearing, the Appeal Commissioner will advise the participants regarding any post-hearing submissions or evidence which is outstanding. An oral decision will not be given at the hearing as all decisions must be in writing.

The Tribunal expects participants to present their cases within the time allocated for a hearing. An Appeal Commissioner may place time limits on testimony and oral

submissions. The Appeal Commissioner may end testimony or arguments if a participant or their representative does not abide by the time limits. Where it appears that it is not possible to complete the hearing on time due to circumstances which could not be reasonably anticipated, the Appeal Commissioner may continue it later or ask the participants to put their closing arguments in writing.

8.30 Evidence at Oral Hearings

Participants are responsible for providing copies of new medical reports or other evidence to the Tribunal and to the other participants at least two weeks before the hearing, or within the deadline set by the Tribunal. Appeal Commissioners have a copy of all filings with the Tribunal and the Board's claim file(s) which they review ahead of the hearing.

Disclosure must be made ahead of hearings. Appeals may be delayed if the Tribunal and all participants do not receive evidence within established filing deadlines or in advance of the hearing. The Tribunal may exclude late-filed evidence, if it concludes that the evidence was intentionally held back until the hearing. It is unacceptable for a participant to hold back documentary evidence to impeach the credibility of a witness.

If special equipment such as video playback equipment is required at a hearing, arrangements must be made in advance.

8.40 Privacy

Oral hearings are not open to the public. A family member or other support person can attend. The Tribunal has the discretion to permit attendance by members of the public, including the media, with the consent of all participants. Observers, such as trainees are generally allowed to attend with the consent of the participants. Observers must be identified at the start of the hearing.

8.50 Witnesses

Any person giving evidence at the hearing is referred to as a witness. Any participant may bring a witness(es) to give evidence at the hearing. Participants are responsible for advising their witnesses of the date, place, and time of the hearing. The Tribunal is to be notified prior to the hearing if a witness is attending.

Generally, witnesses are excluded from a hearing until called to testify, to reduce the likelihood of their evidence being influenced, either intentionally or inadvertently, by the evidence of other witnesses. In deciding whether to exclude a witness, the Appeal Commissioner may consider: whether there is an actual risk a witness may be influenced; whether the witness's evidence is likely to be contentious; and whether there are good grounds to allow the witness to remain in attendance.

The Tribunal may hear evidence from persons who were originally identified as observers or representatives. If the person was present while another witness gave evidence, this may be considered in determining the weight to be given to the evidence provided by that person.

All witnesses will be required to confirm or swear that the evidence given to the Tribunal is the truth. Where a witness wishes to swear on a religious book or sacred object, the Tribunal should be advised in advance of the hearing to ensure it is available for the hearing.

8.60 Recordings

All hearings before the Tribunal must be recorded by the Tribunal [s.253(1)]. The Tribunal's recordings must be kept for a period of two years after the expiry of the appeal period (30 days from the date of the Tribunal's decision). Every participant is entitled, at their own expense, to a transcript of the recorded proceedings [s.253(2)].

Participants are not permitted to use their own equipment to record the Tribunal's proceedings.

8.70 Security

The Tribunal may arrange for security at a hearing. If any participant has security concerns, they should contact the Tribunal prior to the hearing.

8.80 Post-Hearing Submissions and Evidence

Occasionally, a participant requests or is asked to provide additional evidence or submissions after the hearing. A time frame for providing the additional evidence or submissions may be set by the Appeal Commissioner.

If the Tribunal receives additional evidence or submissions following a hearing, it must be disclosed to all participants who attended the hearing and the Board. If the Tribunal obtains further evidence on its own initiative, it will be disclosed to the participants. The Appeal Commissioner will determine the procedure and time frame for obtaining submissions.

8.90 Failure to Attend a Hearing

A participant, with notice of a hearing, who fails to attend the hearing is deemed to have waived the right to receive and respond to any evidence or submissions presented at the hearing or received by the Tribunal after the hearing. If a participant chooses not to attend the hearing, another participant may ask the Tribunal to require their attendance.

Where a participant has given notice, but was not present at the time scheduled for the hearing, the Tribunal may:

- proceed without the participant;
- give the participant the opportunity to file post-hearing submissions and evidence;
- convert the hearing to written submissions; or
- reschedule the hearing.

9.00 APPEALS PROCEEDING BY WRITTEN SUBMISSION

Appeals are dealt with by written submission when the Tribunal believes that the issue(s) under appeal can be fairly resolved by written evidence and arguments. Evidence may include: medical reports and written statements (sworn or not) given by a participant or witness. Submissions are written arguments in support of a participant's position.

