Reviewers' Training Manual

For use by persons appointed to conduct reviews under Part 5 of the Accident Compensation Act 2001

Introduction

What's in this manual?

These are notes for the assistance of persons appointed to conduct reviews under the Accident Compensation Act 2001 ("the 2001 Act"). It will be used in the training of reviewers. A suggested induction programme for a newly appointed reviewer is attached as **Appendix 7**.

Note that the Accident Compensation 2001 was known as the *Injury Prevention, Rehabilitation, and Compensation Act 2001*. Under the *Accident Compensation Amendment Act 2010*, the name of the principle Act was changed.

This Training Manual contains the following chapters:

Chapter	Title	Page Number
1	Review and appeal proceedings for decisions under former Acts	3
2	Role of the reviewer under the 2001 Act	4
3	Restrictive principles	7
4	The application for review	14
5	Pre-hearing and case management	17
6	Arranging the hearing	22
7	Conducting the hearing	28
8	Making the decision	39
9	Costs	45
10	Vacating decisions and issuing supplementary decisions	47
11	Indemnity of reviewers	48
12	Appeals	49
13	Duties on termination of appointment	50
App. 1	Oaths and affirmations	51
App. 2	Sections 101 & 102 of the 1982 Act	52
App. 3	Sections 89, 89A, 90 and 163 of the 1992 Act	54
App. 4	Sections 135 – 151 of the 1998 Act	57
App. 5	Review Costs and Appeals Regulations	63
App. 6	Suggested order of proceedings (multi-party hearing)	68
App. 7	Reviewer induction programme	69

This Training Manual is a central reference guide for persons appointed to hear 2001 Act applications for review. Other documents will be referred to by reviewers in the course of their work, including the 2001 Act and amendments, the former Acts and their amendments, Regulations, and decisions of the Court of Appeal, High Court, District Court and the Accident Compensation Appeal Authority. Reviewers can obtain further guidance from the Manager – Adjudication.

1. Review and appeal proceedings for decisions under former Acts

Section 391 of the Accident Compensation Act (the 2001 Act) sets out what is to occur in respect of a review of any decision that has been made under:

- the Accident Compensation Act 1972 (the 1972 Act) or the Accident Compensation Act 1982 (the 1982 Act),
- or either of them as applied by Section 453 of the Accident Insurance Act 1998 (the 1998 Act),
- or as applied by the 2001 Act,
- the Accident Rehabilitation and Compensation Insurance Act 1992 (the 1992 Act),
- or the 1998 Act.

When the decision in respect of which a review is sought was issued before 1 July 1992, or clearly was issued under the 1972 or 1982 Acts, the review provisions are those under the 1982 Act. The relevant sections of the 1982 Act are reproduced in **Appendix 2**.

When the decision was issued under the 1992 Act and the review application was filed before 1 July 1999 the review provisions are those under the 1992 Act. The relevant sections of the 1992 Act are reproduced in **Appendix 3**.

Section 391 of the 2001 Act provides for Part 6 of the 1998 Act to continue in force and apply to a review from a decision made by the Corporation prior to 1 April 1992. Therefore, when the decision was issued under the 1998 Act the review provisions are those under the 1998 Act. One of the significant effects of this is that the provisions of section 135(3) of the 2001 Act (which gives the Corporation a discretion to accept a review application made after the expiry of the three months in extenuating circumstances – see paragraph 4.2.1.1 below) cannot apply retrospectively to decisions of the Corporation made before the 2001 Act came into force. Authority for this is to be found in the District Court decision of Ward v ACC (64/2003) in which Judge Beattie stated (at page 4):

> [8] The [2001 Act] came into force on 1 April 2002, that is, after [ACC] had made the decision which is now in issue. Although that Act was in force by the time the appellant made her application for review, I rule as a matter of law that the provisions of that Act pertaining to review do not apply, as the decision which was being sought to be reviewed, was a decision made before the coming into force of that Act. Furthermore, the transitional provisions of the 2001 Act, in particular s.391, provides for Part 6 of the [1998 Act] to continue in force and apply for review or appeal from a decision made by the Corporation prior to 1 April 2002.
>
> [9] Although s.391(3) of the 2001 Act states that the 1998 Act continues if the application for review or appeal was filed before 1 April 2002, I am satisfied that Part 5 (the review and appeal provisions) of the 2001 Act cannot apply to decisions made before 1 April 2002 as to do so would have the effect of disadvantaging those claimants who were bound by the three month provision of the 1998 Act.

> [10] As a matter of statutory interpretation I find that the provisions of s.135(3) of the 2001 Act, which gives the Corporation a discretion to accept a review application made after the expiry of the three months in extenuating circumstances, cannot apply retrospectively to decisions of the Corporation made before that Act came into force. Such an interpretation would require explicit wording.

The relevant sections of the 1998 Act are reproduced in **Appendix 4**.

2. Role of the reviewer under the 2001 Act

2.1 Importance of the review process

The place of a reviewer in the review and appeal process prescribed in the Act is a very important one. It is at the review stage that facts relevant to the matter in issue are identified and recorded. If oral evidence is collected, it is recorded at this stage. The reviewer's finding of credibility based on the demeanour or genuineness of witnesses will be made (and, at any later stage, will be given due weight).

Under section 141 a reviewer must conduct a hearing at which the applicant and other parties defined in section 142 may be present. After considering the evidence a reviewer must issue a written decision giving reasons. An appeal against that decision may be made to the District Court (section 149). Appeals may be lodged by any of the parties defined in section 149.

A review is in the nature of a fresh look at the Corporation's primary decision. The applicant has opportunity to present further evidence and to examine or criticise the grounds on which the primary decision was made. There is no limit to the evidence that can be put forward at review. A reviewer is not limited to the evidence as it stood at the time of the original decision.

2.2 Duties of reviewers

The statute imposes a number of duties on reviewers. These have been summarised as a duty to:

- conduct a hearing between the parties
- allow certain persons to be present at, and be heard, and to present evidence, at the hearing
- attempt to reach agreement about the time and place of the hearing and give notice to the parties of the time
- conduct the hearing in accordance with the principles of natural justice (see paragraph 3.3 below)
- adopt an “investigative approach” with a view to conducting the review in an informal, timely and practical manner (see paragraphs 2.2.1, 2.2.2 and 2.2.3 below)
- reach a decision
- exercise due diligence in decision-making (see paragraph 2.2.4 below)
- give notice of the decision within 28 days of the conclusion of the hearing
- give reasons for the decision
- "act independently" (see paragraph 3.3.5 below)
- award costs in certain circumstances.

2.2.1 Investigative approach

The duty to adopt an “investigative approach” requires the reviewer to conduct the review in an inquisitorial rather than an adversarial manner. The inquisitorial approach involves an emphasis on fact-finding by the reviewer. The conduct of the hearing is largely driven by the reviewer, who should undertake his/her own inquiries beyond the scope of the evidence and submissions

presented by the parties. In contrast, an adversarial approach involves the case being largely driven by the parties. The parties define the issues, decide who are to be witnesses in the case, cross-examine their opponents' witnesses and present their arguments to the decision maker as persuasively as they can. The 2001 Act does not envisage an adversarial approach. This is illustrated by the comment of Lianne Dalziel, the then Minister for Accident Insurance, when addressing the House at the second reading of the Injury Prevention, Rehabilitation and Compensation Bill on 6 September 2001:

> [The] reviewer adopts an inquisitorial approach, anyway, now…It is very important that the reviewers conduct reviews in the manner that they think fit. But they must adopt an investigative approach, with a view to conducting the review in an informal, timely, and practical manner….Even as a lawyer I would not stand in this House to defend an adversarial approach at a review hearing. I would find that utterly unacceptable.

It should be noted however that reviewers are not given the statutory power to direct parties as to how to present their respective cases. For example, reviewers cannot compel any person to attend a hearing or to give evidence.

In the District Court decision of Boston (223/2007) Judge Ongley commented:

> The Reviewer's investigative function is usually confined to following up lines of enquiry that appear relevant and incomplete during the course of a hearing, or which are suggested by a claimant. There is a limit to the investigation that a Reviewer can undertake without powers to require production of information and without funding or resources for full enquiries. Without full argument I would be reluctant to make a broad pronouncement obliging Reviewers to go further than is customary.

2.2.2 Informality

Reviews should be structured in a way that enables claimants to represent themselves. For claimants to be able to do that effectively, they must not be inhibited by the usual legal technicalities that characterise courts of law. Therefore, less emphasis should be placed on procedural rules such as those relating to the admissibility of evidence in review hearings.

Informality should carry through to the review decision, so that an unrepresented claimant is able to read and understand the decision.

2.2.3 Practicality

Reviews must be conducted in a practical manner. Reviewers should make practical decisions quickly, with the minimum of detail, focusing on the key issues and then analysing and resolving them without regard to legal technicalities.

2.2.4 Diligence

Diligence involves a commitment to the completion of the task with attention to detail. The parties should be able to see that their material and arguments have been listened to and analysed. Where reviewers acquire knowledge of which parties may be unaware, any matter which may influence the decision should be disclosed so that the parties can respond (see

paragraph 3.3.4 below).

However, diligence should not be embraced so enthusiastically that every stone is raised and examined. Reviewers need to balance the concept of diligence with the duty to conduct the review in a timely and practical manner. Hearings should not be interminable and decisions should be delivered in a timely way.

2.3 Service Delivery Manager

2.3.1 Oversight of Review process

The Service Delivery Manager has a duty to oversee the work of the reviewers.

2.3.2 Further responsibilities

Particular additional areas of responsibility of the Service Delivery Manager are:

- supervision of reviewers
- workload management and allocation
- reviewer resource maintenance
- working with the Manager – Operations in ensuring sufficient administrative support for reviewers
- quality control of office outputs
- performance measurement in relation to reviewers
- liaison with client advocate organisations
- giving professional guidance to reviewers (career development, training, career paths, recruitment, and ethics)
- overview of trends (effectiveness of change, legislation weakness, programmes, management strategies, and feedback to other managers, statistics).
- quality control of review decisions
- technical support (interpretation of legislation, policy gaps, decision support guides, obtaining legal opinions, communication of FairWay policy)
- standards performance, quality, consistency, methods, outputs.

3. Restrictive principles

3.1 Limitations on powers generally

Statutory powers must be exercised reasonably and in good faith, for proper purposes only, and in accordance with the spirit as well as the letter of the empowering statute (see also paragraph 3.2 Exercise of Discretion).

3.1.1 Relationship with District Court

The readiness of the District Court to intervene on appeal by way of rehearing will vary according to the circumstances. The circumstances will include the thoroughness of the argument presented to the reviewer, the extent to which the reviewer's decision is a fully reasoned one, and the extent to which significant fresh evidence, arguments or authorities have been introduced for the first time on appeal.

If a reviewer has breached the principles of natural justice or improperly exercised discretion the Court is almost certain to refer the matter back to the reviewer for rehearing.

3.2 Exercise of discretion

3.2.1 Generally

Discretionary powers granted to public authorities are not absolute, but are subject to general legal limitations. These limitations are expressed in a variety of different ways.

- that discretion must be exercised reasonably and in good faith,
- that relevant considerations only must be taken into account,
- that there must be no corrupt behaviour by persons in a position of trust, or
- that the decision must not be arbitrary or careless.

That is, discretion must be exercised in the manner intended by the empowering Act.

A reviewer is bound to exercise his or her powers reasonably, in good faith, and on proper grounds. There are built-in safeguards against careless or casual decisions.

See below (paragraph 3.3 Natural Justice) for limitations on procedural matters.

3.2.2 Reasonableness

The classic expression of what has come to be known as Wednesbury reasonableness is:

> It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his

> consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short v Poole Corporation ([1926] Ch. 66, 90, 91) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and in fact all these things run into one another.
> (per Lord Greene MR, Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223)

The range and flexibility of this technique are obvious. Sometimes, on appeal, it is employed without being expressed. There are no precise rules governing its use.

A reviewer must make decisions in good faith, i.e., "according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man, competent to the discharge of his office ought to confine himself." A reviewer must act "in good faith", a term which usually means "for legitimate reasons", although it can sometimes mean "with personal honesty and good intentions".

A reviewer must make his or her decisions in such ways that the results are certain.

3.2.3 A reviewer's discretion

A reviewer must not fetter his/her discretion or exercise it unlawfully. Examples of unlawful exercise of a reviewer's discretion are:

- failure to consider the case with an open mind
- blindly following a policy laid down in advance
- pursuing consistency at the expense of the merits of individual cases
- being bound by the decisions of other reviewers.

A reviewer must not make decisions at the direction of another person. The action of a reviewer will be invalid if some other person or body has intervened to prevent him or her acting independently in reaching his or her decision. External dictation will, if the intervention is in fact the effective cause, mean that the reviewer's action is invalid. The same action might also be invalid on the grounds of bad faith or abuse of power.

3.2.4 Delegation

It is essential to the lawful exercise of a reviewer's power that the reviewer should exercise it. The statute intends that no part of a reviewer's power or duty can be delegated (except the clerical duties of giving notice of hearing, communicating with the parties, dispatching notice of the decision, and preparing documents for appeal).

3.3 Natural justice

3.3.1 Generally

The principles of natural justice apply to procedural matters, rather than to the exercise of discretion on the merits of a case.

Section 140(c) of the Act requires reviewers to comply with the principles of natural justice. It also requires reviewers to comply with any relevant provision of the Act and any regulations.

Natural justice is also a requirement in terms of section 27(1) of the New Zealand Bill of Rights Act 1990 (which applies, among other things, to acts done by any person or body in the performance of any public function power or duty, or duty conferred or imposed on that person or body by or pursuant to law):

> **27. Right to justice** -(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

In its broadest sense natural justice may mean simply "the natural sense of what is right and wrong" and even in its technical sense it is now often equated with fairness.

The principles of natural justice are not laid down in any universal rules. The requirements of natural justice must depend upon the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and other matters.

There are four principles which require consideration here:

- the parties must be given adequate notice
- the parties must be given a fair hearing
- a reviewer must not act on secret information
- a reviewer must be free from bias and prejudice.

3.3.2 Adequate notice

The statutory rule is provided in section 141:

> (2) The reviewer must hold the hearing at a time and place that are—
>
> (a) agreed to by all persons who are parties to the application and the reviewer; or
>
> (b) decided on by the reviewer if those persons do not agree.
>
> (3) The reviewer must take all practicable steps to ensure that notice of the time and place of the hearing is given—
>
> (a) to every person entitled to be present and heard at it; and
>
> (b) at least 7 days before the date of the hearing.

