

2007/10/04-06**THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA****RESOLUTION OF THE BOARD OF DIRECTORS****RE: Reconsideration of Classification Decisions****WHEREAS:**

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("*Act*"), the Board of Directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

AND WHEREAS:

Pursuant to section 37(2) of the *Act*, the Workers' Compensation Board ("WCB") may create, divide and consolidate classes and subclasses and assign, withdraw and transfer an employer, independent operator or industry among classes and subclasses;

AND WHEREAS:

Pursuant to sections 96(4) and (5) of the *Act*, the WCB may, on its own initiative, reconsider a decision or order if not more than 75 days have elapsed since that decision or order was made;

AND WHEREAS:

A statement in Item AP1-37-3, *Classification Changes* and Item AP1-96-1, *Reconsiderations of Decisions of the Assessment Manual* which provides that a decision to change an employer's classification due to Board error does not constitute a reconsideration of the previous decisions is not supported by the *Act*;

AND WHEREAS:

Item AP1-37-3, *Classification Changes*, of the *Assessment Manual*, does not include in the list of reasons for change in classification, policy changes that might result in a change to an employer's classification;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. The POLICY statements in AP1-37-3 and AP1-96-1 of the *Assessment Manual*, attached to this Resolution as Appendix A, are approved and apply to all decisions, **including appellate decisions**, on or after November 1, 2007.
2. This resolution is effective November 1, 2007.
3. This resolution constitutes a policy decision of the Board of Directors.

DATED at Richmond, British Columbia, November 6, 2007.

By the Workers' Compensation Board

**DOUGLAS J. ENNS, CHAIR
BOARD OF DIRECTORS**

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RE: **Classification – Changes**

ITEM: **AP1-37-3**

BACKGROUND

1. Explanatory Notes

This policy sets out the reasons for changing a firm's classification, the effective date of a change, and the impact of a change in classification on experience rating.

The Board may do one or more of the following with respect to all or part of the firm's operation:

- (a) Change an existing classification unit;
- (b) Add a classification unit; or,
- (c) Delete a classification unit.

2. The Act

See Items AP1-37-1, AP1-37-2 and AP1-42-1.

POLICY

1. Firm's Responsibility

It is the responsibility of each firm to provide timely, complete and accurate information to the Board regarding changes in the firm's operations, and to act promptly on information requests and information provided by the Board.

2. Change in Classification

The Board may change a firm's classification. The reasons for a change in classification fall into ~~three~~**four** main categories:

- (a) The firm's operations have changed and the firm is now misclassified;
- (b) The firm's operations have not changed, but it is misclassified; ~~or,~~

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(c) Policy changes which result in changes to classification units; or,

~~(e)~~**(d)** The firm was misclassified based on the firm's non-compliance with reporting requirements, which includes, but is not limited to fraud, misrepresentation, failure or delay in providing timely, complete and accurate information to the Board, or failure to act on information.

The effective date of a change in a firm's classification depends on the reason for the change.

3. Effective Date of Change in Classification

(a) *Change in Operation*

Unless there has been firm non-compliance, if the operations have changed, and the firm is now misclassified, the change will be effective on the date of the change in operation, or January 1st of the year in which the decision to change the firm's classification occurred, whichever is later.

If the date of the change in operation cannot be determined, the effective date will be January 1st of the year in which the decision to change the classification occurred.

(b) *No Change in Operation*

i. No Board Error

Unless the firm was misclassified because of firm non-compliance or Board error, if the operations have not changed, but the firm is misclassified, the effective date of a change in classification will depend on whether the change will lead to an increase or decrease in the base rate.

- If the change will lead to a decrease in the base rate it will be effective January 1st of the year in which the decision to change the firm's classification occurs.
- If the change will lead to an increase in the base rate it will be effective January 1st of the year following the date of the decision to change the firm's classification.

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ii. Board Error

A Board error occurs if the firm has provided timely, complete and accurate information to the Board, but a clear error is made by the Board in classifying the firm. It includes a misclassification that continues after a Board officer has audited a firm and a classification review has taken place. It does not include borderline classification questions requiring a judgment decision or situations where the information supplied by the firm is not timely, complete and accurate, regardless of whether this was deliberate or inadvertent.

