REPLACED by BPIS #5 on March 31, 2005

PRACTICE DIRECTIVE **#59**

RECONSIDERATIONS

Effective Date: March 3, 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 reconsiderations.

For convenience, in this Practice Directive:

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

B. EFFECTIVE DATE &TRANSITION RULES

The following transition rules apply to reconsiderations:

1. Reconsiderations that were completed (i.e., a letter was sent to the client) before March 3, 2003 will have been dealt with under the former provisions.

2. Reconsiderations that are requested on or after March 3, 2003 are dealt with under the current provisions.

3. Reconsiderations that are not completed before March 3, 2003, cannot be completed if, on March 3, 2003:

   (a) 75 days have passed since the decision was made;
   (b) a review to the Review Division has been requested in respect of the decision; or
   (c) an appeal to WCAT has been filed in respect of the decision.

Where a reconsideration is in progress on March 3, 2003 and either 3(a), 3(b) or 3(c) has occurred, the reconsideration process must cease. The Board officer who was in the process of reconsidering the matter will advise any applicant that reconsideration of the decision will not proceed, as either 75 days have passed, a review to the Review Division has been requested or an appeal to WCAT has been filed.

C. LAW AND POLICY

Under the current s.96 (4) & (5), the Board may, "on its own initiative" "reconsider" a previous decision or order. However, if any of the following circumstances exist, Board officers may not reconsider the matter:

- 75 days have elapsed since the decision or order was made;
- a Review Division review has been requested (whether or not 75 days have elapsed); or
- a WCAT appeal has been filed (whether or not 75 days have elapsed).

The following definition of "reconsideration" is provided under Section 1 of the *Act*:

> *Reconsideration means to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order.*

Rehabilitation Services & Claims Manual ("RSCM"), Vol. II, Policy item #103.01, *Changing Previous Decisions – Reconsiderations,* elaborates as follows on the meaning of the term "reconsideration":

> *A reconsideration occurs when the Board considers the matters addressed in a previous decision anew to determine whether the conclusions reached were valid. Where the reconsideration results in the previous decision being varied or cancelled, it constitutes a redetermination of those matters*.

D. DEFINING TERMS

- "Reconsideration" means to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order. [*Act*, s.1]

- A "reconsideration" must be distinguished from a "reopening". [See RSCM Vol. II, Policy #102.01, "*Changing Board Decisions – Reopenings*"].

- A "reconsideration" is also not a "review." Under the current provisions the term "review" refers to a Review Division review.

- The term "readjudication" is no longer used.

- The date of a "decision" normally refers to the date of the decision letter.

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

E. ADJUDICATIVE GUIDELINES

Unlike a reopening, a reconsideration can have retroactive application. Although a decision can be retroactively changed by reconsideration, there is no automatic recovery of previously paid monies. Any decision on recovery of compensation paid must be in accordance with law and policy. [see RSCM, Vol. I & II, Policy item #48.41, "*When Does an Overpayment of Compensation Occur?*"]

The purpose of the Bill 63 amendments is to promote finality and certainty within the workers' compensation system. Given the limited availability for reconsideration, it is important that all relevant evidence be submitted or obtained expeditiously and that Board officers apply law and policy in well-reasoned decisions in the first instance.

1. Addressing Requests for Reconsideration from Workers, Employers and Others

There is no formal mechanism in the current provisions for workers or employers to request reconsideration. Rather, reconsideration is entirely discretionary at the Board's "own initiative." RSCM Vol. II, Policy item #103.01 clarifies that the Review Division is intended to be the primary dispute resolution mechanism in situations where there is disagreement about a Board officer's decision or order. Therefore, if a worker or employer asks for reconsideration of a Board officer's decision, there is no obligation for the Board officer to reconsider. However, in all instances, the Board officer must:

(i) acknowledge receipt of the request;
(ii) acknowledge that the applicant disagrees with the Board officer's decision or order; and
(iii) if appropriate, include a reminder that the applicant has a right to request a review by the Review Division.

A response must be issued in an expeditious manner.
[sample letters attached]

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2. Initiating Reconsideration on the Board's Own Initiative

In rare circumstances, reconsideration on the Board's 'own initiative' may be warranted. For example, Board officers may wish to correct clear errors in their decisions. However, reconsideration cannot take place if any of the following have occurred:

(i) 75 days have passed since the decision was made;
(i) a review to the Review Division has been requested in respect of the decision; or
(ii) an appeal to WCAT has been filed in respect of the decision.

RSCM Vol. II, Policy item #103.01 provides guidance regarding the criteria that must be considered in determining whether reconsideration is appropriate, including:

- new evidence;
- a mistake of evidence;
- a policy error; or
- a clear error of law.

If reconsideration by a Board officer will result in a disallow of a previously allowed claim, the Board officer must have Manager's approval.

RSCM Vol. II Policy item #103.01 also provides that, in addition to the criteria used by Board officers, a Manager/Director may reweigh the evidence and substitute his or her judgement for that of the Board officer for quality assurance purposes (within 75 days unless there is an application for review/appeal).

Where reconsideration is warranted, a comprehensive decision letter should be issued by the Board officer.

3. Preliminary Determinations

In some circumstances, where a Board officer has not yet been able to gather sufficient information to make a decision, it may be appropriate to issue a "preliminary determination." A preliminary determination is not a decision. Rather, it is an interim determination which requires a final decision at a later point in time.

RSCM Vol. I & II, Policy item #96.21, "*Preliminary Determinations",* provides details regarding the conditions under which a preliminary determination on the validity of a claim may be made.

As a preliminary determination does not constitute a decision, the limitations on reconsideration described above are not applicable. However, they become applicable once a decision is ultimately made.

RSCM Vol. II Policy item #65.04 and RSCM Vol. I Policy item #66.12, *Provisional Rate*, also involve preliminary determinations. Under those policies, compensation may be based on a provisional rate for the purpose of providing temporary financial relief to a worker if there is a delay in obtaining information as to the worker's average net earnings.

Letters from Board officers outlining preliminary determinations should contain a statement indicating what information is requested and should provide a time-frame for a decision.

"Readjudication" and "Reviews" under Former Provisions

Board officers no longer have the ability to "readjudicate". As well, "reviews" can only be conducted by the Review Division.

For example, in the past, the former RSCM Policy item #40.30 mandated "reviews" of permanent partial disability awards under s.23 (3) of the *Act*. As a result of Bill 63, this policy has been discontinued. Absent evidence of fraud or misrepresentation, Disability Awards will only be "reopening" loss of earnings awards if they meet the reopening criteria – i.e, if there is significant change in the worker's medical condition.