Under section 145(5) the reviewer may make a decision in the absence of any person who does not give a reasonable excuse for non-attendance. The general rule seems to be that a notice

should include a statement of the time and place for a hearing, and the legal and factual issues that will be discussed. The purpose of giving notice is to allow the party to prepare the case effectively and to answer the opposing case.

Thus, in addition to the statutory requirement of 7 days written notice, there is the general requirement of natural justice that the parties be advised of the legal and factual issues. If the case is complicated this requirement is best met by discussing the issues with the parties at a case conference. It may be necessary for the reviewer to issue a memorandum to the parties setting out the issues to be resolved. An example of this is where there are preliminary issues relating to a reviewer's jurisdiction, such as the validity of the application for Review.

At the same time as notice is given of the hearing, it is good practice to ensure that appropriate disclosure of factual documents has been (or is now) made. See below, **paragraph 6.9 Disclosure.**

3.3.3 Fair hearing

3.3.3.1 Who may appear?

The statutory rules are:

> **142. Persons entitled to be present and heard at hearing**
> The following persons are entitled to be present at the hearing, with a representative if they wish, and to be heard at it, either personally or by a representative:
>
> (a) on every review, the applicant and the Corporation:
> (b) if the review relates to a decision to accept or decline cover for personal injury caused by medical error, any registered health professional or organisation whose action or inaction was the ground of the claim:
> (c) if the applicant is a treatment provider, a registered health professional, or an organisation referred to in paragraph (b), the claimant:
> (d) if the review relates to a decision to accept or decline cover for a work-related personal injury,—
> (i). the claimant; and
> (ii). the claimant's employer; and
> (iii). in the case of a claim for cover for personal injury under section 30, any employer whose name the reviewer receives from the claimant or from the claimant's employer or from the Corporation so that notice can be given under section 141(3), if the name is that of any other employer of the claimant or any former employer of the claimant.

Part 5, the Dispute Resolution provisions, is not a code. This is because there is mention of external standards, e.g., the principles of natural justice, and the discretion given to reviewers.

The statutory list of persons entitled to be heard, therefore, should not be regarded as an exclusive list, but rather as a set of examples or an irreducible minimum. It therefore follows that the reviewer, in conducting the review hearing in accordance with the principles of natural justice (especially the rule that both sides shall be heard) and as he or she thinks fit, may allow other persons to present any relevant evidence.

3.3.3.2 Observers

If anyone wishes to attend the hearing as an observer, the informed consent of all parties to the review must be obtained. The name of the person, their occupation, and the reason for their presence as an observer should be explained. If any of the parties objects to the presence of the observer, then the observer should be advised that they cannot attend. In the event that all parties agree to the observer's presence, it is the reviewer's duty to ensure that the observer does not take any part at all in proceedings.

In some situations the reviewer or the Manager - Operations may have arranged for a security guard to attend the hearing. Obviously it is not appropriate to seek the consent of the parties to the attendance of the guard at the hearing. Reviewers may conduct hearings as they see fit. That may include the attendance of a security guard. The security guard should however sign a confidentiality agreement before the hearing.

3.3.3.3 Who may appear in an employer's work injury review?

In the case of an application for review by an employer against a work injury decision, the employee/claimant must be given the opportunity to attend the hearing. (See section 142(d)).

The District Court places great emphasis on the attendance of all parties at hearings involving work injury disputes. It has in the past returned these matters to the reviewer for re-hearing where all parties have not attended.

Under the Review Costs and Appeals Regulations 2001 the reviewer may award costs to the applicant or any other person if the reviewer makes a decision in favour of that person. There is no power to award costs to a non-applicant party, such as an employer or registered health practitioner, if the applicant is successful at the review. See section 148.

See below, paragraph 6.9, regarding disclosures in work injury reviews.

3.3.3.4 Evidence and submissions

The statutory rules are that certain parties may present evidence, and under section 141(4) the reviewer may admit any relevant evidence whether or not that evidence would be admissible in a court.

The general principles are:

- a hearing will normally be an oral hearing; that is, it is conducted in the presence of the reviewer and all the parties to the review. The parties will have the opportunity to give evidence and make submissions either orally or in writing to the reviewer.
- the reviewer may request the applicant to provide written submissions prior to the hearing and to send copies of these to the other parties to the hearing
- at an oral hearing, a reviewer must:

  (a) consider all relevant evidence which a party wishes to submit;.
  (b) inform every party of all the evidence to be taken into account; and
  (c) allow comment on the evidence and argument on the whole case.

- a reviewer must allow opportunity for witnesses to be questioned, so that their evidence can be tested.

If all the parties agree and the reviewer considers it appropriate, the reviewer may be able to issue a decision on the written evidence presented without the need to convene a formal hearing. This is called a decision "on the papers." (see paragraph 5.5 Necessity for a Hearing).

See also below paragraph 7.13 Evaluation of evidence.

3.3.4 A reviewer must not act on secret information

The Corporation's duty to disclose information is fully discussed in paragraph 6.9 Disclosure. The reviewer's duty to disclose is less clear. However, the parties must always have a fair opportunity to correct or contradict anything prejudicial to their case. On rare occasions there may be limits on the right to see adverse evidence; such as where it is necessary to protect another individual's privacy. What is essential is substantial fairness to the person adversely affected. A reviewer must only take into account information that is put before her or him and which has been disclosed to the parties.

NB. A reviewer should avoid private telephone or face-to-face discussions with any of the parties. If such discussions cannot be avoided for any reason, the reviewer must disclose to the other parties both the fact that the discussion occurred and the content of the discussion. All other correspondence, including emails, should always be copied to all parties.

3.3.5 A reviewer must be free from bias and prejudice

3.3.5.1 Statutory provisions

Under section 138 the reviewer has a duty to act independently. The reviewer may not hear any review where the reviewer has had any previous involvement with the claim other than as a reviewer.

3.3.5.2 General principles

The general principles of natural justice require an opportunity to be heard by an independent and impartial decision maker, who maintains a detached attitude to the parties and witnesses.

3.3.5.3 Reviewer precluded from hearing certain reviews

See paragraph 5.4.1 Independence.

A reviewer may not be involved in a review if there is any risk not only that justice might not be done but also that justice might not be seen to be done. If a reviewer declines jurisdiction, the review should reallocated to another reviewer.

3.4 Human Rights Act

The Human Rights Act 1993, which came into force on 1 February 1994, provides statutory protection of human rights in New Zealand, in addition to those rights contained in the Bill of Rights Act. The Human Rights Act contains a number of specified discriminations:

> Indirect discrimination - Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part of this Act has the effect of treating a

> person or a group of persons differently on one of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under this Part of this Act other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

The listed prohibited grounds of discrimination are:

- sex
- marital status
- religious or ethical belief
- colour
- race
- ethnic or national origin
- disability
- age
- political opinion
- employment status
- family status
- sexual orientation

A reviewer must ensure that her or his conduct, practice, conditions, or requirements are lawful under the Human Rights Act and under the Bill of Rights Act.

4. The application for review

4.1 Who may apply?

The following persons may apply for a review under section 134:

4.1.1 Claimant, of a decision of the Corporation

Any claimant may apply to the Corporation for a review of a decision.

A claimant may also apply for a review of any delay in processing the claim for entitlement that the claimant believes is an unreasonable delay.

Under section 58 where the Corporation has exceeded the time limits in sections 56 or 57 for making a decision on a claim for cover, the Corporation is required to advise the claimant that that he or she is "deemed" to have cover for the personal injury in respect of which the claim was made. If the Corporation issues a decision declining to "deem" cover, then the claimant may apply for a review of that decision.

4.1.2 Employer, of a work injury decision

An employer may apply for a review of a decision that a claimant's injury is a work-related personal injury suffered during employment with that employer. An employer may not apply for a review of a decision about entitlements that have been or are being provided to a claimant who has cover for a work-related personal injury (section 134(3)).

4.1.3 Premium payer

A levy payer who is dissatisfied with any decision of the Corporation relating to any premium payable or claimed to be payable may apply for a review of that decision. A self-employed levy payer may apply for a review of a determination under section 209 of a level of weekly compensation that reflects the likely costs of that person's incapacity. However, no right of review exists under the Act in respect of the calculation for the purposes of the Income Tax Act 1994 of the taxable income of any person (section 236(2)). A premium payer may also not seek review of any decision relating to the entitlements that have been given or are being given to any person under the Act (section 236(3)).

4.1.4 Others

Under the now repealed Medical Misadventure provisions, a registered health professional or organisation (such as a hospital) could apply for review of a decision that the registered health professional or organisation contributed to personal injury caused by medical error. "Registered health professional" is defined in section 6 of the Act. In 2005, Treatment Injury replaced Medical Misadventure. A registered health professional has no standing to apply for a of review a Treatment Injury decision.

4.2 Application for review

Section 135 provides:

135. How to apply for review

(1) A review application is made by giving an application that complies with subsection (2) to the Corporation.

(2) The application must—

(a) be written:

(b) whenever practicable, be made on the form made available by the Corporation for the purpose:

(c) identify the decision or decisions in respect of which it is made:

(d) state the grounds on which it is made:

(e) if known by the applicant, state the relief sought:

(f) be made within 3 months of—

(i). the date on which the claimant has a decision under section 58; or

(ii). the date on which the Corporation gives notice under section 64; or

(iii). in the case of a decision under the Code, the date on which the claimant is notified of the decision:

(g) in the case of a review application relating to a claim for entitlement, not be made less than 21 days after the date the claim for entitlement is made.

4.2.1 Requirements as to time

The application for review must be made within 3 months of the date on which notice in writing has been given of ACC's decision.

Where the Act requires a document to be given to a person, section 307 provides that the document must be given by the method described below according which is most likely to ensure that the document reached the person:

- personal delivery
- posting it to the usual address of the person. Notices of primary decisions are usually posted by the Corporation. If so, delivery is deemed to occur at the time the notice would have been delivered in the ordinary course of post
- sending it by fax or some other electronic means
- providing it in a manner approved by the person.

Delivery by post is proven by showing that the notice was properly addressed to the usual or last known address of the person and, unless the contrary is proved, it is presumed the notice was posted on the day it was dated.

The three months for lodging the application for review runs from the date when the written notice of the decision was personally delivered or from when it would have been delivered in the ordinary course of post (Clarey v ARCIC 124/95).

Where a decision is posted, the three months cut off date for the Corporation to receive the application for review will run from a day or two after the date of the decision letter.

Notices by electronic means are deemed to be received the next day. Proof of sending is by a correct machine generation acknowledgement of receipt.

4.2.1.1 Extenuating circumstances

There was no discretion under the 1998 Act or the 1992 Act to extend the time for lodging an application for review beyond 3 months (see, for example, Zehnder v ARCIC (73/95)). The consequences were considered to be harsh as review is the gateway to challenging primary decisions in the courts and if a person loses the right of review through lapse of time, that person has no other remedies.

As a result of strong submissions to the Parliamentary Select Committee, the 2001 Act now provides that the Corporation must accept a late application if satisfied that there are extenuating circumstances that affected the ability of the claimant to meet the time limits. Section 135(3) gives examples of what might constitute extenuating circumstances:

- Where the claimant was so affected or traumatised by the personal injury giving rise to the review that he or she was unable to consider his or her review rights
- Where the claimant made reasonable arrangements to have the application made on his or her behalf by an agent of the claimant, and the agent unreasonably failed to ensure that the application was made within the required time
- Where the Corporation failed to notify the claimant of the obligations of persons making an application

This is not an exhaustive list, but provides guidance as to what might constitute extenuating circumstances.

Section 135(3) limits the extenuating circumstances to claimant applicants. Employers, health professionals or organisations, and levy payers must still lodge their applications within 3 months, and there is no discretion to extend that period in any circumstances.

See paragraph 1 above in relation to the transitional provisions for primary decisions issued by the Corporation under the 1998 Act, where the application for review is lodged after 1 April 2002.

4.2.2 Requirements as to form

Under section 135 the application must be in writing and must state the reasons for the application. Section 135(2)(b) provides that the application should be made on the form made available by the Corporation for the purpose, “whenever practicable”. In practice, it is likely that the Corporation will accept any written, signed, and dated communication that identifies the decision in respect of which review is sought, indicates the applicant's dissatisfaction with that decision, and briefly states the reasons for that dissatisfaction. If the reasons are not given, or are insufficient to clearly identity the issues, the application does not satisfy the requirements of the Act and the Corporation may ask the applicant for more details.

5. Pre-hearing Procedure and Case Management

5.1 Review Office administrative action

The involvement of Fairway Resolution Ltd (FairWay) begins when ACC sends a request for the appointment of a reviewer to conduct a review. The request is usually accompanied by the claimant's claim file. The Resolution Co-ordinator (RC) acknowledges receipt and prepares a cover sheet for the file. The RC then gives the file to the reviewer for screening.

5.2 Screening

When screening the file, the reviewer should check the following:

- the Act under which the decision was made
- the Act under which the review is to be conducted
- the date of the decision under review
- whether the review application was filed within time
- any other issues of jurisdiction – ie is the decision reviewable?
- the date by which the hearing must be set
- the parties entitled to attend and be heard at the review
- any interests that the reviewer may have in the review (see paragraph 5.4.1 below)
- whether a case conference is required

5.3 Case Management

5.3.1 Is a case conference required?

The reviewer can determine whether a pre-hearing case conference (usually by telephone) between the reviewer and all the parties is required. The purpose of the case conference includes:

- clarification of the issues
- canvassing whether the parties would like to try mediation or facilitation
- setting a timetable for further investigations
- finding out whether the parties will be calling witnesses or bringing support persons to the hearing
- ascertaining whether the parties would prefer a review on the papers or whether they have any special needs
- agreement on a date, time and venue for the hearing
- agreement on the time to be allocated for the hearing
- any other matters that the reviewer decides should be discussed

The main aim of the case conference is to facilitate the most prompt and efficient resolution of the dispute as is possible in the circumstances of the case, and to avoid unnecessary and costly delays.

