

Practice Directive 1-96-1 (A)

Reconsideration, Review, and Appeal

Effective March 3, 2003

DEFINITIONS

A “decision” is a determination that affects a person’s rights or imposes an obligation or liability under the *Workers Compensation Act* (the “Act”).

A “reconsideration” is a new decision by an operational division of the Board that confirms, varies, or cancels a previous decision of that operational division.¹

A “rectification” is an administrative action to correct a clerical error, an accidental slip (e.g. transposed keystrokes) or omission, or a clerical oversight.

A “review” is a readjudication by the Review Division to confirm, vary, or cancel a decision of an operational division of the Board or to refer a decision of an operational division back to that operational division.

An “appeal” is a readjudication by the Workers’ Compensation Appeal Tribunal of a Review Division decision.

DECISION

The *Canadian Dictionary*² defines a decision as:

1 the act of making up one’s mind; resolution. 2 the deciding or settling of a question, dispute, etc., by giving judgment to one side. 3 a judgment reached or given.

Only a decision may be reviewed or appealed. A response to a question about general legislative, policy, or administrative application or an action of an administrative nature is not usually a decision.

EXAMPLES:

An employer telephones to inquire about a payment due date. The Board officer determines the due date and advises the employer. The answer is one of general application and accordingly is not a decision.

An independent operator’s spouse requests a retroactive cancellation of the independent operator’s Personal Optional Protection due to a work-related injury to the independent

¹ Section 1 of the *Act*.

² *Canadian Dictionary*, Gage, 2003.

operator. As backdating is discretionary, a Board officer must make a decision whether to backdate the cancellation to the date business ceased.

The Assessment Department informs employers and independent operators of its decisions through various means, including: orally in person or by telephone, by system generated notices or letters (which often do not contain complete written reasons), and by letters containing detailed analysis and reasons. An oral decision must be reduced into writing³ and dated (whether or not a written decision is to be provided to the affected party).

Certain system generated notices and letters document and advise of one or more new Assessment Department decisions, and others are mere records or reminders of previous decisions.

EXAMPLES:

The Assessment Department's *Welcome Letter*⁴ documents and advises of several decisions, including a determination of a firm as an employer and the firm's classification unit.

A *Claims Cost Statement* does not document or advise of any decision. It is a mere record of costs paid on a claim; and, therefore, only apprises an employer of the consequences of such previous decisions as determination of worker status, acceptance of a claim, and wage rate.

A payroll assessment is not a decision: the Assessment Department is merely accepting (without determining accuracy or veracity) a payroll assessment for administrative application. However, either the Assessment or Revenue Services Department may, at any time and of its own volition, determine the accuracy or veracity of a payroll assessment; and on so doing makes a decision as to the amount of the assessable payroll.

An estimated payroll assessment is a decision.

RECONSIDERATION

Although the Review Division is primarily responsible for dispute resolution, the Board recognises the specialized knowledge, expertise, and experience possessed by Board officers and permits such officers to exercise reasoned discretion in effecting a reconsideration on their own initiative. However, such reconsideration of a decision is prohibited by statute⁵ if

- (a) more than 75 days have elapsed since that decision was made, or

³ In either Employer Account System notepad or PeopleSoft Accounts Receivable conversation pad.

⁴ Letter 18E08A or 18E08Q or their equivalents.

⁵ Section 96(5) of the *Act* prohibits reconsideration of a decision, which is a conclusion arrived at through discernment, resolution, or adjudication. There is nothing through any of a plain-reading, purposive, or contextual interpretation of the *Act* or through necessary implication to suggest that the denotation of "decision" has been expanded or varied to (a) include mere mechanical action or application of process or (b) exclude the exercise of reason from its meaning.

