

PRACTICE DIRECTIVE #58

REOPENINGS

Effective Date: March 3, 2003

Amended: July 1, 2003

A. BACKGROUND

On March 3, 2003 the *Workers Compensation Act* (the "Act") was amended by Bill 63, the *Workers Compensation Amendment Act (No.2), 2002*.

Prior to March 3, 2003, the Board had broad discretion under s.96 (2) of the *Act* to "reopen, rehear and redetermine any matter," other than Appeal Division decisions, that had been previously dealt with by the Board. Bill 63 has substantially changed the Board's authority in this regard. As a result, the Panel of Administrators has approved amendments to the Board's policies concerning reopenings.

For convenience, in this Practice Directive:

- Legislation and policies as they read immediately before March 3, 2003, are called "the former provisions".
- Legislation and policies relating to reopenings, reconsiderations, reviews and appeals, as they read on or after March 3, 2003, are called the "current provisions".

This Practice Directive has been amended, effective July 1, 2003, to more clearly define where staff should direct clients who seek a review or appeal of a reopening decision. The sample letters for formal reopening requests have been modified and are available to staff on e-file.

B. EFFECTIVE DATE & TRANSITION RULES

The effective date of the current provisions is March 3, 2003. Therefore, the following transition rules apply to reopenings:

1. Reopenings that were completed (i.e., a decision letter was provided) before March 3, 2003 will have been dealt with under the former provisions.
2. Reopenings that are requested on or after March 3, 2003 will be dealt with under the current provisions.
3. Where a reopening was requested before March 3, 2003, but decided after March 3, 2003, the current provisions apply.

C. LAW & POLICY

Under the current s.96 (2), the Board, “on its own initiative, or on application,” may “reopen a matter that has previously been decided by the Board” if one of the following two grounds has been met. There has been either:

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

Under the current Section 96(3), if one of the above two grounds has been met, and the Board determines that the circumstances justify a change in a previous decision concerning compensation or rehabilitation, the Board may vary the previous decision.

The *Rehabilitation Services & Claims Manual* (“RSCM”) Vol. II, Policy item #102.01, *Changing Previous Decisions – Reopenings*, provides guidance for determining whether one of the above two grounds has been met.

As well, RSCM Vol. II, Policy item #102.01 states, in part, that:

“The reopening of a previous decision does not affect the application of the decision to the period prior to the significant change in the worker’s medical condition or the recurrence of the worker’s injury. ...A reopening involves the adjudication of new matters.”

Under the current section 96.2(2)(g), the decision on whether to reopen a matter on an application under section 96(2) is not reviewable by the Review Division. Under section 240(2), the decision is to be appealed directly to WCAT. Only the “threshold question” as to whether a matter should be reopened goes directly to WCAT. However, once a Board officer has decided that the reopening grounds have been met, disputes about resulting payable benefits are reviewable by the Review Division. [See also RSCM Vol. II, Policy item #102.01]

D. DEFINING TERMS

- A matter can be “reopened” if there has been a significant change in a worker’s compensable medical condition or there has been a recurrence of the worker’s injury.
- A “reopening” must be distinguished from a “reconsideration.” [See RSCM Vol. II, Policy item #103.01, *Changing Previous Decisions – Reconsiderations*, and Practice Directive #59, *Reconsiderations* for details regarding reconsiderations].

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- A “reopening” is not a “review.” Under the current provisions the term “review” refers to a Review Division review. [See RSCM Vol. II, Policy item #102.01, *Changing Previous Decisions – Reopenings*].
- The term “readjudication” is no longer used.

Note that Practice Directive #38B *Recurrences* has been substantially amended to reflect the current provisions, including the above newly defined terms.

E. ADJUDICATIVE GUIDELINES

As noted, under the current section 96(3) of the *Act*, if one of the two reopening grounds has been met, and the Board determines that the circumstances justify a change in a previous decision concerning compensation or rehabilitation, the Board may vary the previous decision. RSCM Vol. II, Policy item #102.01 clarifies that a reopening “*does not affect the application of the decision to the period prior to the significant change in the worker’s medical condition or the recurrence of the worker’s injury. ...A reopening involves the adjudication of new matters.*” This means that *additional* benefits can be paid or a *reduction* in benefits can be made from the date of the change in the worker’s medical condition or recurrence of injury (not the date of the decision).

A reopening cannot result in retroactive disentitlement. That is, there cannot be a change in benefits (i.e., reduction or addition) that were paid for the time period *prior* to the date of the change in the worker’s medical condition or recurrence of injury.

There can be no reopening of a “disallow” as it is not possible to “reopen” a claim that was never “opened” (i.e. accepted) in the first place.

A reopening can occur with respect to periods of temporary disability (provided there is significant change in the worker’s medical condition or a recurrence of the injury) regardless of whether a permanent disability award has been provided for the compensable injury or disease.

A claim can be reopened for any significant permanent changes in the nature or degree of a worker’s disability.

“A significant change in a worker’s medical condition that the Board has previously decided was compensable” under s.96 (2) means a change in the worker’s *physical or psychological* condition. It does *not* mean a change in the Board’s *knowledge* about the worker’s medical condition. “Significant change” has been further defined in RSCM Vol. II, Policy item #102.01 as follows:

“A significant change in a worker’s medical condition that the Board has previously decided was compensable’ means a change in the worker’s physical or psychological condition. It does not mean a change in the Board’s knowledge about the worker’s medical condition.

A 'significant change' would be a physical or psychological change that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits or services. In relation to permanent disability benefits, a 'significant change' would be a permanent change outside the range of fluctuation in condition that would normally be associated with the nature and degree of the worker's permanent disability."