5.3.2 To set for hearing

If the reviewer determines that a case conference is not required, the RC contacts the parties separately by telephone to discuss the following:

- whether the parties would like the review to be on the papers
- whether the parties have any special needs
- whether any of the parties wish to attend the hearing by telephone
- the date, time and venue for the hearing

5.3.3 Case conference or set for hearing?

While it is up to the reviewer to decide which is appropriate in each particular case, reviewers will usually decide a case conference is appropriate in any one or more of the following circumstances:

- there appears to be scope for mediation or facilitation
- one of the parties is represented by an advocate, barrister or solicitor
- there is doubt about what issues are in dispute
- there is a need for further investigation
- it appears that one of the parties is not ready to proceed with the review
- there appear to be jurisdictional issues (see paragraphs 4.2 above, 5.4 and 6.3 below)

5.4 Decision must be reviewable

The decision in respect of which review is sought must be one that gives rise to rights of review. Section 134 provides that a claimant, employer, levy payer, may apply for a review of a "decision" of the Corporation.

The nature of a "decision" was discussed by Judge Beattie in the District Court decision of Hull (249/97):

> …I find it is clear that it is only decisions which, (i) are the act of deciding a claimant's claim or entitlement, (ii) are the manifestation of the process of the conclusion that has been reached upon a particular claim or entitlement, (iii) conclude the consideration process and state the result or (iv) identify the defining moment on any issue pertaining to a claim or entitlement, that are intended and meant by that word.

In addition, "decision" is defined in section 6:

> **decision or Corporation's decision** includes all or any of the following decisions by the Corporation:
>
> (a) a decision whether or not a claimant has cover:
> (b) a decision about the classification of the personal injury a claimant has suffered (for example, a work-related personal injury or a motor vehicle injury):
> (c) a decision whether or not the Corporation will provide any entitlements to a claimant:
> (d) a decision about which entitlements the Corporation will provide to a claimant:

(e) a decision about the level of any entitlements to be provided:
(f) a decision relating to the levy payable by a particular levy payer:
(g) a decision made under the Code about a claimant's complaint

Allegations of offences committed under the ACC legislation are not reviewable decisions. They are referred for investigation and prosecution by the Crown Solicitor.

5.5 Accepting the allocation of a review

5.5.1 Independence

Under section 138 a reviewer has a duty to act independently when conducting a review. A reviewer is required to disclose any previous involvement that the reviewer has had in the claim other than as a reviewer, and a review may not be allocated to a reviewer who has disclosed such previous involvement (section 139).

No person shall hear any review if that person was involved in a decision being reviewed. (See paragraph 3.3 Natural justice, above). For example a reviewer must not hear a review if she or he had previously made decisions on the claim in a capacity other than as a reviewer.

Reviewers should decline to discuss any aspect of a particular review with any of the parties individually. Any discussion with one party should only take place in the presence of all the parties.

On preparing for the review, it may become apparent to a reviewer that he or she is unsuited to hear a particular application or has an interest in the review. In such cases the reviewer must decline to conduct the review and should return the file to the Service Delivery Manager for reallocation to another reviewer.

Examples of the circumstances where a reviewer ought to decline to conduct the review are:

- where there is a conflict of interest
- where the reviewer has knowledge of, or personal association with, the applicant or any other party
- where the reviewer has trade associations or inside knowledge which might either influence or be perceived as influencing his or her decision
- where the reviewer has any pecuniary or personal interest in the outcome
- where the reviewer has been involved in the decision-making process to date
- where the reviewer has previously heard any of the parties (other than ACC) on other applications, and a party's perception of the independence of the reviewer might be affected, for example, if an unfavourable decision has been overturned on appeal
- where the reviewer for any other reason feels unable to approach the issue with a completely open mind.

There may be cases where a reviewer has some knowledge of matters relevant to the review, but does not consider that the nature or extent of that knowledge precludes him or her from conducting the review. In such a case the reviewer may consider it appropriate to disclose the peripheral knowledge and proceed only if the parties agree. An example is where a reviewer is

asked to undertake a number of related reviews (such as reviews for patients of the National Women's Hospital following the Cartwright Inquiry, or for the members of a motorcycle club challenging the increase in the ACC levy portion of their motorcycle licence fees).

A party's representative cannot refuse to have all his or her reviews heard by a particular reviewer. Each matter must be considered on its own merits. There can only be a valid objection if the reviewer was involved in making the particular decision being reviewed, or if it can be shown that the reviewer is biased in a particular case.

5.5.2 Part-heard reviews

If a reviewer has already part-heard an application for review, that reviewer should complete the hearing and issue the decision.

Where another reviewer has had earlier involvement in procedural matters, e.g., conducted a case conference or granted an adjournment, but no involvement in determining the merits of the application, then there is no requirement that the same reviewer continue the review.

There will be occasions when the reviewer is unable to complete the hearing e.g. on the death of the first reviewer. On those occasions, the reviewer allocated to take over should commence the review *de novo* (afresh). In some circumstances and only by agreement of all the parties, evidence could be presented by listening to the audio recording of the earlier hearing, or by reading a transcript.

5.5.3 Special requests

It will be appropriate on some occasions for the Service Delivery Manager to accede to a request for the appointment of a particular reviewer on cultural grounds. FairWay offers special arrangements for hearings for Maori or Pacific Peoples on request. The form provided by ACC for review applications gives the option for Maori or Pacific Peoples to indicate their interest in taking advantage of the special arrangements. The requests should be identified when the file is received from ACC. The RC and the Manager - Operations will make the necessary arrangements.

It may also be appropriate for the Service Delivery Manager to agree to a request for a male or female reviewer in circumstances where particularly sensitive issues are involved.

5.5.4 Other Matters

If any of the following occur, the reviewer should raise it with the parties by letter or memorandum prior to the commencement of the review hearing:

- a failure to disclose information that is relevant to the issues at review
- the parties should undertake some other action before the hearing
- there are issues of jurisdiction that need to be addressed at the hearing e.g. whether the application for review is valid

Care should be taken to ensure that the setting of the hearing is not delayed beyond the

statutory time limit. Section 146 of the Act provides that the reviewer is deemed to have made a decision in favour of the applicant if the hearing has not been set within three months of receipt of the application by ACC and the delay was not caused or contributed to by the applicant.

5.6 Necessity for a hearing

The reviewer must hold a hearing unless:

- the application is withdrawn or
- all the parties entitled to attend agree not to have a hearing

Where there is no hearing the reviewer must issue a decision with 28 days of a date specified by the parties or within 28 days of the agreement not to have a hearing. Thus the statute envisages that the parties may agree to a hearing "on the papers" (see paragraph 6.5 below).

If a party fails to attend a hearing, without reasonable excuse, the reviewer may make a decision on the evidence available (section 145(5)).

6. Arranging the hearing

6.1 Fixing the time and place

Section 141 (2) requires that every hearing be held at a time and place that is:

- agreed to by all persons who are parties to the application and the reviewer, or
- decided on by the reviewer if those persons do not agree

The section contemplates that the reviewer will attempt to reach agreement with the parties as to the time and place of the hearing but also allows the reviewer to make a determination if the parties cannot agree. This is usually determined in the course of the pre-hearing case conference; alternatively the RC will attempt to reach agreement on behalf of and in consultation with the reviewer.

6.2 Commencement of hearing

Section 146 provides that the date for the hearing must be set within 3 months after the review application is received by the Corporation. Where it is not, the reviewer is deemed to have made a decision in favour of the applicant. This deeming provision does not apply where the applicant has caused or contributed to the delay in setting the hearing.

The requirement to set the hearing within 3 months (which is a repeat of the words in section 149 of the 1998 Act) differs from the wording in the 1992 Act which required the hearing to be commenced within 3 months after the lodging of the application (section 90(9)). The meaning of "set" has not yet been tested in the District Court. In so far as there may be a difference in meaning, reviewers should adopt a conservative approach and ensure that a review is commenced within the 3-month timeframe. This approach is consistent with the intent of the provision, which is to encourage the prompt resolution of the dispute.

6.3 Application within time

Section 135(2)(f) states the application for review must be made within 3 months of the decision date. Under the earlier legislation, there was no discretion to extend this time limit (see Zehnder (73/95)). However, under section 135(3), late applications must be accepted if there are extenuating circumstances that affected the claimant's ability to meet the time limit.

If the application for review has not been lodged within 3 months the reviewer should convene a preliminary hearing to consider the validity of the application (that is, whether there are extenuating circumstances as contemplated in section 135(3)). If there are no extenuating circumstances, the application is invalid and the reviewer has no jurisdiction to consider the substantive issue. If it is found that extenuating circumstances do exist, the reviewer must go on to consider the substantive issue.

The reviewer has the following options:

- Hear the preliminary and substantive issue together and make a written decision as normal.
- Hear the preliminary issue and make a ruling on the spot. The ruling will determine whether

he or she will hear the substantive issue. (In either case there is still a written decision).

- Hear the preliminary issue only and make a written decision on this. If the decision is favourable to the claimant another hearing will need to be convened to hear the substantive issue

The decision on which of these options to adopt will depend on various factors, including the convenience of the parties.

6.4 Setting the venue

Either the reviewer (during a case conference) or the RC (if contacting the parties to set the hearing) discusses options with the parties and attempts to gain agreement to the venue. The availability of suitable hearing venues is limited. There may also be instances where a particular venue suits one party but not another. It is therefore usual practice for the reviewer or RC to propose a venue and ask for the parties' agreement.

If one of the parties has asked for a different venue, the reviewer will consider the request and make a decision. While the final decision as to venue must rest with the reviewer, it is hoped that the following guidelines will be of assistance.

The guidelines generally conform to the principle that reviews should be heard at the review venue nearest to where the cause of action (or a material part thereof) arose.

Where a venue different from that outlined in the guidelines is requested principally for the convenience of counsel, it is unlikely this request will be granted unless the agreement of all parties is obtained.

1. Where the review involves a claimant applicant and ACC only, the venue should generally be heard at the review venue nearest to the claimant's place of residence.
2. Where the review involves an employer applicant and ACC only (e.g. premium decisions) the venue should generally be the review venue closest to where the cause of action arose. There will be cases, however, when there is no need for that location to be chosen and in such cases, with the agreement of the reviewer, the venue may be at a review venue nominated by the employer applicant.
3. Where the review involves a claimant applicant, ACC and an employer (e.g. work injury decisions) the review should generally be heard at the review venue closest to where the cause of action arose.
4. Where the review involves an employer applicant, ACC and a claimant (e.g. work injury) the review should generally be heard at the review venue closest to where the cause of action arose.
5. Where the review involves an employer applicant, ACC and other employers (e.g. work-related gradual process decisions) the review should generally be heard at the review venue closest to where the cause of action arose.
6. Hearings should be conducted on "neutral ground". A hearing in an applicant's home or in a hospital may, on occasion, be necessary.

NB. With the availability of teleconference facilities, disagreements over venue have been lessened. You should be familiar with the Protocol regarding teleconferencing.

6.5 On the papers

Section 141 states a hearing must be held unless the parties entitled to be present agree not to have a hearing. A review without a hearing is known as a "decision on the papers." Under section 147 the review decision "on the papers" must be issued within 28 days of the date specified by all the parties or, where no date is specified, within 28 days of the day all parties agreed not to have a hearing. In practise the reviewer should set a timetable with the parties for filing of all evidence and submissions. The hearing will conclude on the date the last of the information is received by the reviewer (the date specified by all parties). The reviewer will then have 28 days to issue the decision.

A hearing on the papers is particularly appropriate where the issue can be resolved by legal argument only and the outcome does not hinge on evidence. When a decision is to be made on the papers, the reviewer must ensure submissions are given to all parties, and that deadlines are given for the receiving of submissions. As a general principle the applicant is entitled to have the last say.

If during the course of the hearing the reviewer determines that it is necessary to convene a hearing in person then the reviewer may arrange for that to occur. It may become obvious, for example, that evidence should be heard.

6.6 Notice of hearing

Section 141 (3) states:

> The reviewer must take all practical steps to ensure that notice of the time and place of the hearing is given-
> (a) to every person entitled to be present and heard at it; and
> (b) at least 7 days before the date of the hearing.

In practice this will be done by the reviewer during the case conference, or by an RC. However, it is important at the time a file for review is screened by the reviewer, to identify who is entitled to attend. This is particularly important in the case of gradual process and work injury claims, and to identify the health professional(s) in the case of medical error.

In addition to the statutory requirements, there are the requirements of the principles of natural justice, (discussed above ***3.3.2 Adequate notice*****)**.

Written notice of the date, time and venue is always given to the parties. The reviewer must check the accuracy of notice given if a party does not attend, particularly if the hearing goes ahead, or a review decision is made without that party's attendance at the review hearing.

6.7 Contact with parties

The reviewer should not speak to any party or any witness to a review prior to the hearing (unless all parties are present e.g. at a pre-hearing case conference). The RC usually deals with queries and other administrative details relating to the setting of hearings in consultation with the reviewer

Once the matter is fully heard and the hearing concluded the reviewer must not have contact with any party. No further evidence or submissions should be accepted, unless there are exceptional circumstances. If one of the parties' forwards further information to the reviewer after the hearing has been concluded, the reviewer needs to determine whether to accept that information and if they do, must give the other parties the opportunity to respond.

6.8 Adjournment

A reviewer may grant an adjournment at the request of any party. The decision as to whether an adjournment is granted rests with the reviewer. That decision should be based on the following principles:

- the reviewer's duty to act in a timely manner as required as required by section 143(d)
- consensus of the parties
- what natural justice requires

If the adjournment request is not by the applicant, and the applicant does not agree to it, a reviewer should be sure of the grounds for granting the adjournment so as to avoid any possible out of time issues.

A reviewer must, when granting an adjournment, adjourn the hearing to a new time and date (even if the date is 6 months ahead, for example). This enables the reviewer to monitor progress and provides a timetable for parties to work towards. There must be exceptional circumstances for this not to happen.

6.8.1 Refusal appealable

A reviewer may decline to grant an adjournment if he or she considers there are no reasonable grounds for the request. The reasons for that refusal should be fully recorded by the reviewer in the decision.

6.8.2 Adjournment part-heard

In spite of agreements reached at the pre-hearing case conference and advice given in the Review booklet, the parties at the review hearing may present evidence that was not disclosed prior to the hearing. The other party or parties must be given the opportunity to seek comment on this new evidence. Most frequently this is in the form of medical reports. Each party must then be given the opportunity to comment on the evidence by way of further evidence and submissions. In these circumstances the hearing is adjourned part heard, to complete the gathering of the evidence and submissions.

It is important that time frames for the filing of further evidence and submissions are discussed and agreed to at the review hearing.

If the parties so desire, the hearing may reconvene to hear the extra evidence and submissions. The review hearing will not be concluded in terms of section 144(1) until such time as the matter is fully heard.