After the Tribunal advises the participants that the appeal will proceed by written submission, the participant bringing the appeal is usually given the opportunity to file submissions and evidence first. Other participants usually have three weeks to file a response. The Tribunal may allow further reply submissions.

Appeals are considered ready for decision when all submission deadlines have passed or when submissions have been received from all participants. If no submissions are provided to the Tribunal, the Tribunal will decide the appeal based on the Notice of Appeal and other available documents.

Participants should provide any additional evidence at or before the time they provide written submissions. This allows the other participants an opportunity to respond to the additional evidence. If a participant obtains additional evidence after the deadline has passed, but before the Tribunal's decision has been issued, the participant should contact the Tribunal immediately. If a decision has not been issued, the Tribunal may consider the late evidence and provide the other participants with an opportunity to make submissions on the late evidence. This may delay the Tribunal's decision.

10.00 EVIDENCE

10.10 General

The Tribunal expects participants to make reasonable efforts to obtain evidence that is relevant to the issues on appeal which is in their possession or control.

The Tribunal may admit any evidence, including hearsay, that it considers relevant to the appeal. The Tribunal may exclude any evidence that is repetitious, intended to harass or privileged. The rules of evidence under which the Tribunal functions are more relaxed than those which apply to courts.

10.20 Disclosure

The Tribunal requires all participants to disclose evidence they intend to rely upon by the deadline set by the Registrar or Appeal Commissioner. Any video evidence must be submitted on a USB stick with sufficient copies for all participants, including the Board.

The Tribunal may order a participant to provide other participants and the Tribunal with information or documents that the Tribunal considers necessary to resolve the appeal. Participants may be directed to clarify their grounds for the appeal and the remedies requested.

10.30 Summons and Orders for Production

Section 178(1) of the *Act* confers on any member of the Tribunal, the powers, privileges and immunities of a commissioner appointed pursuant to the *Public Inquiries Act*. These include the authority to:

- summon witnesses and require them to give oral or written evidence;
- require the production of any document or thing the Tribunal considers necessary for the full investigation and consideration of any matter;
- accept oral or written evidence, unless the evidence is inadmissible; and
- punish persons guilty of contempt.

If any participant believes that a person with relevant evidence will refuse to attend an oral hearing or requires a summons to get time off work, the participant may ask the Tribunal to issue a summons, also known as a subpoena. A participant who has made reasonable attempts to obtain relevant documentary or other evidence but has been unable to do so, may ask the Tribunal to issue an Order for Production. The Tribunal may also issue a summons or an Order for Production on its own initiative.

Participants who request a summons or an Order for Production should provide a completed copy to the Tribunal for signature. The request may be made using a form found on the Tribunal's website. It will be signed by an Appeal Commissioner and forwarded to the requesting participants who are responsible for serving the documents and paying all costs associated with the service.

Where an oral hearing is to be held, and a participant believes a summons is required to compel a witness to testify at the hearing, a written request should be made to the

Tribunal, on or before the time of the hearing dates are set with the Registrar or Appeal Commissioner. The Tribunal will not issue a summons for a doctor or other healthcare professional unless the participant seeking their attendance pays them reasonable fees for their attendance and preparation for the hearing.

A person named in a summons or Order for Production may request that it be cancelled or varied. The request, along with reasons, should be made in writing to the Tribunal as soon as possible. If a person fails to comply with a summons or an Order for Production, they may be found guilty of contempt and subject to punishment in accordance with s. 178 of the *Workers' Compensation Act* and s. 5 of the *Public Inquiries Act*.

10.40 Criteria for Issuing Summons, Orders for Production or Directing Disclosure

Relevance and proportionality are key considerations in compelling evidence. The Tribunal's decision to issue a summons, an Order for Production or direct disclosure usually considers:

- whether the evidence being sought is likely to be relevant, i.e. could prove or disprove a matter at issue in the appeal;
- whether the person to whom the summons or Order for Production is directed has access to, or control of, information or documents relevant to the appeal;
- whether there are other means to obtain the same evidence;
- whether the evidence sought is compellable (protected in law from disclosure);
- how likely the sought-after information would be discovered;
- is the time, expense and intrusion into privacy to acquire the evidence reasonable compared to the importance of the information;
- timeliness of the request – a request late in the course of an appeal is less likely to be granted than one made at the earliest reasonable opportunity;
- whether a witness needs a summons in order to get off work or to prevent some other hardship