If the need to change the firm's classification is the result of a Board error, the effective date of the change will depend on whether the change will lead to an increase or decrease in the base rate.

- If the change will lead to a decrease in the base rate, the change may be effective on the date that the firm was misclassified because of the Board error, but in no circumstances will the effective date be earlier than January 1st of the year three (3) years before the date the error came to the Board's attention.
- If the change will lead to an increase in the base rate, the change will be effective on January 1st of the year following the date the error came to the Board's attention.

(c) Policy Changes Which Result in Changes to Classification Units

The Board may make policy changes regarding classification units or the composition of classification units which may result in changes to an employer's classification.

Changes to an employer's classification which occurs as a result of a policy change will be effective January 1st of the following year, unless otherwise specified by the Board.

~~(e)~~**(d) Firm Non-Compliance**

A classification change may be necessary due to a firm's non-compliance. Firm non-compliance includes, but is not limited to:

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- fraud;
- misrepresentation;
- failure to provide timely, complete or accurate information to the Board;
- failure to act promptly on information requests; or,
- failure to act on information provided by the Board.

If the need to change the classification is the result of firm non-compliance, the effective date of the change will **be determined by the Board based on the reason for the firm non-compliance.** ~~depend on whether the change will lead to an increase or decrease in the base rate:~~

- ~~i. If the change will lead to a decrease in base rate, the change will be effective January 1st of the year in which the decision to change the firm's classification occurred.~~
- ~~ii. If the change will lead to an increase in base rate, the change may be effective up to three (3) years before the date of the decision to the change the firm's classification.~~

4. Impact on Experience Rating

A change in classification may result in a transfer of experience rating. The following principles apply:

- (a) The classification has changed because of a change in the firm's operations.
 - i. If there has been a distinct change in the operations, the experience rating will not transfer.
 - ii. If the change in operations has occurred incrementally or the firm's operations have evolved over time, the experience rating may transfer.
- (b) If the classification has changed, but not as a result of a change in the firm's operations, the experience rating may transfer. This includes a change in classification because of Board error.

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- (c) If the classification has changed because of firm non-compliance, the general rule is that experience rating will not transfer. However, the Board may decide to transfer experience rating if the non-compliant firm could benefit from a failure to transfer.

The firm will be advised of any change in its classification.

A decision to change a firm's classification **due to a change in the firm's operations, policy changes which result in changes to classification units, or firm non-compliance**, does not constitute a reconsideration of a decision under section 96(4) of the *Act*. Rather, the change constitutes **a new decision pursuant to** the exercise of the Board's normal classification authority under section 37(2). The restrictions, including the 75-day time limit, placed upon the Board's reconsideration authority under section 96(5) does not apply.

PRACTICE

If a classification is being added to a firm's existing classification, the criteria of the multiple classification policy must be met before the classification change policy is applied.

For any other relevant PRACTICE information, readers should consult the Assessment Department's Practice Directives available on the **WCBWorkSafeBC** website.

EFFECTIVE DATE:	November 1, 2007 January 1, 2004
AUTHORITY:	ss. 37(2) and (3) and 42, <i>Workers Compensation Act</i> .
CROSS REFERENCES:	See also The Classification System (AP1-37-1), Classification – Multiple (AP1-37-2) and Transfer of Experience Rating (AP1-42-1) in the <i>Assessment Manual</i> .
HISTORY:	Policy changes to provide three general reasons for classification changes, with corresponding effective dates and direction on the transfer of experience rating were made effective January 1, 2004 and applied to all new decisions on or after that date. Consequential changes to this Item made as a result of the <i>Workers Compensation Amendment Act (No. 2), 2002</i> were effective on March 3, 2003. This Item resulted from an editorial consolidation of the former <i>Assessment Policy Manual</i> , which was effective on January 1, 2003. The Policy in this Item continued the substantive requirements that existed before the consolidation, with any wording changes necessary to reflect legislative and other changes that had

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occurred. Policy No. 30:20:40 in the former *Assessment Policy Manual* was replaced by this Item.