6.9 Disclosure

It is ACC's responsibility to release all relevant information to all parties entitled to appear and be heard at the hearing. The reviewer must ensure that each party has adequate opportunity to be aware of and to comment on information which is available to the reviewer. It would be contrary to the principle of natural justice *audi alteram partem* (hear the other side) for a reviewer to act upon "secret" evidence.

A reviewer should not use acquired experience or expertise as a substitute for evidence. Matters which are not raised by the parties themselves at the hearing, but which the reviewer intends to rely on, should be raised by the reviewer during the hearing (or in the last resort, in subsequent correspondence or at a reconvened hearing). If they are not raised in any of these ways, they should not form a part of the reviewer's decision.

A reviewer has no power to compel the disclosure of documents.

6.9.1 Prior disclosure

It is up to ACC (or its agent) to ensure there is full disclosure of relevant evidence prior to the review hearing.

Prior disclosure enables the applicant/party and his or her representative to examine the evidence, seek additional or contrary evidence, and prepare submissions.

If advance disclosure is not made, it may be necessary to allow the applicant/party proper time at the hearing to examine the evidence and to prepare his or her comments. If the applicant/party wishes to have further time to consider the evidence it may be necessary to grant an adjournment of the hearing or to adjourn it part-heard.

6.9.2 Relevant evidence must be disclosed

All evidence that is relevant to the matter(s) in issue in the review must be disclosed to all parties. It is the responsibility of the reviewer to ensure that he or she does not consider undisclosed information.

Included amongst the documents that must be disclosed will be any relevant reports, memoranda, or file notes on the claimant's ACC file.

If documents are tendered to the reviewer at the hearing, copies should be made available to other parties immediately. If documents are tendered after the hearing, e.g., a medical report obtained after an adjournment, then the reviewer must ensure that all other parties have opportunity to comment (either orally or in writing). It may also be necessary to allow the party tendering the additional documents a right of reply. The applicant has the right to have the final say.

6.9.3 Official Information Act 1982

It should be remembered that the right of a person to documents under the Official Information Act is separate from the duty of a reviewer to disclose. There are many areas where the two coincide but some where they do not. The fact that a request under the Official Information Act has been actioned by ACC does not necessarily mean that a reviewer's duty to disclose has also been fulfilled. Conversely, disclosure at a review hearing may not necessarily be sufficient for the purposes of the Official Information Act.

6.9.4 Privacy Act 1993 and the Health Information Privacy Code 1994

The reviewer is not an "agency" for the purposes of the Privacy Act 1993. This is for two reasons. First, the Privacy Commissioner has determined that a reviewer seeking information on a matter in issue is (for the purposes of the Privacy Act) a tribunal acting in relation to its judicial functions. Such a tribunal is not an agency. Secondly, it is considered that a reviewer comes within the exception*, "(xii) A commission of inquiry or board of inquiry or court of inquiry or committee of inquiry appointed, pursuant to, and not by, any provision of an Act, to inquire into a specific matter."* Therefore, the reviewer is not bound by the Privacy Act and the Health Information Privacy Code, and does not have to comply with the restrictions the Act and the Code puts on the collection, use, and disclosure of personal information.

The reviewer must however, observe the principles of natural justice and does not have license to ride roughshod over personal information rights. Even though the reviewer is not an "agency" for the purposes of the Privacy Act and Health Information Privacy Code, care must be taken to observe the restrictive principles described in ***Chapter 3. Restrictive principles,*** above. For instance, a reviewer should not attempt to obtain information about a party from a health professional, without the consent of all parties.

7. Conducting the hearing

Section 140 empowers the reviewer to conduct a hearing as he or she "thinks fit". That authority is subject to the following:

- the Act and any regulations made under the Act
- the requirement to act independently when conducting a review (section 138).
- the principles of natural justice
- the duty to adopt an investigative approach with a view to conducting the review in an informal, timely and practical manner

In cases involving more than one party it will be a particular challenge for a reviewer to provide an independent and impartial forum. It is essential that the independence of the reviewer is apparent to all parties present, i.e., the issue is not merely whether justice has been done but whether it has been seen to be done.

The reviewer should distance her or himself from the parties at the hearing to maintain the appearance of independence.

7.1 Style of hearing

The reviewer should set the tone for the hearing. This should generally be informal but where there are multiple parties or if it appears that the parties are quarrelsome, the reviewer may find it helpful to adopt a more detached and formal style. It is crucial that the reviewer maintain control of the hearing. A formal manner may provide the best means of achieving this. For instance, the reviewer may address the parties and their representatives by their titles and surnames.

It is not appropriate for a reviewer to adopt the role of a negotiator or mediator at the hearing. The function of the reviewer is to make a decision on the evidence, not to encourage or persuade the parties to reach a compromise or settlement. If the reviewer considers that there is scope for negotiation, he/she should encourage the parties to attempt mediation or some other form of alternative dispute resolution before a hearing is set (ideally, at a pre-hearing case conference). If the parties fail to reach a settlement, the review will proceed.

7.2 Interactive approach

The preferred style of hearing is an interactive one. Ideally, the reviewer should:

- question the parties at appropriate times to elicit relevant information and isolate the issues in dispute
- seek clarification of vague evidence or submissions
- paraphrase evidence or submissions to confirm that they have been understood
- inform the parties of his/her thinking on issues in dispute, and seek comment.

The reviewer should take care to treat the parties even-handedly and be careful not to appear to be an advocate for one or other of them.

7.3 News media

Unlike appeals to the District Court review hearings are private. Neither the public nor the news media are entitled to be present.

7.4 Observers

Observers may attend a hearing only with the informed consent of all parties; that is, all the parties should be advised who the observers are and the purpose of their presence. They should take no part in the proceedings and should not be recorded as being present for the purposes of the record.

7.5 Witnesses

Parties can bring witnesses to support their case. Those witnesses must be available for cross-examination by the other parties. There is no power for the reviewer to compel a witness or any other person to attend the hearing.

7.6 Order of proceedings

A suggested order of proceedings for a multi-party hearing (attended, for instance, by the applicant, the employer, and the Corporation) is contained in **Appendix 6**. Where there are fewer parties, e.g., two-party involving the applicant and the Corporation, or where the applicant alone is present, the procedure can be simplified.

7.7 Establish what is at issue

At the pre-hearing case conference or at commencement of the hearing, the reviewer should establish what is at issue in the review, to avoid wasting time on matters that are not in dispute or which are beyond his or her jurisdiction.

It is not just the broad issue that must be identified. The reviewer must also identify particular details that have come to be in issue during the development of the application.

Reference to the particular decision under review is helpful. At issue must be a primary decision issued by ACC (or its agent). See the discussion above on the definition of "decision", ***5.3 Decision must be Reviewable***

7.8 Administration of oath or affirmation

Oral evidence may be presented to the reviewer under oath or affirmation. The authority for the reviewer to administer the oath or affirmation derives from section 14 of the Oaths and Declarations Act 1957: -

> All courts and all persons acting judicially are hereby empowered to administer an oath to all such witnesses as are lawfully called or voluntarily come before them respectively or to take the affirmation of any such witness instead of an oath.

The phrase "person acting judicially" is defined in section 2 of that Act to mean

> Any person having in New Zealand by law or by consent of parties authority to hear, receive and examine evidence.

For forms of oath and affirmation see **Appendix 1.**

It is important to note that there is nothing breaching the Act or natural justice if the witness is not sworn. Commonsense is needed. For example, it would clearly be inappropriate to swear or affirm a young child or a person with a severe head injury.

If a party (other than ACC) conducts his or her own case and wishes to make an opening statement, he or she should be sworn or make an affirmation before commencing. Frequently an applicant includes factual information in an opening statement which should be sworn or affirmed.

The Corporation's representative should be asked to take the oath or affirmation only if evidence (as distinct from submissions) is being given.

Solicitors, advocates, and representatives do not need to take the oath or affirm as they are not giving direct evidence of any facts.

7.9 Evidence

Section 141(4) provides that evidence may be admitted at the hearing whether or not the evidence would be admissible in a court of law. Sworn oral evidence can be admitted so long as it is relevant. The reviewer may also receive relevant written evidence, which may be in the form of an affidavit or declaration or be unsworn. Unsworn evidence may be in the form of a letter or note which is informally authenticated in some respects, for example signed and dated by the writer, but not necessarily witnessed.

The collection of high quality evidence can be regarded as the reviewer's first responsibility.

Evidence taken before the reviewer is often critical to the outcome of the matter, even if it is taken to appeal. When the matter comes before the District Court it is by way of re-hearing, but it is most unusual for the whole of the evidence to be taken again.

7.9.1 Grasp of the evidence

The investigation of the claim is evolutionary. The reviewer should have a grasp of the evidence up to the time of the hearing. Questions put during the hearing should demonstrate that grasp. It may well be that hard questions will have to be asked of the witnesses. Much depends on the credibility of the applicant's and ACC's witnesses.

The reviewer may ask questions of the parties or witnesses at any time. The reviewer may prefer, where the applicant or other party is represented, to indicate a line of questioning and ask the representative to pose appropriate questions.

7.9.2 Interpreter

Evidence may be given through an interpreter, such as a language or sign language interpreter, where the reviewer considers that necessary. The form of interpreter's oath or affirmation is in **Appendix 1**. This must be administered if evidence is to be given through an interpreter: Lim (342/2013)

If the presence of an interpreter is to be arranged by FairWay this should be discussed with the Manager - Operations.

If the interpreter is brought by the party concerned, it is good practice to inquire about any interest the interpreter might have in the proceedings and his or her relationship to any of the parties, and to give other parties the opportunity to comment. An applicant's interpreter's costs up to the prescribed maximum may be allowed under Schedule 1 of the Review Costs and Appeals Regulations 2002: Other expenses reasonably incurred by the applicant or another person. (see **Appendix 5**)

7.9.3 Use of extra-record facts and official notice

In general where extra-record evidence can be readily identified it should be disclosed by ACC, e.g., ACC policy, where relevant.

The reviewer may take official notice of all things and documents of which Courts are required to take judicial notice. Judicial notice is the notice taken by the Court itself of matters that are so notorious, obvious, or clearly established, that external evidence of their existence is not necessary. As an example, notice may be taken of the fact that there are 12 months in a year.

7.10 Cross-examination

The reviewer controls the procedure of the hearing, subject to the Act, any regulations, and the principles of natural justice. This control extends to the conduct of cross-examination.

Aggressive cross-examination is unlikely to be appropriate at a review hearing. However, it should be remembered that the evidence that is likely to carry the greatest weight is sworn oral evidence tested by cross-examination. It would be a rare circumstance for the reviewer to disallow cross-examination.

The object of cross-examination is two-fold: first, to elicit information concerning facts in issue or relevant to the issue; and second, to cast doubt upon the accuracy of the evidence-in-chief given against the party seeking to cross-examine. In the review process, these objectives assume greater significance, because of the absence of effective discovery provisions, i.e., neither ACC nor the reviewer has the power to seek out undisclosed documents held by the claimant (there is no power to compel disclosure).

The reviewer has the right to ask questions at any time. Indeed, the reviewer has an obligation to elicit relevant information by putting questions. This is especially true where a party is unrepresented. However, the reviewer should avoid adversarial or aggressive cross-examination, since it would have the appearance of bias or prejudice.

The parties to the review are often unrepresented or represented by people without legal qualifications or experience in cross-examination. In these circumstances the reviewer will need to maintain strict control over any cross-examination. The reviewer may need to advise the party that the question is not relevant to the issue or that a response would be of little evidential value. The reviewer may also need to curb overly enthusiastic or aggressive questioning. Reviewers may also need to ensure that advocates are not giving evidence or leading their witnesses.

Similar concerns may arise when an unrepresented party is under questioning from legal counsel for one of the other parties. It is appropriate for the reviewer to exercise strict control when necessary.

7.11 Further inquiries

Under the 1972 and 1982 Acts, a reviewer had some of the powers of a Commission of Inquiry. Under section 154(6) of the 1972 Act and section 102(6) of the 1982 Act a reviewer could make such inquiries as he or she thought fit. Those statutory powers were not carried forward into the subsequent Acts. The review process was more adversarial under the 1992 and 1998 Acts and it was rarely be appropriate for the reviewer to make further inquiries of his or her own motion.

Under the 2001 Act, however, the reviewer has an investigative role and may initiate inquiry him or herself. This is usually in the form of questioning the parties at the review. (See the more detailed discussion of the role of the reviewer in ***Chapter 2, Role of the Reviewer under the 2001 Act*** above.)

7.12 Disruption of the hearing

It is open to the reviewer to advise a person who is unreasonably disrupting the process of the hearing that the person is behaving inappropriately. The reviewer may warn the person that the reviewer intends to invite the person to leave the room in the event that the behaviour of the person does not improve immediately.

If a person at a review hearing becomes personally insulting or abusive toward a reviewer, it is suggested that:

- first, the reviewer may adjourn for say 15 minutes to enable the person to regain composure. There should be warning that unless composure is regained by resumption, the reviewer is minded to conclude the hearing, and determine the review on the material that is then before him or her; and
- if the person remains unreasonable after the break the reviewer may conclude the hearing and determine the review on the material presently before him or her. If the person in contempt is a representative, the party may continue on his or her own behalf (although no pressure whatsoever should be placed on the party). It is not appropriate that written submissions be accepted merely because the person is a representative who cannot conduct him or herself appropriately.

7.13 Evaluation of evidence

7.13.1 Responsibility for evaluation

A reviewer has the responsibility of evaluating the evidence once it has all been heard.

7.13.2 Acceptance of evidence

Evidence may be admitted at the hearing whether or not it would be admissible in a Court of law. However, admitted evidence, if not legal evidence should be such that it can be safely relied upon. It must have some probative force and be authentic or able to be authenticated.

Keith[4] comments:

> This rule is, however, subject to a qualification (which may indeed be inherent); the evidence although admissible may not be as valuable as legal evidence; this is particularly true of extra-judicial statements which are not subject to testing by cross-examination.

And *Keith* adds, what is the crux of this matter:

> This qualification may, of course, mean that debates about admissibility and the related technical rules remain but instead of being raised at the outset they are instead invoked on the level of value.

Thus, while a reviewer will face few problems about whether to receive evidence, there will be major difficulties in the evaluation of that evidence, and in deciding what weight is to be given to each piece of evidence.

