

## APPEALS GUIDELINES

### General

1. "Chairperson of the Workers' Compensation Appeals Tribunal" (the "Chairperson") means the Chairperson appointed under the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act* (the "Act") or such official as may be delegated to act on his behalf.
2. On a written request of a worker, dependent, employer or association, a decision made by an officer or officers of the Workplace Health, Safety and Compensation Commission (the "Commission" or "WHSCC") under the *Workers' Compensation Act*, the *Firefighters' Compensation Act* or the *Occupational Health and Safety Act* can be appealed to the Workers' Compensation Appeals Tribunal (the "Appeals Tribunal") established under the Act. The Commission shall have standing in any appeal to the Appeals Tribunal in accordance with the Act.
3. The Chairperson, after reviewing the issue being appealed, shall decide if the appeal is to proceed by way of oral hearing, including in person, by video or telephone conference or can be properly disposed of by way of written submissions and shall choose one (or in exceptional circumstances two or more members of the Appeals Tribunal) to hear the appeal in the format decided upon by the Chairperson. This decision may be reviewed in accordance with the procedure set out in subsections 21(4.3) and 21(4.4) of the Act.
4. Any party to the appeal will be provided with a copy of the Appeal Record prepared by the Appeals Tribunal prior to the date scheduled for the hearing of the appeal.
5. Any party to the appeal may request the Appeals Tribunal to add documents to the Appeal Record and copies of such documents shall be made available to the parties to the appeal if provided to the Appeals Tribunal at least 20 days before the hearing date.
6. Facts rebutting any added document may be added to the Appeal Record. Any added document(s) or fact(s) rebutting any added document(s), which in the

opinion of the hearing Chairperson is new evidence in accordance with section 21(9.8) of the *Act*, will result in the hearing being suspended and the matter will be referred back to the Commission so that the Commission may consider the new evidence. The Commission shall have 14 days to respond to this new evidence. After the expiration of 14 days, the hearing Chairperson will consider the response of the Commission, if any, and will conclude the hearing in a way that is procedurally fair to all parties.

7. Case law and relevant statutes and Commission policies will not be considered new evidence. Any case law or statutes not provided to the Appeals Tribunal 20 days before the hearing will not be included in the Appeal Record. It shall be the responsibility of the party intending to use such documents to ensure that the Appeals Tribunal and all other parties have copies of such documents.
8. The Chairperson shall designate an officer of the Appeals Tribunal who will advise the parties of the details of the arrangements, including scheduling, made in proceeding with the appeal.
9. The Appeals Tribunal is subject to the *Act* and the Chairperson shall report to the Minister of Post-Secondary Education, Training and Labour.

## **Hearings**

10. For purposes of the Hearings portion of the *Guidelines*, reference to the “Chairperson” shall mean the Chairperson or designated Vice-Chairperson of any appeal.
11. Any party to the appeal may appear on the day the appeal is to be considered and make oral submissions.
12. Where a hearing other than an oral hearing is held, the Chairperson will consider and decide the appeal on the basis of the Appeal Record and any written submissions made by the parties to the appeal.
13. Where an oral hearing is held, the Chairperson shall consider and decide the appeal on the basis of the Appeal Record, the oral and documentary evidence presented and any submissions made by the parties to the appeal.
14. Where Notice of Hearing has been forwarded to a party and the party does not attend at the hearing, the Chairperson may proceed in the absence of the party.