~~Consequential changes to this Item made as a result of the *Workers Compensation Amendment Act (No. 2)*, 2002 were effective on March 3, 2003.~~

APPLICATION:

Applies to all decisions, including appellate decisions, on or after November 1, 2007.~~The amended policy applies to all new decisions on or after January 1, 2004.~~

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**RE: Reconsiderations, Reviews and Appeals
Reconsiderations of Decisions**

ITEM: AP1-96-1

BACKGROUND

1. Explanatory Notes

The *Act* provides the Board with a limited time period to reconsider previous decisions or orders. Subject to certain restrictions, the Board may only reconsider a decision or order under Part 1 of the *Act* during the period of 75 days subsequent to the decision or order being made.

2. The Act

Section 1, in part:

“reconsider” means to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order

Section 39(6):

The Board must notify each employer of the amount of each assessment due in respect of the employer's industry and the time when it is payable. The notice may be sent by post to the employer, and is deemed to be given to the employer on the day the notice is mailed.

Section 96, in part:

- (4) Despite subsection (1), the Board may, on its own initiative, reconsider a decision or order that the Board or an officer or employee of the Board has made under this Part.
- (5) Despite subsection (4), the Board may not reconsider a decision or order if
 - (a) more than 75 days have elapsed since that decision or order was made,
 - (b) a review has been requested in respect of that decision or order under section 96.2, or

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- (c) an appeal has been filed in respect of that decision or order under section 240.

Section 221:

- (1) A document that must be served on or sent to a person under this *Act* may be
 - (a) personally served on the person,
 - (b) sent by mail to the person's last known address, or
 - (c) transmitted electronically, by facsimile transmission or otherwise, to the address or number requested by the person.
- (2) If a document is sent by mail, the document is deemed to have been received on the 8th day after it was mailed.
- (3) If a document is transmitted electronically, the document is deemed to have been received when the person transmitting the document receives an electronic acknowledgement of the transmission.

POLICY

(a) Definition of 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.

Decisions that are reconsidered under section 96(4), and are therefore subject to the time limitations in section 96(5), are decisions on individual matters. Examples of such decisions include:

- the modification of an employer's assessment rate through experience rating;
- determinations regarding whether an individual is a worker, employer, independent operator or labour contractor;

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- the application of a penalty for failure to remit or report as required under the *Act*, and
- the charging of claims costs when an employer is in default and an injury or occupational disease occurs to one of its workers during the period of default.

Matters of general application, on the other hand, are not intended to be covered by section 96(4) and (5). Examples of such matters include:

- the allocation of income, compensation payments, outlays, expenses, assets, liabilities, surpluses or deficits to or from an account of a class or subclass, or to or from a reserve of the accident fund, with the exception of section 10(8) and section 39(1)(b), (d) and (e) decisions as they relate to a specific employer or independent operator; and
- the determination of an assessment rate for a class or subclass.

Section 37 of the *Act* establishes the Board's authority to make any changes to classes and subclasses that are considered necessary and appropriate as part of the management of the classification system. The exercise of this authority, including withdrawing an employer or independent operator from a subclass and transferring the employer or independent operator to another class or subclass, **due to a change in the firm's operations, policy changes which result in changes to classification units or firm non-compliance**, does not constitute a reconsideration of a Board decision. **Rather, the change constitutes a new decision pursuant to the exercise of the Board's normal classification authority under section 37(2). The restrictions, including the 75-day time limit, placed upon the Board's reconsideration authority under section 96(5) do not apply.**

On a review or an appeal, the Review Division and the WCAT may make a decision that confirms, varies or cancels the decision under review or appeal. The Review Division and WCAT decisions are final and must be complied with by the Board.

Varying or canceling a decision may make invalid other decisions that are dependent upon or result from the decision under review or appeal. The reconsideration requirements under sections 96(4) and 96(5) do not limit changes to previous decisions that are required in order to fully implement decisions of the Review Division or the WCAT.

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(b) The purpose of sections 96(4) and (5)

The Board's authority to reconsider previous decisions and orders is found in section 96(4) and (5) of the *Act*. The purpose of these amendments is to promote finality and certainty within the workers' compensation system.

Sections 96.2 to 96.5 establish a right to request a review by a review officer, where a party disagrees with a decision or order made at the initial decision-making level. It is this review, rather than the application of the Board's reconsideration authority, which is intended to be the dispute resolution mechanism for initial decisions and orders of Board officers.