7.13.3 Weight of evidence

The weight to be given to each piece of evidence will be affected by the form in which it is presented. Generally, sworn oral evidence, tested by cross-examination, can be regarded as the best evidence, but there is no rule of law or practice to that effect. Unsworn evidence in the form of medical reports may be considered with sworn medical evidence at review hearings.

7.13.4 Credibility of evidence

While a party or a witness is giving evidence, the reviewer will be assessing his or her credibility. Most commonly, evidence given on oath at the hearing will be accepted at face value. If there are discrepancies between other records and the evidence given at the hearing, then the reviewer should explore the matter immediately by way of questions. The reviewer should record his or her evaluation of the evidence in the decision.

7.13.5 Arbiter of fact

The reviewer is an arbiter of fact, judge of the weight of evidence, and assessor of credibility of witnesses. His or her findings will be reconsidered at any appeal. The reviewer must give reasons for weighing the evidence in the way that he or she did, and the reasons for accepting

evidence as being credible or not credible. If this is done properly, then the District Court will have few grounds to interfere with the reviewer's findings of fact.

It is up to the reviewer to decide what weight is given to any evidence. For example, reviewers may hear evidence taken by Coroners. The reviewer will evaluate that evidence for him or herself - the Coroner's finding is not binding on a reviewer (as noted in *Estate of Black v ACC* (130/2000)).

If challenged at appeal, a reviewer's findings of fact will be given "due weight", i.e.. deference will be given to any advantage the reviewer may have had when seeing and hearing witnesses.

7.13.6 Contradiction

If there is direct contradiction between two pieces of evidence on a relevant matter, the reviewer will need to record the divergent pieces of evidence in the decision, and describe why one is preferred to the other. In doing so, the reviewer may refer to the form in which the pieces of evidence were presented, e.g. on oath at the hearing when the witness was subject to cross-examination; medical report or hearsay evidence. The reviewer should take opportunity at the hearing to explore the contradiction with the party at the hearing.

7.13.7 Matters to beware of

There are particular matters for a reviewer to be wary of:

- human memory can be deceived
- circumstantial evidence, or evidence of situations, can be misleading
- expert witnesses (for instance medical practitioners) can become advocates for the person or organisation instructing them
- evidence acquired through hearsay, and
- the distinction between opinion and fact

7.14 Onus and standard of proof

The party bringing the review (usually the claimant) has the obligation to establish his or her claim. Adequate opportunity should be given to the parties to present the evidence they consider relevant. Considering all the evidence, whatever its source, the reviewer must apply the civil standard of proof, i.e. on the balance of probabilities.

The onus of proof is on the applicant to persuade the reviewer of the merits of her or his case. The standard of proof is on the balance of probabilities; that is, evidence must give rise to a reasonable and definite inference, it must do more than give rise to conflicting interests of probability so that the choice between them is a mere matter of conjecture. (Luxton v Vines [1952] 85 CLR 352/358).

However, the reviewer should endeavour to first solve the issue without recourse to the onus of proof, unless that is really necessary. It should only be in comparatively few cases that the onus of proof is decisive of the outcome. The High Court said, in Jackson v ACC (AP 404-96-01, 14 February 2002):

> …With respect I do not see the issue of which party carries the onus, in the context of entitlements under the Accident Insurance Act as being anything other than an arid and sterile exercise. In general terms under Part 1 of the statute, if an accident, as defined, causes personal injury as defined (s 29) then there is cover. The causal nexus between accident and injury must be established as a factual matter and on the balance of probabilities. If the available information (or evidence) establishes that nexus on the balance of probabilities then an applicant's entitlement to cover is beyond dispute. If the nexus cannot be established to that degree then there is no entitlement.
>
> "I see no material difference between this elementary focus on whether the information or evidence establishes the nexus on the balance of probabilities at either the first level, where claimants seek cover from the respondent, at the second review hearing stage, or on the third rung of an appeal to the District Court. It is not the elaborate procedural game of who carries the onus which is determinative but rather whether the information and evidence justify a conclusion that a nexus has or has not, as the case may be, been established. Obviously a claimant will not gain cover if the information/evidence falls short of establishing a nexus on the balance of probabilities. This obvious proposition need not be obscured by recasting it as an onus.

This approach has been endorsed by several later Court decisions under the 2001 Act (see also Wakenshaw v ACC [2003] NZAR 590).

7.14.1 A Robust Inference of Causation (Ambros)

Where there is a conflict of medical opinion, the Court has to decide the factual question of injury by accident with the assistance of the medical opinion, but the Court of Appeal stated in ACC v Ambros [2008]1 NZLR 340 (CA):

> The different methodology used under the legal method means that a court's assessment of causation can differ from the expert opinion and courts can infer causation in circumstances where the experts cannot. This has allowed the court to draw robust inferences of causation in some cases of uncertainty.… However, a court may only draw a valid inference based on facts supported by the evidence and not on the basis of supposition or conjecture.

This case has been cited with approval by the District Court on numerous occasions (See Heteraka (17/2014); Fannin (28/2014); McManus (47/2014) by way of example.)

7.15 Record of proceedings

7.15.1 Legislative provisions

Under section 154 ACC must, on receiving a copy of the notice of appeal, provide to the Registrar a copy of any notes made by, or by direction of, the reviewer relating to the hearing of the review. Therefore if the reviewer has made notes relating to the hearing ACC is required to provide them for the purpose of an appeal.

ACC is also required to provide the record of the review hearing which must be taken under section 143 of the Act. ACC is required to keep the record of the hearing for at least two years. In practice that obligation has been delegated to FairWay as part of our service agreement.

7.15.2 Practices

It is good practice for the reviewer to make hand-written notes during the course of the hearing. Those notes are to be given to the RC with the completed decision and file. These notes can then be edited, typed, and certified, if the recording fails or if for any reason there is no transcript from the digital recording.

Fairway Policy states the hearing is recorded to comply with the reviewer's statutory duty to record the evidence, to assist with the reviewer's decision making, for quality control purposes and in the event of an investigation. FairWay will store the recording electronically and securely. The entire hearing (not just the evidence) will be recorded.

7.15.3 Use of digital audio recorders

Digital audio recorders and tapes are provided by FairWay. The reviewer should seek assistance if instruction in their use is required.

Special care must be taken to ensure that the whole of the proceedings is recorded. If the proceedings are not recorded and evidence has been given at the hearing, the District Court may direct a rehearing of the review.

7.16 Failure to appear at a hearing

Where any party fails to attend a hearing without reasonable excuse the matter may be determined in the absence of that party (section 145 (5)). If a party indicates that he or she does not propose to attend the hearing, then the reviewer may take this as an invitation to proceed to decision in the party's absence.

Before issuing a decision where one party has failed to attend, the reviewer should check that:

- the date of hearing had been agreed with the party and that at least seven days' prior notice was given to the applicant or the party concerned
- the notice was in appropriate form, and
- it had been posted to the last known correct address

A representative, e.g. the applicant's solicitor, has a responsibility to notify the party of the hearing. So, where a party is represented the notice of hearing need only be sent to the representative. In practice, we also send a courtesy copy to the client

If the notice requirements of the Act have been met, the reviewer is entitled to make a decision on the basis of the evidence before him or her. Section 145(5) states the reviewer may make a decision even though a person entitled to be present and heard did not attend unless, before the reviewer makes the decision, the person gives a reasonable excuse for not attending and the reviewer considers the decision should not be made until the person has been heard.

7.17 Option for Maori applicants

FairWay provides options for hearings for Maori applicants. These arrangements may include:

- conducting the hearing on a marae
- conducting the hearing in Te Reo
- conducting the hearing with some degree of Maori protocol

Arrangements have been made in each region for the assistance of local Pae Arahi. Applicants are invited to indicate their interest in these arrangements on their review application. Reviewers should discuss any arrangements with the Service Delivery Manager.

7.18 Option for Pacific Peoples applicants

Similar arrangements have been made for applicants from the Pacific Peoples. The arrangements may include:

- family and elder support
- the hearing to be conducted in the relevant Pacific language
- the hearing to be held at an appropriate community venue

In additional FairWay has a Pacific Peoples reviewer who may be appointed to particular reviews. Again applicants may indicate their preference on the review form.

7.19 Attendance by telephone

One or more of the parties may wish to attend the hearing by telephone. As the conduct of the hearing is a matter for the reviewer the decision as to whether teleconferencing is appropriate rests with the reviewer.

FairWay has developed a protocol for attendance by telephone by ACC which includes the following steps:

- ACC must make the request to attend by telephone no later than 10 working days before the hearing.
- if the reviewer has no preliminary objections, the request should be referred to the other parties for comment.
- the reviewer will then consider the parties' comments and decide whether it is appropriate for the hearing to be conducted fully or partly by telephone and advise the parties.
- if the reviewer agrees that ACC may attend by telephone, ACC must provide its written submissions to the reviewer and the other parties no later than 3 working days prior to the day of the hearing.

Similar steps are appropriate where one of the other parties requests to attend by telephone.

When considering whether to grant the request the reviewer may wish to consider the following:

- teleconferencing may not be appropriate when evidence is to be given by telephone. This is particularly the case where there are issues of credibility.
- do any of the other parties object to attendance by teleconference? Are those objections reasonable?
- is the matter otherwise suitable for teleconference? This is a matter for the judgement of the reviewer.

8. Making the decision

8.1 Correctness and relevancy

The first requirement of the reviewer's decision is that the correct law is applied, taking into account all relevant evidence. The reviewer must make a decision which gives the evidence the weight that it deserves. A "correct decision" is one that is fair after application of the correct law on all the facts. If it is not correct, it is liable to be overturned on appeal.

The reviewer must take account of relevant considerations and not take account of irrelevant considerations.

Only about 10% of review decisions go to appeal. This is not a measure of correctness as parties frequently appeal “correct” decisions and might not appeal “incorrect” decisions. Peer reviews, annual quality reviews, analysis of Court decisions and complaints, coaching and mentoring are some of the quality control systems.

8.2 Revision

Under sections 65 and 390, ACC has authority to revise its decisions. ACC’s authority may be exercised after a review has commenced. If the hearing has been concluded, the reviewer is obliged to make a decision.

If ACC revises its decision and the parties are satisfied (as evidenced by the applicant's signed withdrawal), then this will be the end of the application for review. It might be appropriate in some cases for the reviewer to record the terms of the revised decision in a review decision.

If any party is not wholly satisfied with the revised decision, the original application for review should proceed, so long as no party is prejudiced. In these circumstances, the review decision would record the terms of the revision, the matters still in issue, and the reviewer's decision on those remaining issues.

8.3 Administrative back-up

Reviewer’s may dictate decisions (transcribed by an outside provide) or type their own decisions. The responsibility for checking the accuracy of all decisions lies with the reviewer.

8.4 Jurisdiction

The reviewer must confine his or her comments in the decision to those matters that are before him or her for decision. If it appears to the reviewer that the applicant seeks a different type of compensation or other assistance, the review decision must nonetheless be confined to the issue under review. There is no power to substitute one request for review for another.

Where the reviewer quashes a decision he or she may refer the matter back to the ACC with directions, in accordance with section 145(4).

8.5 Recording the facts

A reviewer should record findings of fact and evaluation of the evidence in the decision. Generally it is preferable that the relevant facts be recited in the decision rather than reference being made to written evidence.

On the other hand, full quotation of long documents such as medical reports should be avoided. Where possible, relevant passages should be selected.

8.6 Evaluating the facts

See above **7.13 Evaluation of evidence**.

8.7 Competing medical reports

The reviewer will frequently be called upon to choose between two or more competing medical reports. In so doing it is proper to record which was adopted or preferred and which was rejected and the reasons why. The reviewer should be careful not to unnecessarily criticise the rejected report or the doctor making it, particularly when the doctor is not present at the hearing and therefore has no opportunity to give evidence or answer the criticism.

When weighing competing reports the reviewer may consider, among other things:

- The relative qualifications and experience of the medical practitioners
- whether the medical practitioner is a specialist in a relevant area of medicine
- the relevance of the area of speciality in relation to the medical issue
- whether an examination was carried out
- the practitioner's familiarity with the applicant's condition
- who obtained the report
- the questions that were put to the practitioner
- the information available to the reporting practitioner (did he/she have all the correct facts and access to all other relevant medical opinion?)
- whether the practitioner has assumed the role of an advocate

8.8 Unfavourable comment

Criticism of persons who are not present at the hearing should not be expressed. It would not be good practice to make unfavourable remarks about a person who does not have opportunity to comment. For these reasons avoid unfavourable comments about people who are not at the hearing or who have not had opportunity to comment.

8.9 Application of ACC policy

8.9.1 What is ACC policy?

In order to achieve consistency in decision-making in respect of claims and in respect of premiums, ACC from time to time declares policy. This is not only inevitable, but is also

desirable, so that claimants are treated uniformly, and so that claimants and their advisers know in advance how particular classes of claims are likely to be treated.

A declaration of policy may take the form of an interpretation of discretion vested in ACC by the legislation, or it may resolve doubts about the interpretation of legislative words or phrases which have a number of meanings, or it may fill an apparent gap in the legislation.

ACC policy differs from ACC practices and administrative procedures. Policy is fixed by authority of the Board, either directly or by delegation, while practices are not.

8.9.2 Reviewer not bound by ACC policy

A reviewer is not bound by ACC policy or procedure. Section 145 specifically requires the reviewer to put aside the policy and procedures followed by ACC and decide the matter only on the basis of its substantive merits. This means the decision must be made based only on the relevant legislation.

It is not objectionable for a reviewer to have a crystallised point of view about issues of law. However, he or she must never appear to have judged the facts or merits of a particular case prior to the completion of the hearing. The distinction that must be drawn is that between administrative expertise and prejudgment.

8.9.3 Reviewer bound by the law

The law which binds a reviewer is:

- New Zealand's statutes (especially the Accident Insurance legislation and the Acts Interpretation Act 1999)
- regulations (especially those made under the 2001 Act), and
- any judgments which assist in interpretation or exercise of discretion under the legislation

Any decisions of the District Court, High Court, or Court of Appeal on accident compensation matters have a high precedent value and are binding on reviewers.

The doctrine of precedent or *stare decisis* is expressed in Nikorima [1983] NZAR 636 in this way:-

> …the Act ... provides its own review and appeal procedures. I believe these are intended, inter alia, to maintain that general degree of conformity in the assessment of compensation for similar consequences to similar victims, which is desirable in any just system of compensation.

The general rule is that a reviewer is bound by decisions of the District Court, the High Court, and the Court of Appeal. This general rule ensures consistency in decision-making.