15. The Chairperson shall preside over the hearing of an appeal and shall conduct the proceedings informally.
  16. The Chairperson may make such order or give such directions at the hearing as is necessary for the maintenance of order and efficient functioning of the hearing. If more than one Chairperson is designated to hear an appeal, one such Chairperson shall be designated as Chairperson of the hearing.
  17. Disputes on what evidence should be heard or what procedure should be followed at the hearing shall be decided by the Chairperson. The Chairperson's decision shall be conclusive and final.
  18.
    - (1) A party to an appeal may
      - (a) be represented by an advocate, an agent or counsel,
      - (b) call and examine witnesses,
      - (c) conduct cross-examinations of witnesses who testify at the hearing, and
      - (d) present his or her arguments and submissions to the Chairperson.
    - (2) The Chairperson may ask questions of any witness at the hearing.
    - (3) The Chairperson may reasonably limit further cross-examination of a witness where the Chairperson is satisfied that the cross-examination is not relevant to the issue under consideration.
  19.
    - (1) The Chairperson may by summons, in the form approved by the Appeals Tribunal, at the request of a party require any person who resides in New Brunswick:
      - (a) to give evidence on oath or affirmation, and
      - (b) to produce in evidence at a hearing specified documents and things, which are relevant to the appeal.
    - (2) Any summons shall be served personally by the party calling the witness.
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- (3) A party serving a summons shall pay the person served fees for attendance, travel and expenses in accordance with the *Rules of Court of New Brunswick*.
  - (4) A party to an appeal may request the Chairperson to summons a witness who resides in New Brunswick to attend at the hearing and to produce specified documents and things, provided that the request is made in writing to the Appeals Tribunal at least 7 days before the hearing is to be held or such shorter period of time as is just in the circumstances.
  - (5) Despite section 18(1), (2), and (3), the Chairperson will only summons a witness where it is necessary for resolution of the case on its real merits as contemplated by subsection 21(9) of the *Act* and therefore:
    - (a) merit for the issuance of a summons must be established to the satisfaction of the Chairperson;
    - (b) the party submitting a request for summons must identify the issue that requires evidence or clarification to the satisfaction of the Chairperson;
    - (c) a summons will not be issued for Members of the Legislative Assembly (MLA) unless it is determined by the Chairperson that an exceptional circumstance exists requiring oral testimony. The party requesting a summons for an MLA must, in writing, establish to the satisfaction of the Chairperson that written testimony cannot provide a proper explanation of the factual circumstances as known by the MLA in question.
20. (1) The Chairperson may admit as evidence at the hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
- (a) any oral testimony, and
  - (b) any document or other things,
- which are relevant to the appeal, and the Chairperson may act on such evidence and attribute to it the weight deemed appropriate.
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- (2) Where the Chairperson is satisfied as to its authenticity, a copy of a document or other thing may be admitted as evidence at the hearing.
- (3) Written submissions advocating the position of any party to a hearing and provided by an MLA shall not be accepted at a hearing. An MLA may submit a new letter to the Appeals Tribunal for use at a hearing outlining facts within his or her knowledge that may be relevant to the Appeals Tribunal's deliberations. Any new letter shall be submitted to the Appeals Tribunal in accordance with section 35 of the *Guidelines*, or it shall be subject to review by the Chairperson under section 36 of the *Guidelines*.

Any letter, document or other materials submitted by an MLA, whether included in an Appeal Record, submitted to the Appeals Tribunal in accordance with section 35 or considered pursuant to section 36 shall meet the content requirements established for new evidence set out in these *Guidelines*. The Chairperson presented with the letter, document or other material shall rule on its admissibility in accordance with section 17 of the *Guidelines*.

21. At the hearing, the appellant shall submit his/her evidence first and each respondent shall then submit his/her evidence. On the close of evidence of all parties, each party may address the Chairperson; however, the appellant will be provided with the right of last reply.
22. The Chairperson may adjourn the hearing from time to time where he/she is satisfied that an adjournment is necessary to ensure a proper appeal.
23. Proceedings at the hearing shall be recorded, and a transcript shall be provided on request of any party to the appeal provided that an undertaking to pay the costs of transcription is provided by the party requesting the transcript and such payment is received by the Appeals Tribunal prior to the delivery of the requested transcript.
24. (1) The hearing shall be conducted in either of the official languages (English or French) of the Province of New Brunswick as chosen by the appellant. Any party to the appeal requiring an interpreter to translate the evidence or proceedings from one official language to the other official language shall make that request to an officer of the Appeals Tribunal as soon as possible before the hearing and in any case not later than 30 days prior to the hearing.

