

PRACTICE DIRECTIVE #38B

REOPENINGS AND RECURRENCES – BILL 63

Effective Date: March 3, 2003

Amended: July 18, 2003

A. BACKGROUND

On June 30, 2002, the *Workers Compensation Act* (the “Act”), was amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. As a result, the Panel of Administrators approved amendments to the Board's policies. On October 16, 2002, further policy amendments were made to the transition rules outlined in Chapter 1 of the *Rehabilitation Services and Claims Manual* (“RSCM”), Vol. I and II.

On March 3, 2003, the *Act* was further amended by Bill 63, the *Workers Compensation Amendment Act (No.2), 2002*. As a result, further amendments were made to the RSCM. The effective date for Bill 63 and the resulting policy amendments is March 3, 2003.

Practice Directive #38B, *Recurrences* was effective October 16, 2002. It provided guidance for Board officers in determining when section 35.1(8) applied with respect to claims where the date of injury was prior to June 30, 2002, and there was a recurrence of disability on or after June 30, 2002.

Due to the provisions of Bill 63, the directive was amended on March 3, 2003. **On July 18, 2003 this directive was further amended to clarify the practice in situations where there is a request for wage loss benefits on a claim previously designated health care only (“HCO”).**

Practice Directive #38A, *Effective Dates and Transition Rules*, remains in effect, as there have been no substantive changes in the Bill 49 transition rules.

B. PURPOSE

The main purpose of this practice directive is to provide:

- (a) clarification of Board terminology because of the specific terminology used in Bill 63;
- (b) guidance as to when the reopening grounds must be met; and
- (c) guidance on the transitional provisions in section 35.1(8).

The terms “reopening”, “reconsideration” and “recurrence” now have distinct new legal meaning because of Bill 63 (see Practice Directives #57, *Reconsiderations* and #58, *Reopenings*). The terminology used in Practice Directives #38A, *Effective Dates and Transition Rules*, and #38B, *Recurrences*, which were effective October 16, 2002, was consistent with the law, policy, practice and administrative systems as they were prior to March 3, 2003.

REPLACED by BPIS#6 on March 31, 2005

For convenience, in this directive, the law and policy relating to average earnings as they read immediately before June 30, 2002 are called the “former provisions”. The law and policy relating to average earnings as they read on or after June 30, 2002 are called the “current provisions”.

C. EFFECTIVE DATE

This revised directive is effective March 3, 2003 and applies to all adjudication decisions made on or after March 3, 2003.¹

D. LAW

Section 35.1(8) of the *Act* provides that where a worker has a recurrence of a disability on or after June 30, 2002, that results from an injury that occurred before June 30, 2002, the Board must determine compensation based on current provisions.

Section 96(2) of the *Act* provides that: “...*any time, on its own initiative, or on application, the Board may reopen a matter that has previously been decided by the Board*” if:

1. *“there has been a significant change in a worker’s medical condition that the Board has previously decided was compensable; or*
2. *there has been a recurrence of the worker’s injury.”*

Sections 96(4) & (5) of the *Act* permits the Board “*on its own initiative*” to “*reconsider a decision*” if:

1. 75 days have not elapsed since the decision was made²; and
2. no review/appeal has been requested/filed.

E. POLICY

RSCM, Vol. II, Policy item #102.01, *Changing Previous Decisions – Reopenings*, provides guidance for determining whether one of the grounds for reopening in section 96(2) has been met.

RSCM, Vol. II, Policy #103.01, *Changing Previous Decisions – Reconsiderations*, elaborates on the meaning of the term “reconsideration”.

The term “recurrence of injury” in Chapter 14 of the RSCM incorporates the concept of “recurrence of disability”.

¹ See Practice Directive #57, *Bill 63, Effective Dates and Transition Rules for Reopenings, Reconsiderations, Reviews and Appeals*

² The 75-day period commences on the date the decision was made.

F. NEW TERMINOLOGY

Prior to Bill 63, the Board used the term “reopening” for various business activities relating to a worker’s claim. The administrative process of reinitiating compensation on the AWL can no longer be termed a “reopening” of the claim. The term “reopening” now only refers to two specific situations. As well, under Bill 63, the Board’s ability to amend a decision is dependent upon the new “reconsideration” provisions. To promote clarity and consistency, the correct use of various terms is clarified below:

The following are terms with distinct legal meanings:

- **Reopening**³ - refers to the grounds outlined in section 96(2) which are:
 1. *“a significant change in a worker’s medical condition that the Board has previously decided was compensable”*; or
 2. *“a recurrence of a worker’s injury.”*

Once either of the two grounds has been met, the matter may be reopened. Whether additional health care, wage loss or other benefits will be paid, will then have to be determined by the Board officer.