Examples:

The following hypothetical scenarios illustrate factors that may be considered in determining whether a reopening is appropriate:

1. Non-compensable secondary condition

A worker's claim is accepted for a work-related low back strain, resulting in the payment of temporary wage loss benefits. The worker's physician advises that there were no significant findings on an x-ray report and that the strain has resolved. The worker returns to work. A year later, the worker contacts the Board, asking that her claim be reopened, as her low back has become sore again. A new medical report reveals that the worker has now developed osteoarthritis in her low back. Her pain is located at the same level as the back strain. The original claim was only accepted for a back strain. As that condition has resolved, there is no recurrence. Also, while there has been a significant change in the worker's medical circumstance, (i.e. she now has signs and symptoms of osteoarthritis) these circumstances were not previously decided as being compensable. Therefore, the Board officer should decline to reopen the matter, as there has been no "recurrence of the worker's injury" and no "significant change in [the] worker's medical circumstances that the Board has previously decided was compensable" (i.e. the grounds have not been met).

2. Reopening Request, New Medical Information Indicates Misdiagnosis

In rare cases, with the benefit of hindsight, it might appear that a worker's original condition was misdiagnosed and that the condition/symptoms were actually due to a non-compensable condition. In such cases, the grounds for reopening have not been met and the claim cannot be reopened. That is:

- there has been no recurrence; and
- there has been no significant change in the worker's medical condition (only a change in the Board's knowledge about the condition) and the newly discovered condition was not previously decided as being compensable.

As well, where more than 75 days have elapsed, the decision cannot be reconsidered. As the decision cannot be reconsidered nor the matter reopened, there would be no retroactive disentitlement – e.g., no overpayment declared respecting the benefits already awarded.

3. Recurrence of original injury

A worker's claim is accepted for a work-related compound fractured leg, resulting in payment of temporary wage loss benefits. The worker returns to work. A year later, he contacts the Board, asking that his claim be reopened, as his leg has become sore again. Medical evidence indicates that the original leg fracture has resulted in scarring which is now causing neurological symptoms. This would constitute a "recurrence of the worker's injury" and the claim *could* be reopened for further benefits.

Under the current provisions, when a Board officer reopens a matter, after determining that one of the grounds for reopening has been met, there is no automatic presumption that wage loss benefits will recommence. That is, a Board officer may now decide that no wage loss benefits are payable after reopening the matter.

For example, in scenario #3 above, the Board officer reopened the claim on the basis that the worker had experienced a recurrence of his leg injury. In such a case, it may become apparent upon investigation that, despite the fact that the grounds have been met and the *matter* has been reopened, no wage loss benefits are payable because the worker has not missed time at work.

Decision Letters on reopening a claim or initiating a new claim:

A reopening is different than a new injury entitling a worker to make a new claim.

The former RSCM Policy item #107.10, *Distinction Between Reopening and New Claim*, provided that:

"where a worker claims compensation in circumstances that could reasonably be alleged either as a recurrence of a previous injury or as a new claim, the matter should be treated as if the worker is claiming both in the alternative."

Thus, Board practice was to issue a decision letter containing two decisions - one on whether the circumstances constituted a reopening and one on whether the circumstances constituted a new claim. In the past, both decisions were appealable to the Review Board.

Under the current section 96.2(2)(g), the decision on whether to reopen a **matter on application** under section 96(2) is not reviewable by the Review Division. Under section 240(2), the decision on whether to reopen a matter "**on application**" is to be appealed directly to WCAT. In these cases, only the "threshold question" as to whether a matter should be reopened goes directly to WCAT.

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A reopening request will be considered “on application” only where a formal reopening request has been made by a worker or employer. That is, the application must include a request for a “reopening” and must refer to at least one of the criteria listed under s.96(2).

For example, a Board officer may decline a worker’s formal request to reopen a matter because she has found no significant change in the worker’s medical condition and no recurrence of the worker’s injury. The worker may then choose to appeal the Board officer’s decision to WCAT on the basis that there was, in fact, a significant change in the medical condition. WCAT then would have jurisdiction to determine whether there are grounds for a reopening.

However, if, for example, a Board officer decides that the grounds for reopening have been met, but then determines that minimal compensation is payable, the decision on compensation benefits would be reviewable by the Review Division.

As well, if a Board officer decides that a new claim should be accepted or denied, that decision would be reviewable by the Review Division.

Therefore, a Board officer may make three decisions with respect to the same circumstances -- i.e., that (1) a matter should or should not be reopened; (2) if reopened, what benefits are payable; and (3) whether a new claim should be started.

- 1) Clients who have made formal “on application” reopening requests should be advised that disputes about the threshold question as to whether a matter should be reopened are appealable to WCAT. If the decision on reopening is not as a result of “an application” the client should be advised that matter can be reviewed by the Review Division.
- 2) If the reopening grounds have been met, disputes about resulting payable benefits are reviewable by the Review Division.
- 3) Disputes about the new claim decision are reviewable by the Review Division.

Board officers should specify in decision letters which avenues of appeal/review are available.

Where a Board officer’s decision is made in response to a **formal** reopening application, the decision letter contains **only** a “reopening” decision and no other issues are addressed, the worker should be advised that an appeal can be filed with WCAT.

Note that a “reopening” request will **not** be considered “on application” where:

- there has been a general request to “reopen” a claim by a worker, where the worker is simply asking for more benefits without being particular as to the basis by which such benefits might be provided; or

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- a “reopening” request raises multiple issues (e.g., also includes a request for reconsideration and questions benefit levels).

In such instances, the worker should be advised that, should he/she disagree with the Board officer’s decision, a request for review may be made to the Review Division.

A reopening request will also **not** be considered “on application” where:

- it is made by someone other than the worker, employer or their representative;
- a reopening is being considered as a result of routine medical reports received from a worker’s doctor; or
- the Board has made a decision to reopen on its “own initiative”.