- (2) Any party to the appeal and any witness testifying at the hearing in his/her mother tongue who requires an interpreter to translate the evidence or proceedings or hearing into the language in which the hearing is to be conducted, shall make that request to an officer of the Appeals Tribunal as soon as possible before the hearing and in any case not later than 30 days prior to the hearing.
25. (1) The appellant has the onus to establish his/her case to the satisfaction of the Chairperson, and the appellant is responsible for submitting all evidence necessary to meet that onus.
- (2) Each party to the appeal is responsible for submitting all evidence necessary to support his/her assertions.
26. A copy of the Chairperson's written decision will be forwarded to each party in the appeal not later than 90 days from the date of the hearing.
27. Subject to the *Act*, the Chairperson may vary these rules on any appeal, or make additional rules, if the Chairperson believes that in the circumstances of the case, changes are necessary to ensure that the appeal is conducted and considered fairly on its merits.
28. The Chairperson may make such orders or give such directions as the Chairperson considers proper to prevent abuse of the appeal process.

### **Postponements**

29. A postponement may occur when a hearing date has been set and, either prior to or on the date of the hearing, it is requested that the hearing be deferred to a later date and such request is granted by the Appeals Tribunal.
30. Requests for a postponement shall fall into two categories, namely:
- (i) **Exceptional Circumstances** which include illness, death and adverse weather conditions.
- (ii) **General Circumstances** which include all other circumstances including timetable conflicts.

The Appeals Tribunal shall determine whether or not a request for postponement is an Exceptional or a General Circumstance.

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31. A hearing postponed under Exceptional Circumstances will be rescheduled at the next earliest date. A hearing postponed under General Circumstances will be treated as a new appeal and will return to the beginning of the appeal scheduling process.
32. The appellant or his/her representative may request a postponement at any time. Excluding Exceptional Circumstances, other parties shall not be entitled to request a postponement after a Notice of Hearing postmarked 30 calendar days prior to the hearing date has been issued.
33. Requests for a postponement are to be made in writing stating the reasons for the request with notice to all parties involved.
34. The Appeals Tribunal may determine that an appeal should be postponed. In these cases, the appeal will be rescheduled at the next earliest possible date.

### **New Documentary Information**

35. For the purposes of preparing the Appeal Record, all parties are required to submit to the Appeals Tribunal a copy of any new documents or reports that the parties wish considered at the appeal no later than 20 days prior to the hearing date.
36. Subject to section 6, the Chairperson presiding at the hearing shall decide, in accordance with the *Act*, whether or not to accept at the hearing any document previously not available prior to the 20 days set forth in section 35.

### **Witnesses**

37. Not later than 10 days before the hearing date, the Appeals Tribunal must be advised in writing of any witnesses that will be at the hearing. The list will include the name(s) and the purpose in having the witness attending the hearing.

An MLA may not attend as a voluntary witness or as an observer to an Appeals Tribunal hearing prior to obtaining confirmation from the Chairperson at least 10 days before the hearing is to be held that Exceptional Circumstances exist which would make his/her appearance permissible. Failure to obtain a confirmation from the Chairperson may result in the hearing being postponed

or a hearing decision being rendered void and a new hearing rescheduled at the next available opportunity.

## **Time Limits**

The following represents guidelines for dealing with appeal time limits under subsection 21(1.1) of the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act* (the "Act"). These guidelines may be modified at the discretion of the Appeals Tribunal if the facts of a particular case require modification.

### 38. Overview of Time Limits

- 38.1 Decisions rendered before June 1, 2001, will continue to have no time limit.
- 38.2 Decisions rendered on or after June 1, 2001, will have a 1-year time limit from the date of decision.
- 38.3 The Appeals Tribunal has the discretionary authority to extend the 1-year time limit before or after the expiration of the limitation period.

### 39. Notice of Time Limits

When the Commission issues a decision, the parties are advised in the decision letter of the time limit for appealing.

### 40. Extending the Time Limit

Circumstances where the Appeals Tribunal may exercise its authority to consider appeals outside of the time limit:

#### Favourable Circumstances

- 40.1 The appellant provides a reasonable explanation for delay in filing the appeal which may include but is not limited to:
  - (S)he was unaware of the decision appealed from, and upon becoming aware of the decision, took reasonable steps to advance an appeal.