The doctrine of precedent does not require a decision of the District Court or a higher Court to be followed if it is irrelevant to the facts currently being considered, i.e. if the current case is distinguished from the precedent on the facts. The doctrine does not require the application of a rule, if the purported rule was not an essential step in the Court's reasoning. That is, the

essential findings of the Court on the law of a case must be followed but not mere observations by the Judges which are not binding and give guidance only.

Where a reviewer is required to make a decision by applying law that is capable of two or more interpretations, or by exercising discretion, a reviewer can:

- proceed to make a decision, adopting the interpretation, or exercising the discretion in the manner he or she thinks appropriate
- discuss the problem with colleagues (but if that discussion leads him or her to an approach different from that adopted at the hearing, the parties should be invited to comment)
- ask the parties to provide submissions and counter-submissions, with the reviewer subsequently reaching his or her decision

However, it remains the reviewer's role to interpret and apply the law and that function cannot be delegated.

8.9.4 Precedent decision being appealed

A decision being appealed remains binding precedent. There may be occasions when a reviewer is faced with making a decision on a point of law which is the subject of appeal. It may be appropriate, if the parties request it, to adjourn the review pending the outcome of the appeal.

8.10 Citing authority

It is desirable to cite the statutory authority and relevant judicial decisions. Conventional methods of citation should be used.

8.11 Reasons

8.11.1 The statute

Under section 144(2) reviewers must state the reasons for the decision in the notice of decision.

8.11.2 General statements of the need to give reasons

Natural justice requires that the parties be advised of the reasons for the reviewer's decision. The District Court, on appeal from a review decision, is entitled to know how the decision was arrived at. It is necessary for the reviewer to give reasons in the decision:

- because the parties are entitled to know how and why the reviewer reached the decision
- to comply with the principles of natural justice
- because there is less risk of the decision being overturned at appeal if cogent reasons are given, and
- because the Act requires it

8.11.3 The connecting factor

Reasons contained in the decision are the logical connecting factor between the evidence, the relevant law and the conclusion. The reasons are the synthesis of the evidence and the law. The reasons make sense of what has gone before.

Reasons should be expressed in logical form with major and minor premises and a logical conclusion. The major premise is the body of relevant fact as found. The minor premise is the body of relevant law. By applying the latter to the former, a logical conclusion is reached.

Reviewers should express their reasons in that form, so that the parties can check the decision for accuracy. If reasons are not expressed, then the reviewer will not have fulfilled the statutory duty, and any higher Court will have little assistance.

8.12 Written decision

A written decision must be issued within 28 days after the conclusion of the hearing and state the reasons for the decision being made (section 144).

As a general rule, the review decision should stand on its own. It should be a complete document in its own right able to be read and understood by someone with no background knowledge of the case. However, this may be unnecessary where for example, one of the parties concedes during the hearing, or ACC revokes the primary decision during the course of the hearing.

Although there is no provision for oral decisions, nothing in the legislation prevents the reviewer from delivering an oral decision at the conclusion of the hearing, and later confirming the decision in writing. This practice is encouraged in appropriate circumstances.

8.13 Format of decision

The standard template for review decisions is available to all reviewers in their Templates folder on the shared drive or through IRIS. Reviewers are required to use template. The template can be amended to suit the decision. However, all decisions must be properly titled with the correct review number and the correct names of the parties and of those present. The decision must be dated and signed by the reviewer. The review decision should clearly state the Act under which the issue is being considered. A reviewer should construct her or his decision using the following headings under the general heading “Decision”:

- Issue
- Outcome
- Reasons
- Costs awarded

The “Reasons” sub-heading should be further sub-divided with headlines as appropriate.

FairWay has identified the following criteria against which review decisions will be measured as part of its quality assurance programme:

- clear delineation of the issues
- clear recording of relevant facts
- accurate identification of the relevant law and policy
- adherence to jurisdiction
- clear, logical reasoning in applying the law/policy to the facts, leading to a clear outcome
- avoidance of errors
- compliance with the template
- simple, clear, unambiguous language, free of grammatical and spelling errors

8.14 The vital words

Section 145(3) provides that, the reviewer must make a decision which:

- dismisses the application, or
- modifies ACC's decision, or
- quashes ACC's decision

When quashing ACC's decision the reviewer must either substitute the reviewer's decision for that of ACC or to require ACC to make the decision again in accordance with the reviewer's directions.

There is also the inherent jurisdiction to adjourn the hearing (see **6.8 Adjournment** above).

It is therefore suggested that every review decision should contain one of the three vital words, **dismiss, modify** or **quash**.

8.15 Precedent value of decision

Reviewers' decisions can be of value in showing how existing interpretations of the law and policy are applicable to different fact situations but they are not binding in a legal sense.

8.16 Failure to issue decision within 28 days

The reviewer has a statutory obligation to issue a decision within 28 days of the review hearing. The Act does not specify any consequences for failure to comply with this obligation. FairWay does however, impose a performance requirement of strict compliance.

8.17 Notice of decision

As a matter of practice the RC undertakes the mailing of a decision on behalf of the reviewer. A copy of the decision will be sent to the applicant, ACC and all persons who were entitled to be present and heard at the review hearing (section 144 (3)). The original decision itself will be retained on the claim or other relevant ACC file.

9. Costs

9.1. Generally

Section 148 provides:

Costs on review

(1) The Corporation is responsible for meeting all the costs incurred by a reviewer in conducting a review.

(2) Whether or not there is a hearing, the reviewer—

(a) must award the applicant costs and expenses, if the reviewer makes a review decision fully or partly in favour of the applicant:

(b) may award the applicant costs and expenses, if the reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review:

(c) may award any other person costs and expenses, if the reviewer makes a review decision in favour of the person.

(3) If a review application is made and the Corporation revises its decision fully or partly in favour of the applicant for review before a review is heard, whether before or after a reviewer is appointed and whether or not a review hearing has been scheduled, the Corporation must award costs and expenses on the same basis as a reviewer would under subsection (2)(a).

(4) The award of costs and expenses under this section must be in accordance with regulations made for the purpose.

(5) If any costs and expenses are awarded against the Corporation under this section, the Corporation is liable to pay them within 28 days of the decision to award them.

The relevant regulations are set out in **Appendix 5**. Note the maximum amounts payable.

If an unsuccessful applicant seeks costs, the reviewer may only award costs when the reviewer considers the applicant acted reasonably in applying for the review. In the District Court decision of Alliance Group Ltd (59/00) Judge Middleton suggested that it would be prudent for a reviewer, when awarding costs to an unsuccessful applicant, to state that the applicant acted reasonably in making the application for review.

In all cases no costs may be awarded unless the party seeking costs has incurred costs. The decision of Lucas (266/00) confirms this requirement. For example, if a representative does not charge the client for the service, then no representative's costs may be awarded.

9.2. Whether unsuccessful applicant acted reasonably

When an applicant who was unsuccessful seeks costs, the reviewer will consider:

- whether the reasons for ACC's primary decision were fully and adequately explained beforehand
- whether the applicant presented anything new at the hearing
- whether the applicant's conduct has caused costs to be unreasonably incurred
- whether the statute is clearly against the applicant, and
- whether there are clear rulings of the District Court, High Court or Court of Appeal against the applicant's submissions

9.3. Whether costs reasonably incurred

In the District Court decisions of Buttle (189/00) and Fitzsimmons (197/00) it was held that the reviewer has no discretion to pick and choose which costs to award. If the applicant is successful, or if the unsuccessful applicant acted reasonably in applying for the review, the reviewer must award all the costs and expenses as provided in the Schedule to the Regulations, to which an applicant may be entitled. This means that there is no discretion for the reviewer to determine whether the costs were reasonably incurred.

In the District Court cases referred to above the reviewer declined to award costs incurred by the applicants in respect of specialist reports. The District Court did not traverse in any detail the words contained in Schedule 1 of the Review Costs and Appeals Regulations 1999 (repeated in the 2002 Regulations) where it is states that costs may be awarded for all *"relevant and reasonably necessary"* specialists' reports. Nevertheless the decisions of Buttle and Fitzsimmons are binding.

9.4 Costs to non-applicant parties

The reviewer may award costs to persons other than the applicant.

Section 148(2) provides that the reviewer may award costs to "any other person" if the reviewer makes a decision in favour of that person. The "other persons" are likely to be parties to the review. For example, costs may be awarded to the claimant where the employer made the application for review, if the reviewer makes a decision in favour of the claimant.

10. Vacating decisions and issuing supplementary decisions

10.1 No power to vacate review decision

The reviewer has no power to revoke a review decision once it has been issued. Thus, even though the reviewer might acknowledge that a review decision was erroneous or without jurisdiction, it must stand until it is overturned or set aside either on appeal to the District Court, or by application for a declaratory judgement or application for review to the High Court.

10.2 Supplementary decisions

However, on purely ancillary matters which are not contested by the parties (such as the correction of typographical or mathematical errors, or an overlooked award of costs), it is appropriate for the reviewer to issue a supplementary decision. This is a practical and inexpensive method of overcoming a procedural difficulty. However, supplementary decisions should never purport to alter in any way the merits of the original review decision.

10.3 Section 133 - Variation of decisions

As already noted at 10.1, where the reviewer has issued the decision there is no power to revoke that decision, even though the reviewer might acknowledge that a review decision was erroneous or without jurisdiction. This is also the case where fresh information comes to hand after a reviewer has made the decision.

Where fresh information is made available, it would be appropriate for the fresh information to be referred back to ACC. The Corporation may give consideration to a revision of the original decision in terms of s.134. This section allows the parties to agree to a variation to the review decision provided that the variation is favourable to the applicant.

11. Indemnity of Reviewers

FairWay has legal advice that a hearing before a reviewer is an occasion of absolute privilege, meaning that no civil action may be brought against the reviewer.

11.1 Defamation

FairWay's legal advice is that the nature of the duties of a reviewer are such that they have "a duty to act judicially" as that phrase is used in section 14(1) of the Defamation Act 1994. Accordingly:

- anything said, written or done in the course of the hearing itself
- all evidence given during the course of the hearing
- the content of the reviewer's decision itself, and
- everything that is done from the inception of the process which leads to the hearing (including all documents and briefs created for the purpose of the hearing or said during interviews of potential witnesses)

is protected by absolute privilege; that is, no civil action can lie even where a statement is made with malice.

If there is any doubt as to the doctrine of absolute privilege (and the view is that there is not) the doctrine of qualified privilege would apply; that is, no civil action can lie except where there is malice.

12. Appeals

Decisions of a reviewer are subject to a right of appeal to the District Court under section 149. There is a further right of appeal on questions of law to the High Court and Court of Appeal. (Note that there is no right of appeal of decisions under the ACC Code of Claimants' Rights – section 149(3)).

Any party may exercise the right of appeal against a reviewer's decision to the District Court.

Under section 151, a notice of appeal must be filed in the District Court within 28 days after notification of the decision, although the Court may extend the time.

12.1 Duties on appeal

Under section 154 of the Act ACC must on receipt of the notice of appeal make available:

- a copy of the decision appealed against, and
- the record of the review hearing, and
- all documents, items, and exhibits relating to the review that are in the custody of ACC or the reviewer, and
- a copy of any notes made by, or by direction of, the reviewer relating to the hearing of the review

In practice FairWay retains the record of the hearing and the reviewer's notes and provides them to ACC on request.

13. Duties on termination of appointment

Reviewers are expected to order their affairs so that minimal disruption is caused if their appointment terminates in unforeseen circumstances. Keeping clear file notes of the current state of each of the cases in which they are involved is one example. Issuing the decision promptly after the conclusion of the hearing is another.

On occasions, despite the reviewer's best endeavours, there will be matters outstanding at the termination of appointment. In such circumstances, it may be that the reviewer will voluntarily undertake the outstanding work.

In the case of incapacitating illness or death, it is likely that the Service Delivery Manager will ask remaining reviewers to assist in the following steps:

- establish the stage that has been reached in respect of each application for review
- read the relevant file and any other relevant records, and listen to the whole of the audio recording in respect of each review that has been heard but not decided
- identify the actions that are now required in order to resolve each review. That may require a rehearing, or agreement by the parties for the new reviewer to issue a decision based on the audio recording of the hearing and the documentary evidence, or by obtaining agreement to the new reviewer issuing a decision after receiving further submissions from all parties.

It must be remembered that a reviewer's power should be exercised by the reviewer who heard the case and by no one else. No part of a reviewer's power or duty can be delegated (apart from some procedural matters). When the reviewer who heard a review remains reasonably available, then he or she should issue the review decision. Only when the reviewer is not reasonably available (eg in the case of retirement, illness or death) should the matter be resolved by way of rehearing before another reviewer.

Appendix 1

Form of Oath

Do you swear by Almighty God that the evidence you are about to give at the hearing of this Application shall be the truth, the whole truth and nothing but the truth?

(To which the witness will say "I do")

Form of Affirmation

Do you solemnly, sincerely and truly declare and affirm that the evidence you are about to give at the hearing of this Application shall be the truth, the whole truth and nothing but the truth?

(To which the witness will say "I do")

Scots form of oath (a witness is entitled to have the Scots form of oath administered)

Witness, hold up your hand, and repeat after me,- "I swear by Almighty God, as I shall answer to God at the great day of judgment, that I will speak the truth, the whole truth, and nothing but the truth."

Interpreter's oath or affirmation

Will you truly and faithfully interpret the documents, and the oath to be administered to the [applicant, witness *or as* the *case may be],* and the evidence about to be given, and all other matters and things touching the present application for review which you shall be required to interpret from the [Maori *or as the case* may *be]* language into English and the English language into the [Maori *or as the case may be)* language according to the best of your skill and ability: [*if oath,* And do you so swear by Almighty God? *or if affirmation,* And you do so solemnly, sincerely and truly declare and affirm?)

(To which the interpreter will say "I do")

Appendix 2

Sections 101 and 102 of the 1982 Act

101. Application for review - (1) Any person who is dissatisfied with a decision of the Corporation, or of any member, officer, employee, or agent thereof, or of any committee appointed by the Corporation, not being a decision under subsection (4) or subsection (5) of section 27 of this Act, may apply to the Corporation for a review of that decision where it affects-

(a) Whether or not a person has suffered personal injury by accident or died as a result of personal injury by accident so suffered; or
(b) The liability of the applicant to pay any levy under this Act or the amount of any such levy for which he is liable; or
(c) The granting or payment of rehabilitation assistance under this Act to any person or of compensation under this Act to any person or deceased person:

Provided that there shall be no right to apply for a review pursuant to this section in respect of the determination under and for the purposes of the Income Tax Act 1976 of the assessable income of any person:

Provided also that the obligation to pay and the right to receive and recover any levy shall not be suspended by any application pursuant to this section.