- (b) a review has been requested in respect of that decision (whether or not 75 days have elapsed).⁶

Thus, any reconsideration of a decision by a Board officer after the occurrence of either (a) or (b) above is beyond the powers⁷ of the Board; and any resulting decision is invalid in law. If either (a) or (b) above occurs while a reconsideration is in progress, the reconsideration process must cease; and the Board officer reconsidering the matter must inform the affected party that reconsideration cannot proceed, as either 75 days have passed or a review has been requested. If the 75th day falls on either a Sunday or a holiday, the time is extended to the next day that is not a Sunday or a holiday.⁸

Pursuant to policy, a Board officer has no authority to reconsider unless:

- (a) there is new evidence indicating that a prior decision or order was in error;
- (b) there has been a mistake of evidence, such as:
- material evidence was overlooked, or
 - facts were mistakenly taken as established which were not supported by any evidence or by any reasonable inference from the evidence;
- (c) there has been a policy error such as:
- applying an applicable policy incorrectly, or
 - not applying an applicable policy; or
- (d) there has been a clear error of law, such as a failure to follow the express terms of the *Act*;
- (e) one or more of the reasons for reducing or cancelling a penalty under Policy 1-47-1 are met.

Reconsideration by a Board officer without the presence of at least one of (a) to (e) above is a contravention of a published policy under the *Act*.

As the mere upholding or confirmation of a previous decision is reconsideration,⁹ care must be exercised in answering a question about or clarifying a previous decision, for the answer may

- (a) be beyond the power or authority of the Board,
- (b) begin anew the 90 day period¹⁰ in which a party has the right to request review of a Board decision.

⁶ There is no right of direct appeal to the Workers' Compensation Appeal Tribunal from a decision of the Assessment or Revenue Services Departments.

⁷ *Ultra vires* [Latin: beyond the powers]. Describing an act by a public authority that goes beyond the limits of the powers conferred on it by statute or otherwise.

⁸ *Interpretation Act*, R.S.B.C. 1996 chapter 238, section 25(2).

⁹ By definition, what is statute-barred is the exercise of reason to or the adjudication of the underlying premises of a previous decision (whether or not such results in a redetermination – a variation or cancellation of a previous decision).

When answering a question about or clarifying a previous decision, a Board officer must distinguish clearly between the acts of clarifying and reconsidering and must ensure that the response is unambiguous, unequivocal, and recorded.¹¹

EXAMPLE:

An employer telephones and asks if its non-reporting penalty can be waived.

- (a) The Board officer may reconsider and may uphold or waive the penalty. Here, the Board officer has reconsidered, and, therefore, must advise the employer that he or she has reconsidered and must inform the employer of its right to request a review by the Review Division.
- (b) The Board officer's response may be informational only: the decision is reserved to the Review Division of the Board, and the time-limit for requesting a review by the Review Division is 90 days from the date of decision. Here, the Board officer has neither reconsidered (has not exercised reason to or adjudicated on the underlying premises of a previous decision). The Board officer has simply provided information.

A reconsideration should be communicated in writing and must be supported by reasoned application of law, policy, or both to the underlying premises or conclusion of a previous decision. However, operational constraints may dictate that a reconsideration be communicated orally.

A Board officer can only reconsider a prior decision of his or her own, or of a peer or subordinate officer, if the prior decision is of a type that that Board officer is authorized to make. If a Board officer does exercise the limited discretion to reconsider, the Board officer must ensure that:

- reconsideration is not prohibited by statute,¹²
- there is authority under policy to reconsider,¹³
- the reconsideration is supported by reasoned application of law, policy, or both to the underlying premises or conclusion of a previous decision,
- the affected party understands that the Board officer has reconsidered, and
- the affected party is made aware of its right to request a review by the Review Division.

A decision to change an employer's classification does not constitute a reconsideration, for such a change is merely the exercise of the Board's normal classification authority under section 37(2) of the *Act*. Thus, the restrictions placed upon the Board's reconsideration authority under section 96(5) do not apply.¹⁴

¹⁰ Section 96.2(3) of the *Act*.

¹¹ Through correspondence, Employer Account System notepad, or Account Receivable conversation notes.

¹² Section 96(5) of the *Act*.

¹³ Policy 1-96-1(e).