- (S)he retained the services of a representative, provided instructions and reasonably relied on the representative to file an appeal, but no appeal was filed and, upon becoming aware of the representative's inaction, took prompt and reasonable steps to pursue the appeal.
- (S)he was misled as to the requirements to file an appeal within the year by any person who ought to have provided accurate information with respect to the requirements of appeals.
- (S)he demonstrates that s(he) was unable to pursue the appeal due to mental or physical incapacity.
- Such other circumstances as the Appeals Tribunal deems just.

#### Unfavourable Circumstances

- 40.2 The appellant knew or ought to have known of the requirement to file notice of an appeal within a year from the date of the Commission's decision, but failed to take any steps to pursue an appeal within the required time.
- 40.3 No reasonable explanation exists for the delay in pursuing the appeal.
- 40.4 The appellant disagrees with the time limitations for bringing appeals.
- 40.5 The appellant filed a previous appeal with respect to the same matter, which was withdrawn giving no reason.

#### 41. Process

- 41.1 An application for an extension must be made in writing.
  - 41.2 The applicant must identify the date of the Commission's decision, the decision and what is being requested.
  - 41.3 The applicant must state the reason for the extension and the reasons must demonstrate an arguable case on the merits of the matter.
  - 41.4 The Appeals Tribunal will conduct a paper review and advise all parties of the decision in writing, giving reasons.
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- 41.5 If an extension of time limit is granted by the Appeals Tribunal under section 4.4, the parties to the hearing may challenge this decision to the hearing Chairperson. As part of the hearing process, any party challenging such a decision must provide 14 days notice to the Appeals Tribunal and all parties of their intention to challenge this decision.
- 41.6 The Chairperson or Vice-Chairperson will conduct a hearing in accordance with its *Guidelines*.
- 41.7 The Chairperson or Vice-Chairperson will rule on the extension of time decision and if favourable, rule on the Commission's decision being appealed. However, if the ruling on the extension of time decision is not favourable, then the Chairperson or Vice-Chairperson will not rule on the Commission's decision. This will be considered a final decision of the Appeals Tribunal.
- 41.8 The decision of the hearing Chairperson on the extension of time may be appealable to the Court of Appeal of New Brunswick.
42. Time Limit Refused by the Appeals Tribunal Pursuant to Subsection 4.5
- 42.1 If the extension of time limit is not granted by the Appeals Tribunal pursuant to section 4.5, the appellant may appeal this decision to the Chairperson of the WCAT. This appeal must be filed within 15 days of the appellant receiving notice of the decision referred to in subsection 4.5 herein. Any decision rendered will be a final decision of the Appeals Tribunal and may be appealable to the Court of Appeal of New Brunswick.

### **Policy Challenge**

43. If known to them at the time of filing a Notice of Appeal, the appellant shall indicate in the Notice of Appeal that a Commission policy is being challenged and which section of the policy is in question. This notification shall state the reasons why the policy is being challenged.
44. If, after filing a Notice of Appeal, an appellant determines that a policy challenge is necessary before a hearing before the Appeals Tribunal, the appellant shall immediately provide notification of the policy challenged to the Appeals Tribunal, the Commission and to any other party involved in the

hearing. This notification shall state which policy is being challenged and which section of the policy is being challenged. This notification will state the reasons why the policy is being challenged.

45. At a hearing before the Appeals Tribunal, where a policy is being challenged, the appellant shall provide proof that the notification of the policy challenge was sent to the Appeals Tribunal, the Commission and any other party involved in the hearing.
46. Failure by an appellant to provide notification of a policy challenge may result in an adjournment of the hearing. The hearing chairperson shall determine whether adequate notice of a policy challenge was provided. If it is determined that adequate notice of a policy challenge was not provided, the hearing Chairperson may adjourn the hearing or a portion of the hearing, so as to allow the Commission and other parties involved time to prepare for, and address, the policy challenge.
47. If at a hearing a policy is challenged, the hearing Chairperson shall determine in their reasons for decision if the policy being challenged is patently unreasonable.
48. If a policy is found to be patently unreasonable, the hearing shall be suspended in accordance with the *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act* and the hearing shall resume once the matter has been considered by the Commission.
49. After being informed of the Commission's decision, the Appeals Tribunal shall establish a date for the resumption of the hearing as necessary.