10.50 Expert Evidence

Expert evidence is defined as opinion evidence given by a person whom the Tribunal finds to be an expert, based on their training, qualifications, or experience. The following rules apply:

- if a participant intends to file new expert evidence the Tribunal should be notified as soon as possible;
- objections to a person's qualifications as an expert will not generally cause the Appeal Commissioner(s) to exclude the evidence. Objections will be considered

- in weighing the evidence received;
- if it is anticipated that the expert witness will attend a hearing, a written report outlining the evidence that will be addressed at the hearing must have been filed in advance of the hearing;
 - the qualifications of the expert should be included with the expert's report; an expert's resume may be used for this purpose;
 - written reports from expert witnesses should be provided to the Tribunal and the other participants as soon as they are received and no later than the deadline set by the tribunal;
 - when a previously undisclosed expert report is received at an oral hearing, the Tribunal will determine what steps are necessary to ensure that the other participants are given an adequate opportunity to respond;
 - the Tribunal will not require an expert to attend an oral hearing unless the Tribunal believes attendance is necessary for a fair hearing; and
 - the Tribunal may request a person having professional, technical or other knowledge to assist them in respect of any matter before it. If the Tribunal receives such assistance, it will not rely upon any new evidence provided by the expert without notifying the participants and providing them with an opportunity to respond to the evidence.

10.60 Internet Evidence

The Tribunal may admit printed internet evidence if the source is satisfactorily identified. As with all evidence, it must be: provided in a suitable manner; relevant; and organized to permit easy reference by witnesses, other participants, and the Tribunal. A mere reference to a website does not put that website into evidence before the Tribunal.

10.70 Oral Evidence from Prior Appeals

Where a decision found in a claim file contains a recital of evidence from an oral hearing, the recital of evidence will be considered by the Tribunal. The Tribunal maintains recordings of oral hearings for two years following a hearing. These recordings will not be considered evidence before the Tribunal in later appeals unless transcribed by a certified court reporter. A participant requesting a transcript is entitled to it at their own cost.

10.80 Site Visits

The Tribunal may conclude that a site visit will help resolve an appeal. Participants and their representatives will be invited to attend the site visit. The Appeal Commissioner may receive comments and submissions from the participants during the site visit or may request submissions concerning the relevance or significance of the matters observed during the site visit.

11.00 DECISIONS

11.10 Preliminary Decisions

Preliminary decisions deal with procedures or processing issues but do not directly determine the issues on appeal. Preliminary decisions may be in a formal decision format. They may also be by letter or oral. Preliminary decisions may be issued by the Registrar or the Appeal Commissioner to whom the appeal has been assigned.

Examples of issues dealt with in preliminary decisions include:

- extension of the time limit within which to appeal to the Tribunal;
- whether an issue is within the Tribunal's jurisdiction;
- granting extensions or postponements for the filing of written submissions or the holding of oral hearings;
- issuing a summons to require a witness to attend a hearing;
- orders to produce documents or evidence;
- how the appeal should proceed (written submissions or oral hearing);
- whether an appeal is no longer of practical use due to a later event or decision of the Board (moot).

11.20 Appeal Decisions

An appeal decision is a final disposition of the issues on appeal. It follows a standard format.

11.30 Referral Back to the Hearing Officer

A s. 251 referral requires a Hearing Officer to reconsider some or all of the issues that have been appealed to the Tribunal but does not decide the issue(s) on appeal. It brings the appeal before the Tribunal to an end but an appeal of the Hearing Officer's reconsidered decision will receive priority over other appeals filed with the Tribunal.

11.40 Decision Outcomes

The Tribunal may confirm, vary, or reverse the decision of the Hearing Officer [s.252(1)]. Tribunal decisions do not use these terms but 'allowed', 'allowed-in-part', and "denied" correspond to the statutory terms as follows:

Denied: On every issue, the Tribunal agreed with the determinations made by the Hearing Officer, though not necessarily with the reasons for the determination. The Hearing Officer's decision was confirmed.

Allowed-in-part: On one or more issues, the Tribunal reached a different conclusion from the Hearing Officer, so the Hearing Officer's decision is varied.

However, the participant bringing the appeal was not granted the exact relief sought.

Allowed: The Tribunal disagreed with the determinations made by the Hearing Officer on all issues appealed to the Tribunal. The Hearing Officer's decision was reversed.