¹⁴ Policy 1-37-3. The Board may reconsider even if 75 days have passed or the matter is before either the Review Division or Workers' Compensation Appeal Tribunal.

An employer or independent operator may defer seeking a review from the Review Division until it has received reasons for a decision¹⁵ and may request such reasons from the Assessment Department either informally or by way of a formal *Request for Written Reasons*.¹⁶ A Board officer responding to either a *Request for Written Reasons* or other written request for reasons must provide the requestor with written reasons for the decision within 30 days of the date of request and may reconsider the decision.¹⁷

RECTIFICATION

A rectification is neither a decision nor a reconsideration of a decision; and, therefore, a Board officer may rectify any of the following types of errors outside of the 75-day time limit imposed by section 96(5):

1. a clerical error - an error in a document arising in the mechanical process of writing or transcribing.
2. an accidental slip – an error that occurs when the decision as recorded does not reflect the intent of the decision-maker.
3. a clerical oversight – an error that arises as a result of an omission in the administrative process.

EXAMPLES:

An employer uses web-based registration to register as ABC Bananas Inc. Six months later the employer advises the Board that its correct name is ABC Bananas Ltd. and requests that its account information be amended to include its proper name. The correction of the employer's account information is an administrative action and is not a decision.

On 1 April 2003 (01/04/2003) an employer telephones to register with the Board. The Employer Service Representative effecting the registration inadvertently transposes the day and month such that the date of registration reads as 4 January 2003 (04/01/2003). While the date of registration is a decision, the inadvertent transposition of the day and month of the registration date is not a decision and therefore may be rectified.

As a general rule, rectification should not be undertaken while the employer has a matter before either the Review Division or the Workers' Compensation Appeal Tribunal.

REVIEW

Only an employer or independent operator may request review of an Assessment or Revenue Services Department decision to the Review Division,¹⁸ and any such request for a review must¹⁹ be filed within 90 days after the decision²⁰ was made.

¹⁵ For example, system generated notices or letters often do not contain complete written reasons.

¹⁶ Form 63M3. A *Request for Written Reasons* does not commence a review with the Review Division.

¹⁷ Reconsideration must not be statute-barred, and there must be authority under policy to reconsider.

¹⁸ Section 96.3(2) of the *Act*.

An employer or independent operator may request review of an assessment matter, a monetary penalty, or a payment under section 47(2) of the *Act*;²¹ however, only an employer may request review of a classification matter.²²

A request for review to the Review Division:

- statute-bars reconsideration,²³ and
- requires that as “soon as practicable after a request for a review is filed, the Board must provide the parties to the review with a copy of its records respecting the matter under review.”²⁴

The Review Division will disclose the Board’s records by providing the parties to the review with a copy of the Board’s records respecting the matter under review.

The Review Division may request a statement of written reasons regarding a decision. The Board officer directed to provide the statement of written reasons must, within 30 days of the date of request, provide Review Division with either the statement of written reasons or advice that no such statement will be forthcoming.

The Review Division is authorized to refer a decision under review back to the Assessment or Revenue Services Department.²⁵ Reevaluation of any such referral will be assigned to the Director or to the manager of the Board officer who made the initial decision. There is no statutory or policy time-limit on such reevaluation.

Subject to appeal, a decision of the Review Division is final and binding upon the Board.²⁶ However, as the Review Division may review its own decision within 23 days after the decision was made, if the Board officer²⁷ charged with implementing the review decision believes the decision contains a clerical error, oversight, or slip (e.g. a simple transposed keystroke) or is patently in error;²⁸ that Board officer may contact the Manager, Assessment Policy within three days of receiving the decision and with written substantiation request that the decision be referred back to Review Division for clarification.

If, however, no such request for clarification is made, the Assessment or Revenue Services Department must if practicable implement the Review Division’s decision within ten working days of its receipt and must, if so required, calculate and pay interest²⁹ on any refunded amount.

¹⁹ Section 96.2(4) of the *Act* - the chief review officer may extend the time to file a request for review even if the time to file has expired.

²⁰ Section 96.2(3) of the *Act*.