(2) An application pursuant to this section shall be made in writing within one month after the date on which notice in writing has been given of the decision in respect of which review is sought or within such extended time as the Corporation may allow on application made either before or after the expiration of that month, and shall state shortly the grounds on which the application is made.

(3) Any application pursuant to this section shall be made by delivering or posting it to the Corporation or any authorised agent.

(4) where a remedy by way of review or appeal is provided under this Part of this Act, no other remedy shall be available.

102. Hearings of applications for review - (l) The Corporation may from time to time appoint under section 13 of this Act suitable persons to be Reviewers for the purpose of hearing applications for review that are made to the Corporation under section 101 of the Act.

(2) On receipt of any such application, the Corporation shall endeavour to resolve the matter at issue promptly by administrative means, and, if it is unable to resolve the matter, shall refer it to a Reviewer for a hearing.

(3) Every such hearing shall be held as expeditiously as possible, and subsections (2) and (3) of section 8 of this Act shall apply to every such hearing.

(4) Every such hearing shall be held at a time and place that are-

(a) Agreed to by the applicant and the Reviewer; or

(b) Specified in a notice given by or on behalf of the Reviewer not less than 7 clear days before the day appointed for the hearing.

(5) The applicant, either personally or by a representative, shall be entitled to be present and be heard at the hearing and to present any relevant. evidence in support of the application.

(6) The Reviewer may receive such other relevant evidence and make such other enquiries as he thinks fit, and may for that purpose appoint a medical committee. All evidence and information so received or ascertained (otherwise than at the hearing) shall be disclosed to every party to the review.

(7) The Reviewer may receive any relevant evidence under subsection (5) or subsection (6) of this section, whether or not the evidence would be admissible in a Court of law.

(8) In reaching his decision the Reviewer shall act independently

(9) On the completion by a Reviewer of any hearing-

(a) He may, if he so authorised, give a decision on the application; or

(b) He shall, if he is not so authorised or for any reason declines to give a decision, forward to the Corporation a written report of his findings together with his recommendation, and shall at the same time send a copy thereof to the applicant.

(10) On the receipt by the Corporation of the report of a Reviewer in respect of an application, the Corporation shall consider the application and give a decision thereon.

(11) Notice of the decision shall be sent to the applicant and the Corporation by the Reviewer and the Corporation shall give effect to the decision.

(12) Every notice under subsection (11) of this section shall contain information as to the applicant's right of appeal under this Act

(13) where a decision against which the applicant may appeal is given under the foregoing provisions of this section, the reasons therefor shall be stated and shall, if so requested by the applicant, be delivered in writing.

(14) Subject to this section and to any rules of procedure laid down by the Corporation, the procedure at a hearing shall be as the Reviewer determines.

(15) Subject to any regulations made under this Act, where on an application for review,-

(a) The Corporation resolves the matter at issue in favour of the applicant pursuant to subsection (2) of this section; or

(b) A hearing of the application is held and a decision is given in favour of the applicant or the Reviewer considers that the applicant has acted reasonably in applying for a review-The Corporation or the Reviewer, as the case may be, may allow the applicant reasonable costs.

Appendix 3

Sections 89, 89A, 90 and 163 of the 1992 Act

89. Application for review - (1) Any claimant (or the representative of any deceased claimant) who is dissatisfied with a decision of the Corporation or exempt employer m respect of his or her claim or entitlement under this Act may apply to the Corporation or exempt employer, as the case may be, for a review of that decision.

(2) Any employer who is dissatisfied with a decision of the Corporation under section 65 6r section 107 of this Act may apply to the Corporation for a review of that decision.

(3) Any registered health professional who is dissatisfied with a decision of the Corporation under subsection (6) or subsection (7) of section 5 of this Act in respect of that registered health professional may apply to the Corporation for a review of that decision.

(4) Any person who is dissatisfied with any decision of the Corporation relating to any premium payable or claimed to be payable by that person under this Act may apply to the Corporation for a review of that decision; but no such right shall exist under this Act in respect of the determination for the purpose of the Income Tax Act 1995 of the assessable income of any person.

S89(4) - Amended by 1994 No.164, Schedule 20. (From 1 April 1995)

(4A) Nothing in subsection (4) of this section shall confer any right to apply for a review of any decision relating to the entitlement under this Act of any person to any payment or rehabilitation or the making of any payment directly or indirectly under this Act in respect of that person.

s89(4A) - Added by 1993 No.55, 933. (From 1 July 1993)

(5) An application pursuant to this section

(a) May be made in the prescribed form within 3 months alter the date on which the claimant is entitled to treat the claim in respect of which the review is sought as having been rejected under section 66 of this Act; and

(c) In any other case, an application in the prescribed form may be made within 3 months after the date on which notice in writing has been given of the decision in respect of which the review is sought -

and each such application shall state briefly the grounds on which the application is made.

(6) Any application under this section shall be made by giving it to the Corporation or exempt employer in the same manner as notices may be delivered under section 162 of this Act.

(6A) Nothing in this section shall entitle any person to apply for a review of the terms of any agreement made under section 27 of this Act.

s89(6A) - Added by 1993 No.25, s14. (From 11 May 1993)

(7) Where a remedy by way of review or appeal is provided under this Part of this Act, no other remedy shall be available whether in any Court, Employment Tribunal, Disputes Tribunal, or otherwise.

89A. Decision of regional health authorities - Any decision by a purchaser affecting the entitlement of any claimant to the provision of treatment, service, physical rehabilitation, or related transport under this Act is hereby deemed for the purposes of section 79(1) and this Part of this Act to be a decision of the Corporation.

s89A - Added by 1993 No 25, s15. (From 11 May 1993)

90. Review - (1) The Corp$_o$ration or exempt employer, as the case may be, shall appoint a person to hear each review; and that person shall act independently in hearing the review.

(2) No person shall hear any review if that person was involved in the decision being reviewed.

(3) Except as provided in this Part of this Act, decisions of persons appointed under subsection (1) of this section shall be binding on all parties to the review.

(4) On any review, the person appointed under subsection (1) of this section shall conduct a hearing at which the person shall

(a) Allow the applicant and the Corporation or exempt employer to be present and be heard, either personally or by a representative; and

(b) Allow the applicant and the Corporation or the exempt employer to present any relevant evidence; and

(c) Where the applicant is a registered health professional who applied for the review under section 89 (3) of this Act, allow the claimant to be present and be heard either personally or by a representative; and

(d) Where the review is conducted by a person appointed by the Corporation in respect of a work injury or alleged work injury, allow the employer of the applicant to be present and be heard, either personally or by a representative and to present any relevant evidence.

(5) Every such hearing shall be held at a time and place that are-

(a) Agreed to by the applicant, the Corporation or exempt employer, and the person hearing the review; or

(b) Specified in a notice given by or on behalf of the person hearing the review not less than 7 clear days before the day appointed for the hearing-

and where any party does not attend, without reasonable excuse, the matter may be determined in the absence of that party.

(6) Evidence may be admitted at the hearing held under subsection (4) of this section whether or not the evidence would be admissible in a Court of law and, subject to this Act and any regulations made under this Act, the person appointed under subsection (1) of this section shall conduct the hearing in accordance with the principles of natural justice and otherwise in such manner as he or she thinks fit.

(7) Notice of the decision on the application shall be given, in writing, to any person entitled to appeal against the decision, the applicant, and the Corporation or exempt employer, as the case may be, within 28 days after the conclusion of the hearing and the notice shall state the reasons for the decision made.

(8) Where the person appointed under subsection (1) of this section has not, within 28 days of the conclusion of the hearing, advised the applicant of his or her decision confirming, modifying, or revolting the original decision, the applicant shall be entitled to treat the original decision as having been confirmed, and may appeal against that decision under section 91 of this Act.

(9) Where the hearing of a review has not been commenced within 3 months after the lodging of the application for review, and the delay is not caused or contributed to by the applicant, the application shall be deemed to have been determined in favour of the applicant.

(10) Where, on an application for review,-

(a) The matter is resolved in favour of the applicant (whether or not there is a hearing); or

(b) The person hearing the review considers that the applicant acted reasonably in applying for the review,-

the person hearing the review shall award the applicant reasonable costs and expenses m accordance with a scale prescribed by regulations made under this Act.

163. Production of documents---The production of any document under the seal of the Corporation or under the hand of any officer of the Corporation authorised in that behalf, or, where the Commissioner of Inland Revenue is acting as agent for the Corporation, under the hand of the Commissioner of Inland Revenue or of any officer of the Inland Revenue Department authorised by him or her in that behalf, purporting to be a copy of or extract from any statement relating to earnings or from any assessment or amended assessment of premiums under this Act, shall in all courts and all proceedings (including reviews conducted under this Act) be sufficient evidence of the original, and the production of the original shall not be necessary; and all courts and persons conducting reviews under this Act shall in all proceedings take judicial notice of the seal of the Corporation and of the signature of any officer of the Corporation duly authorised in that behalf and of the signature of the Commissioner of Inland Revenue and of any officer of the Inland Revenue Department authorised by him or her in that behalf, either to the original or to any such copy or extract.

Appendix 4

Sections 135 – 151 of the 1998 Act

135. Who may apply for review—
(1) The insured may apply to the insurer for a review of any of its decisions on the claim.
(1A) If the Regulator considers that an insurer has not taken adequate action in relation to a claim by an insured, the Regulator may, on behalf of the insured or on his or her own initiative, apply to the insurer for a review of any of its decisions on the claim, but may not take any further part in the review.

Sub-section 1A added by 2000/6 effective 1 April 2000

(2) An employer may apply to the insurer for a review of its decision that an insured's injury—

(a) Is a work-related personal injury suffered during employment with that employer; or

(b) Is attributable to that employer.

(3) An employer may not apply to the insurer for a review of a decision about the entitlements to be provided to an insured who has cover for a work-related personal injury.
(4) A registered health professional may apply to the insurer for a review of its decision that the registered health professional contributed to personal injury caused by medical error.
(5) A premium payer may apply to the manager for a review under section 310.
(6) An insurer may apply for a review of another insurer's decision, to that other insurer, if the decision is about—

(a) Whether an insurer is an insured's managing insurer:

(b) Whether an insurer is a contributing insurer:

(c) The amount a managing insurer is liable to reimburse a receiving insurer under section 104:

(d) The amount a contributing insurer is liable to contribute to the managing insurer under any of sections 108, 110, 111, or 113:

(e) The amount the manager is liable to contribute to an insurer under section 451.

136. How to apply for review—
(1) A review application is made by giving an application that complies with subsection (2) to the insurer.
(2) The application must—

(a) Be written:

(b) Be made on the form provided by the insurer for the purpose, if the insurer provides such a form:

(c) Identify the decision or decisions in respect of which it is made:

(d) State the grounds on which it is made:

(e) Be made within 3 months of—

(i) The date on which the insured has a decision under section 66; or

(ii) The date on which the insurer gives notice under section 72.

Cf. 1992, No. 13, s. 89 (5)

137. Insurer to acknowledge receipt of review application—
An insurer who receives a review application must send the applicant an acknowledgement—

(a) Indicating when the review application was made; and

(b) Containing an explanation of the effect of sections 149 and 150.

138. Insurer to engage and allocate reviewers—
(1) Every insurer must engage at least 1 person, and as many additional persons as it considers necessary, to be a reviewer under this Part.
(2) The insurer must—

(a) Arrange for the allocation of each review to a reviewer; and

(b) Arrange for the allocation of a new reviewer to a review that an existing reviewer is, for any reason, unable to finish.

Cf. 1992, No. 13, s. 90 (1), (2)

139. "Accepted interests"—
"Accepted interests" means—

(a) The interest that a reviewer has in an insurer because the insurer is responsible for paying the reviewer; and

(b) The interest that a reviewer has in an insurer because the insurer is responsible for meeting all the costs incurred by the reviewer in conducting a review.

140. Reviewer's duty to act independently—
(1) A reviewer must act independently when conducting a review.
(2) The fact that accepted interests exist does not mean that the reviewer is not independent of the insurer.

141. Reviewer must disclose interests and previous involvement—
(1) A person asked by an insurer to become a reviewer must disclose to the insurer every interest that the person has in the insurer, other than the accepted interests.
(2) A reviewer to whom an insurer proposes to allocate a review must disclose to the insurer any previous involvement that the reviewer has had in the claim other than as a reviewer.
Cf. 1992, No. 13, s. 90 (2), (6)

142. Insurer's duties to secure independence of reviewer—
(1) An insurer must not engage as a reviewer—

(a) A person employed or engaged by the insurer to make decisions on claims in a capacity other than that of reviewer; or

(b) A person who discloses to the insurer any interest in the insurer other than the accepted interests.

(2) An insurer must engage reviewers on contracts for services.
(3) An insurer must not include in the reviewer's contract any term or condition that could have the effect, directly or indirectly, of influencing the reviewer, when conducting a review, in favour of the insurer.
(4) An insurer must not allocate a claim to a reviewer who discloses to the insurer any previous involvement in the claim other than as a reviewer.

Cf. 1992, No. 13, s. 90 (2), (6)

143. Conduct of review: general principles—
The reviewer may conduct the review in any manner he or she thinks fit, but he or she must—

(a) Comply with section 140; and

(b) Comply with any other relevant provision of this Act and any regulations made under this Act; and

(c) Comply with the principles of natural justice; and

(d) Act in a timely manner.

144. Conduct of review: hearing to be held—
(1) In the course of conducting a review the reviewer must hold a hearing unless—

(a) The applicant withdraws the review application; or

(b) The applicant, the insurer, and all persons who would be entitled to be present and heard at the hearing agree not to have a hearing.

(2) The reviewer must hold the hearing at a time and place that are—

(a) Agreed to by the applicant, the insurer, and the reviewer; or

(b) Decided on by the reviewer, if those persons do not agree.

(3) The reviewer must take all practicable steps to ensure that notice of the time and place of the hearing is given—

(a) To every person entitled to be present and heard at it; and

(b) At least 7 days before the date of the hearing.