11.50 Deadlines for Issuing Decisions

There are no statutory deadlines for making preliminary decisions. The Tribunal has 60 days to issue an appeal decision [s. 246(3)] once the appeal is complete. The time for issuing a decision begins upon completion of an oral hearing or the date on which all evidence and submission deadlines have expired, whichever is later. The deadline may be extended by virtue of s. 240(2), if, in the opinion of the Tribunal, an injustice would result if the deadline were not extended.

11.60 Correcting Decisions

The Tribunal may issue a decision to correct a typographical or clerical error contained in an appeal decision already released by the Tribunal [s. 252(3)]. The Tribunal is not permitted to reconsider an appeal decision.

11.70 Publication of Tribunal Decisions

Decisions made after January 1, 2010, without identifying features, are available free through the Canadian Legal Information Institute's website at www.canlii.org.

11.80 Personal Identifiers in Decisions

Tribunal decisions are written to make it easy to remove identifying features.

Tribunal decisions include a cover page setting out the names of participants and representatives. This information is not found in the body of the decision.

Generally, the names of participants and witnesses, (where the use of names would tend to identify the participants), are not used in the body of Tribunal decisions. Experts will be referred to by name, unless the use of an expert's name might identify the participant.

The names of representatives will generally not be used in the body of a decision, instead they will be referred to by their role. Board claim file numbers or employer registration numbers are not included in the body of a decision.

Quotations contained within Tribunal decisions are edited to protect privacy. This will

normally be accomplished by substituting a descriptive term for a name, and using square brackets to show the change, e.g., [the Worker].

12.00 APPLICATIONS UNDER SECTION 29 OF THE ACT

12.10 Application to Determine if a Right of Action Against an Employer is Barred

Section 29 of the *Act* allows any party to an action to apply for a determination of whether a right of action is barred by s.28(1) of the *Act*. The application form may be downloaded from the Tribunal's website and hand-delivered, mailed, or faxed to the Tribunal. Completion of the Tribunal's Section 29 Application form will generally satisfy the requirements for initiating an application. Applications must be made to the Chief Appeal Commissioner and, if applicable, should include the following:

- copies of all pleadings in the action and in any other action arising out of the same set of facts;
- if not in the pleadings, a brief statement of the facts giving rise to the action;
- the remedy or remedies sought;
- notice of any workers' compensation claim which is related to the cause of action;
- whether a potential participant is an assessed employer under the *Act*;
- a list of any potential respondents or participants in the application, including any representatives for the respondents or participants;
- the residency of any potential participant to the application;
- the trial date(s) for the action if known;
- an indication as to how the application should proceed (oral hearing or written submission);
- the likelihood of an agreed statement of facts; and
- the likelihood that legislation other than the *Act* may be considered in the application.

All documentation and information contained in the application should be provided to the Tribunal, the Board, and all potential participants (including a worker's employer).

The rules set out in this Practice Manual for appeals generally apply to s. 29 applications.

12.20 Decisions under s.29 of the Act

The Chief Appeal Commissioner may assign an application to an Appeal Commissioner for decision.

13.00 COSTS

The Tribunal does not have the authority to award costs.

14.00 Summary of most recent substantive revisions to Practice Manual

Section 2.30 was amended to include the statutory requirement that notice to the Attorney-General of Nova Scotia be given if a participant wishes to argue that a Board Policy or Regulation is inconsistent with the Workers' Compensation Act. It also provides that the Tribunal does not have to address an argument made without timely notice.

Section 5.50 was amended to provide that the Tribunal does not have to address a Constitutional argument where timely notice was not given to the Attorney-General of Nova Scotia and the Attorney-General of Canada.

Section 8.20 was amended to give notice that the Tribunal may end testimony or arguments and conclude a hearing where participants do not abide by the scheduled time for a hearing.

APPENDIX "A"

Definitions

In this Practice Manual,

"Appeal Commissioner" means a member of the Tribunal with judge-like authority appointed pursuant to s. 238(3)(b);

"Board" means the Workers' Compensation Board;

"Chief Appeal Commissioner" means the CEO of the Tribunal appointed as Chief Appeal Commissioner pursuant to s. 238(3)(a);

"Panel Chair" means an Appeal Commissioner who coordinates the hearing of an appeal by a panel of three Appeal Commissioners;

"Registrar" means an Appeal Commissioner appointed pursuant to s. 238(3)(b) to carry out the duties of Tribunal Registrar and includes an Appeal Commissioner who acts in place of the Registrar;

"Tribunal" means the Workers' Compensation Appeals Tribunal established under s.238(1) of the *Act*.