- **Reconsideration**⁴ - is defined in section 1 of the *Act* – i.e. *“to make a new decision in a matter previously decided”*.
- **Recurrence of Disability** - has three general meanings, it:
 - may refer to the application of the transition rule in section 35.1(8);
 - may refer to section 32 (which was not changed by Bills 49 or 63); or
 - is treated by policy as similar in concept to one of the grounds for reopening⁵.
- **Suspended** – means a temporary cessation in benefits under section 57. Paying further benefits does not require meeting the reconsideration or reopening grounds.

Although the above terms may have been used in the past for various other activities, they should now only be used within the context of their legal meanings.

The following are terms that should be used for business processes only:

- **Reactivation** - means the activity of making a claim active for the claim owner.
- **Reinitiation of Benefits** - means the paying of further temporary or permanent disability benefits using the AWL system or the permanent disability award system.

³ see Practice Directive #58, *Reopenings*

⁴ see Practice Directive #59, *Reconsiderations*

⁵ Section 96(2) uses the term “Recurrence of Injury”

G. ADJUDICATIVE GUIDELINES

1. Always use the legal terms in their legal context.
2. Always use the business process terms in their business process context.
3. The term “final” may continue to be used in the business process sense (e.g. deactivating a claim on E-File or AWL). However, it must not be used in the context of a legal decision to terminate benefits. In cases where benefits are terminated and the decision is communicated to a worker or employer, the decision should explicitly state that benefits are terminated, rather than stating that “the claim has been finalled”. For example: *“Benefits have been terminated on “x” date because (the worker) is fit to return to pre-injury duties”*. Where a legal decision is made to terminate benefits, further benefits can only be paid if the legislative provisions for a reopening, reconsideration or recurrence have been met.
4. There may be circumstances where there is still ongoing temporary disability or the need for health care. In those cases, the claim can be deactivated for administrative purposes, if the claim owner does not believe that there is any claims management action required in the near future (e.g. where a worker has returned to full-time but modified duties). In those situations, if further benefits need to be authorized, the reopening provisions might not necessarily apply.
5. In prior guidelines some distinction was drawn between whether surgery scheduled prior to a claim’s termination constituted a “recurrence of disability”, for section 35.1(8) purposes, once the worker actually underwent the surgery. In light of Bill 63, all such cases must now be treated as reopenings and therefore, if the date of injury was prior to June 30, 2002, section 35.1(8) will apply.
6. Where a claim is reopened under section 96(2), and the date of injury is prior to June 30, 2002, the transitional provisions in section 35.1(8) will apply.
7. Ongoing Temporary Disability – Selective Light Employment

Many employers are able to accommodate workers in full-time selective light/modified employment in spite of objective signs of disablement with respect to a worker’s pre-injury job. For administrative purposes, the Board officer may have deactivated the claim, as there was no outstanding case management action required in the near future. However, if a worker is no longer able to continue with the modified work (or it is no longer available), the reopening provisions would not apply. This is because there is ongoing temporary disablement from the pre-injury job.

8. Ongoing Temporary Disability – Graduated Return-to-Work

Board officers must exercise caution in making a decision to terminate benefits following, or prior to, the completion of a graduated return-to-work program. In particular, where the

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return-to-work date was based on an estimated date. Where a return-to-work is unsuccessful within a very short period of time, there is normally ongoing disability. Therefore, the reopening provisions of section 96(2) would generally not apply. Board officers must ensure to monitor the durability of a return-to-work prior to deactivating a claim.

9. If, following plateau, a worker is not able to continue with a vocational rehabilitation plan and the worker requests temporary wage loss benefits, the grounds for reopening must be met.
10. If a Board officer wishes to revisit a decision on a matter previously decided, the requirements for reconsideration must be met. This includes any errors. If an error is brought to an officer's attention after the legal period for reconsideration has elapsed, the party affected should be advised that he or she can apply to the Review Division for a review. (See Practice Directive #59, *Reconsiderations*)
11. Health Care Only Claim and Request for Further Health Care Benefits
 - If less than 12 weeks have elapsed between the last treatment and the date of the further treatment, in the absence of evidence to the contrary, the further medical treatment would be treated as ongoing disability.
 - If 12 or more weeks have elapsed between the last treatment and the date of the further treatment, in the absence of evidence to the contrary, the further medical treatment would be treated as a request for reopening. As such, the grounds for reopening must be met.
12. HCO Claims and Subsequent Request for Wage Loss Benefits

Where a time loss decision is later required on a HCO claim and no prior decision concerning time loss has been made, it is not a case of "*reopening a matter previously decided*", but rather, it requires that the Board officer make a *new* decision.