(4) The reviewer may admit any relevant evidence at the hearing from any person who is entitled to be present and be heard at it, whether or not the evidence would be admissible in a court.
Cf. 1992, No. 13, s. 90

145. Persons entitled to be present and heard at hearing—
The following persons are entitled to be present at the hearing, with a representative, if they wish, and to be heard at it, either personally or by a representative:

(a) On every review, the applicant and the insurer:

(b) If the applicant is a registered health professional, the insured:

(c) If the review relates to a decision to accept or decline cover for personal injury caused by medical error, any registered health professional whose action or inaction was the ground of the claim:

(d) If the review relates to a decision to accept or decline cover for a work-related personal injury,—

(i) The insured; and

(ii) The insured's employer; and

(iii) Any employer or insurer whose name the reviewer receives from the insured or from the insured's employer or from the insurer so that notice can be given under section 144 (3), if the name is that of any other employer of the insured, any former employer of the insured, or the insurer of any such employer; and

(iv) The manager.

Cf. 1992, No. 13, s. 90

146. Record of hearing—

(1) The reviewer must ensure that an accurate record of the evidence given at the hearing is taken and provided to the insurer.

(2) The insurer must keep the record for at least 2 years.

Cf. 1992, No. 13, s. 90

147. Review decisions: formalities—

(1) The reviewer must make a review decision within 28 days after—

(a) The day on which the hearing of the review finishes; or

(b) If there is no hearing,—

(i) The day that the applicant, the insurer, and all persons who would be entitled to be present and heard at the hearing specify for the purposes of this section in their agreement not to have a hearing; or

(ii) If those persons do not specify a day, the day on which those persons agree not to have a hearing.

(2) A review decision must—

(a) Be written; and

(b) Contain the reasons for the decision; and

(c) Contain information about the right of appeal.

(3) As soon as practicable after making a review decision under subsection (1), the reviewer must give a copy of the decision to—

(a) The applicant and the insurer; and

(b) Every other person who was entitled to be present and heard at the hearing and who was present at it.

(4) The reviewer must give a copy of the decision to a person who was entitled to be present and heard at the hearing, but who was not present at it, if that person asks the reviewer for a copy.

(5) An insurer whose decision is the subject of a review must supply a copy of the review decision to any person who asks for a copy, but must ensure that the copy supplied contains no information that may identify any individual. The insurer may charge a fee for supplying the copy, which must be no greater than the cost of preparing the copy for supply and supplying it.

148. Review decisions: substance—

(1) In making a decision on the review, the reviewer must—

(a) Put aside the insurer's decision and look at the matter afresh on the basis of the information provided at the review; and

(b) Put aside the policy and procedure followed by the insurer and decide the matter only on the basis of its substantive merits.

(2) The reviewer must—

(a) Dismiss the application; or

(b) Modify the insurer's decision; or

(c) Quash the insurer's decision.

(3) If the reviewer quashes the insurer's decision, the reviewer must—

(a) Substitute the reviewer's decision for that of the insurer; or

(b) Require the insurer to make the decision again in accordance with directions the reviewer gives.

(4) The reviewer may make a decision even though a person entitled to be present and heard at the hearing did not attend it unless, before the reviewer makes the decision,—

(a) The person gives the reviewer a reasonable excuse for the person's non-attendance; and

(b) The reviewer considers that a decision should not be made until the person has been heard.

Cf. 1992, No. 13, s. 90 (5)

149. Deemed review decisions—

(1) The reviewer is deemed to have made a decision on the review in favour of the applicant if—

(a) The date for the hearing has not been set within 3 months after the review application is made to the insurer; and

(b) The applicant did not cause, or contribute to, the delay.

(2) The date of the deemed decision is 3 months after the review application is made.
Cf. 1992, No. 13, s. 90 (8), (9)

150. Effect of review decisions—

(1) A review decision is binding on—

(a) The applicant and the insurer; and

(b) Any person who has a responsibility under this Act that is invoked in the decision,—

but this subsection is subject to subsections (2) and (3).
(2) An insurer is not liable under this Act to provide entitlements other than statutory entitlements as a result of a deemed review decision under section 149.
(3) An insured who is not an applicant cannot lose his or her cover as the result of a deemed review decision under section 149, unless he or she caused or contributed to the delay.
Cf. 1992, No. 13, s. 90 (3)

151. Costs on review—

(1) The insurer that allocates a reviewer is responsible for meeting all the costs incurred by the reviewer in conducting a review.
(2) Whether or not there is a hearing, the reviewer—

(a) Must award the applicant costs and expenses, if the reviewer makes a review decision fully or partly in favour of the applicant:

(b) May award the applicant costs and expenses, if the reviewer does not make a review decision in favour of the applicant but considers that the applicant acted reasonably in applying for the review:

(c) May award any other person costs and expenses if the reviewer makes a review decision in favour of the person.

(3) The reviewer must award costs and expenses under this section in accordance with regulations made for the purpose.
(4) An insurer against which costs and expenses are awarded under this section must pay them within 28 days of the decision to award them.
Cf. 1992, No. 13, s. 90 (10)

Appendix 5

Review Costs and Appeals Regulations (2002-81)

Preamble
Silvia Cartwright, Governor-General
Order in Council
At Wellington this 25th day of March 2002

Present:
Her Excellency the Governor-General in Council

Pursuant to section 328 of the Accident Compensation Act 2001, Her Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, makes the following regulations.

Editor's Note: This regulation has been amended pursuant to the Health Practitioners Competence Assurance Act 2003, effective from 18 September 2004.

1 Title

These regulations are the Injury Prevention, Rehabilitation, and Compensation (Review Costs and Appeals) Regulations 2002.

2 Commencement

These regulations come into force on 1 April 2002.

3 Interpretation

In these regulations, unless the context otherwise requires,—

Act means the Accident Compensation Act 2001

appeal means an appeal under section 149 of the Act

registered specialist means a medical practitioner whose scope of practice includes at least 1 of the following branches of medicine:

(a) anaesthetics:
(b) cardiothoracic surgery:
(c) dermatology:
(d) diagnostic radiology:
(e) emergency medicine:
(f) general surgery:
(g) internal medicine:
(h) neurosurgery:
(i) obstetrics and gynaecology:
(j) occupational medicine:
(k) opthalmology:
(l) orthopaedic surgery:
(m) otolaryngology head and neck surgery:

(n) paediatric surgery:
(o) paediatrics:
(p) pathology:
(q) plastic and reconstructive surgery:
(r) psychological medicine or psychiatry:
(s) public health medicine:
(t) radiation oncology:
(u) rehabilitation medicine:
(v) sexual health medicine:
(w) urology:
(x) venereology

scope of practice has the same meaning as in section 5(1) of the Health Practitioners Competence Assurance Act 2003.

specified registry means the District Court at Wellington.

Scale of costs and expenses on review

4 Awards of costs and expenses on review

(1) A reviewer's award under section 148 of the Act to an applicant for review or another person must be—

(a) only for the costs and expenses of an item described in column 1 of Schedule 1; and

(b) the only award to the applicant for review or other person for those costs and expenses.

(2) The amount of the reviewer's award for costs and expenses of an item described in column 1 of Schedule 1 must—

(a) not exceed the amount specified (opposite the description) in column 2 of that schedule; and

(b) be calculated in accordance with the rate (if any) specified (opposite the description) in column 3 of that schedule.

(3) Amounts and rates specified in Schedule 1 are inclusive of goods and services tax (if any).

Rules for conduct of appeals

5 Part IX of District Courts Rules 1992 excluded

Part IX of the District Courts Rules 1992 (appeals to District Courts) does not apply to an appeal.

6 Notice of appeal

(1) A notice of appeal must—

(a) be in the form set out in Schedule 2; and

(b) have attached to it a copy of the decision appealed against.

(2) An appellant whose notice of appeal has been sent to or filed in the specified registry may, with the leave of the Court, amend the grounds of appeal stated in the notice.

7 Cross-appeals

(1) This regulation applies if a notice of appeal is sent to or filed in the specified registry and a person (other than the appellant) intends to submit at the hearing of the appeal that the decision appealed against should be modified or quashed.

(2) The person must, either within 30 working days after the day on which the notice of appeal was served or within any longer time allowed by the Court, send to or file in the specified registry a notice of cross-appeal in the form set out in Schedule 2.

(3) Part 5 of the Act and these regulations apply accordingly with any necessary modifications.

8 Period within which Corporation must make record available

The Corporation must provide items in accordance with section 154(1) of the Act within 20 working days after it receives the copy of the notice of appeal.

9 Judge may fix time and place for directions hearing in relation to appeal

If a notice of appeal is sent to or filed in the specified registry, a Judge may fix a time and place for a directions hearing in relation to the appeal proceedings.

10 Directions Related To Hearing Of Appeal

(1) At a directions hearing, a Judge may make any directions that appear best adapted to secure the just, expeditious, and economical disposal of the appeal proceedings.

(2) Without limiting the generality of subclause (1), the Judge may—

(a) consult the parties as to the necessity for or desirability of the appointment of medical or other assessors for the purposes of the appeal:

(b) obtain estimates of time for the duration of the hearing of the appeal:

(c) define the issues to be determined on the hearing of the appeal:

(d) make any orders that the Judge considers necessary or appropriate under sections 159 and 160 of the Act.

11 Registrar Must Give Notice Of Decision On Appeal

(1) On the determination of an appeal under section 161 of the Act, the Registrar of the Court must give a copy of the Court's decision to—

(a) the appellant; and

(b) each person who, in accordance with section 155(1) of the Act, was entitled to appear at the hearing of the appeal.

(2) After the time for lodging an appeal against the Court's decision has expired, the Registrar of the Court must give to the Corporation any documents forwarded to the Registrar under section 154(1) of the Act.

Revocation

12 Revocation

(1) The Accident Insurance (Review Costs and Appeals) Regulations 1999 (SR 1999/164) are revoked.

(2) Despite their revocation by subclause (1), the Accident Insurance (Review Costs and Appeals) Regulations 1999 continue to apply for the purposes of section 342(2)(b) of the Act.

Schedule 1 (r4) Scale of Costs and Expenses on Review

Section 148, Accident Compensation Act 2001

This is the latest Schedule 1, which was inserted by the Injury Prevention, Rehabilitation, and Compensation (Review Costs and Appeals) Amendment Regulations 2008, replacing the former Schedule 1 with effect from 17 October 2008.

Schedule 1 - Scale of costs and expenses on review

Item	Maximum award ($)	Rate ($)
Applicant's or another person's representation [1]—		
preparation and lodging of application for review under section 135	116.94	—
participation in a case conference on behalf of applicant or another person before review hearing	58.47	
other preparation of case for review	350.83	
appearance at hearing on behalf of applicant or another person -	350.83	
1st hour of hearing (or part thereof)	—	175.41
2nd hour of hearing	—	29.23 per 15 mins
later hours of hearing	—	14.62 per 15 mins
All relevant and reasonably necessary reports for applicant or another person by any registered specialists [2]	935.54	—
All relevant and reasonably necessary reports prepared for applicant or another person by a person with a recognised qualification to express a competent view on a matter in issue (for example, a person undertaking an occupational assessment, an architect, or a general medical practitioner)-		
if only 1 report is provided	467.77	
if 2 or more reports are provided	701.65	
at the following rates:		
1st hour (or part thereof) of preparation		175.41
2nd hour of preparation		43.85 per 15 mins
3rd hour of preparation		29.23 per 15 mins
Other expenses reasonably incurred by applicant or another person, or on behalf of an applicant or other person, associated with a hearing (for example, transport to a hearing or time off work for an applicant, another person representative, or a witness or support person such as whanau support; disbursements such as photocopying, childcare, or telephone charges)-	584.71	
for transport within this category	153.33	0.29 per kilometre for private transport

[1] Awards for items under this heading may be made in respect of 1 representative only.
[2] As defined by Regulation 3.

Appendix 6

Suggested order of proceedings - multi-party hearing attended by applicant, employer, and ACC

This suggested procedure will be simplified for two-party or single-party hearings**.**
Matters relating to recording the proceedings on digital audio recorders are in bold.

Before the hearing, check that the recorder is working. The unit should be properly placed so as to record all comments without having to be moved during the hearing.

Reviewer turns on recorder.

1. Reviewer introduces himself/herself.
2. Reviewer gives outline of procedure.

Reviewer reads into record: a) review number; b) full name of applicant; c) the date and venue of hearing; d) reviewer's name; e) names of other persons present and their status (e.g. other parties, representatives); f) and a brief identification of the issue under review.

3. Reviewer administers oath or affirmation.
4. Reviewer confirms disclosure of relevant documentary evidence.
5. Applicant (and applicant's witnesses) to give evidence. Questions may be asked when permitted by the reviewer.
6. ACC (and ACC's witnesses) to give evidence. Questions may be asked when permitted by the reviewer.
7. Employer (and employer's witnesses) to give evidence. Questions may be asked when permitted by the reviewer.
8. Right of reply and submissions by applicant.
9. Right of reply and submissions by ACC.
10. Right of reply and submissions by employer.
11. Final right of reply by applicant.
12. Reviewer assists the parties, if appropriate, and identifies shortcomings of the evidence.
13. Address question of costs.

If two people talk at once, or if a noise occurs which might drown out the speaker, repeat the question, evidence or submission so that a clear recording is obtained.

14. When the whole of the hearing is complete, the reviewer declares the hearing ended and only then switches the recorder off.
15. Reviewer should not discuss the matter further.

Appendix 7

Reviewer Induction Programme

ACC legislation – an overview
Dispute resolution provisions of the current ACC Act, independent role, natural justice, costs
Conducting hearings, informality, introduction, explanation, oaths/affirmations, strategies for controlling the hearing, dealing with difficult behaviours, alarms, etc
Investigative role
Review decision writing, contents, reasoning, quality and measurement of quality (including peer reviews)
Jurisdiction
Onus and standard of proof
Digital voice recorders and the Document Management System (DMS)
Case Management
Technical training:
- PICBA
- Medical Misadventure
- Gradual process, work-related injuries
- Sensitive claims
- Exclusion
- Revoking cover
- Suspension of entitlements – causation
- Suspension of entitlements – weighing competing medical evidence
- Suspension of entitlements – non-compliance
- Vocational independence
- Incapacity
- Social rehabilitation
- Vocational rehabilitation
- Weekly compensation
- Independence allowance/lump sums
- What constitutes a primary decision
- Deemed decisions
- Maori and Pacific People protocols
- Different insurers, administrators, Partnership Programme, etc
- Electronic resources, Indices, Informe, etc
Attend a driver-training course if the role requires much driving.