²¹ Section 96.2(1)(b) of the *Act*.

²² Sections 96.2(2) (c) and (d) of the *Act* limit review of classification matters to assignment or withdrawal of an employer to a classification unit.

²³ Section 96(5)(b) of the *Act*.

²⁴ Section 96.2(6) of the *Act*.

²⁵ Section 96.4(8)(b) of the *Act*.

²⁶ Section 96.4(9) of the *Act*.

²⁷ Or the Director Assessments, Director, Revenue Services, or a manager in either the Assessment or Revenue Services Departments.

²⁸ The error must be obvious and apparent on the face of the reasons. If it takes some significant searching or testing to find the defect, the decision is not patently unreasonable.

²⁹ Assessment Policy Manual 1-39-2(d).

APPEAL

There is no direct appeal of an Assessment or Revenue Services Department decision to the Workers' Compensation Appeal Tribunal ("WCAT").³⁰

The WCAT must notify the Board of an appeal filed³¹ as soon as practicable,³² and the Board "must provide the appeal tribunal [WCAT] and the parties to the appeal with a copy of its records respecting the matter under appeal."³³

The 180 day time-limit for rendering an appeal decision commences the day the WCAT receives a copy of the Board's records.³⁴ Therefore, and as a priority, a Board officer or employee assigned to provide the WCAT with a copy of the Board's records respecting the matter under appeal must within three business days of such assignment:

- locate the Review Division's paper file,
- search each of Employer Account System, PeopleSoft Accounts Receivable, Employer e-file, Premium Modification System, Consolidated Employer Account, and Workflow to determine³⁵ if any new document respecting the matter under appeal has been created since the date of the review decision,³⁶ and
- provide a copy of all of the above to each of the WCAT and the parties to the appeal.

The WCAT is empowered to:

- (a) request the Board to investigate further into a matter relating to a specific appeal and report in writing to the appeal tribunal,³⁷ and
- (b) consider there to be a matter that should have been determined but that was not determined by the Board and refer that matter back to the Board for determination.³⁸

In either case, there is no statutory or policy time-limit on such referrals.

The Assessment or Revenue Services Department must if practicable implement the Review Division's decision within ten working days of its receipt and must, if so required, calculate and pay interest³⁹ on any refunded amount.⁴⁰

³⁰ Section 239 of the *Act*.

³¹ Section 245(2) of the *Act*.

³² Section 7.10 of WCAT's Manual of Rules, Practices and Procedures.

³³ Section 245(3) of the *Act*.

³⁴ Section 253(4)(a) of the *Act*.

³⁵ A Board officer must use reasoned discretion in determining which records are probative to or may be probative to the issue under appeal.

³⁶ This is an ongoing obligation; therefore any relevant record that comes to light subsequently must be disclosed.

³⁷ Section 246(2)(d) of the *Act*.

³⁸ Section 246(3) of the *Act*.

³⁹ Assessment Policy Manual 1-39-2(d).

⁴⁰ Section 96.2 of the *Act*.

SETTING ASIDE

Pursuant to section 96(7) of the *Act*, the Board may at any time set aside a decision if that decision resulted from fraud or misrepresentation⁴¹ and may thereafter make a new decision. A Board officer may set aside a prior decision of his or her own, or of a peer or subordinate officer, if the prior decision is of a type that that Board officer is authorized to make. If either fraud or misrepresentation is established, the Board is neither

- (a) obliged to set aside a decision, nor
- (b) prohibited by statute from setting aside a decision even if more than 75 days have elapsed since that decision was made, or a review has been requested in respect of that decision, or an appeal has been filed in respect of that decision.

EXAMPLE:

The Assessment Department makes an estimated payroll assessment and six months later discovers that the employer's payroll is higher than estimated. A Board officer may:

- determine that the employer has misrepresented by silence,
- set aside the estimated payroll assessment, and
- make a new estimated payroll assessment.

⁴¹ The tests for fraud and misrepresentation are found in Practice Directive 1-96-2(A).