The use of the words "on its own initiative" in section 96(4), and the availability of a review mechanism under sections 96.2 to 96.5, indicate that the Board is not intended to set up a formal application for reconsideration process to resolve disputes that parties may have with decisions or orders.

Rather, the Board's reconsideration authority is intended to provide a quality assurance mechanism by the Board. The Board is given a time-limited opportunity to vary or cancel, on its own initiative, any incorrect decisions it may have made.

However, this does not preclude the Board from basing a reconsideration on information that may be brought forward by a worker, employer or other party to a decision or order, provided the grounds for reconsideration have been met.

(c) Advice to parties

Parties to a decision or order will be advised at the time the decision or order is made of the right to request a review of the decision or order under section 96.2. The Board will take all reasonable steps to communicate a decision or order to a party. A party who requests the reconsideration of the decision or order will be reminded by the Board of the party's right to request a review under section 96.2.

If the Board reconsiders a decision or order before the request for review is made, the Board will provide the parties to the decision or order with a reconsidered decision. The reconsidered decision gives rise to a new right to request a review under section 96.2.

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(d) Restrictions on reconsideration

The *Act* places a number of express restrictions on reconsidering previous decisions and orders. It is noted, in this respect, that “reconsider” means the making of a new decision and not merely the starting of the reconsideration process leading to the new decision.

- The Board may not reconsider a decision or order more than 75 days after the decision or order was made. In accordance with section 221, where a decision or order has been sent by either registered or regular mail, the document is deemed to have been received on the 8th day after it was mailed. If the decision is sent electronically, the document is deemed to have been received on the date the Board receives electronic acknowledgement of receipt. One exception to section 221 applies to decisions mailed to employers in accordance with section 39(6) regarding the amount of assessment due in respect of the employer's industry and the time when it is payable. This notice is deemed to be given to the employer on the day the notice is mailed.
- The Board may not reconsider a decision or order if a review has been requested by an employer or an independent operator in respect of that decision or order under section 96.2. A request for review under section 96.2 immediately terminates the authority of the Board to reconsider a previous decision or order, even if 75 days has not passed since the decision or order was made.
- The Board may not reconsider a decision or order if an appeal has been filed in respect of that decision or order to the Workers' Compensation Appeal Tribunal under section 240. The filing of an appeal under section 240 immediately terminates the authority of the Board to reconsider the decision or order, even if 75 days has not passed since the decision or order was made.

There are, in addition, a number of implicit restrictions on reconsidering previous decisions and orders. The Board is not authorized to reconsider appellate decisions or findings of the following bodies:

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- the former Appeal Division;
- the former Commissioners, who existed prior to June 3, 1991;
- the boards of review and the Workers' Compensation Review Board; and
- the Board of Review, which existed prior to January 1, 1974.

Section 256 of the *Act* provides for the Workers' Compensation Appeal Tribunal to reconsider its own decisions and decisions of the former Appeal Division under certain limited conditions.

(e) Grounds for reconsideration

Subject to the limitations set out above, the Board may reconsider a decision on its own initiative where:

- there is new evidence indicating that a prior decision or order was made in error;
- there has been a mistake of evidence, such as:
 - material evidence was initially overlooked, or
 - facts were mistakenly taken as established which were not supported by any evidence or by any reasonable inference from the evidence;
- there has been a policy error such as:
 - applying an applicable policy incorrectly, or
 - not applying an applicable policy;
- there has been a clear error of law, such as a failure by the Board to follow the express terms of the *Act*; or
- one or more of the reasons for reducing or cancelling a penalty under the policy in Item AP1-47-1 are met.

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(f) Authority of Board officers, Managers and Directors to reconsider

A Board officer may only reconsider a decision made by another Board officer where there is new evidence, a mistake of evidence, a policy error or a clear error of law or where one or more of the reasons for reducing or cancelling a penalty are met.

A Manager or Director may reconsider a decision or order made by a Board officer in any of these circumstances, and may also reweigh the evidence and substitute his or her own judgment for that of the Board officer.

(g) Correction of administrative errors

The correction of an administrative error such as a clerical, typographical or mathematical error or a slip or omission does not result in a reconsideration of a previous decision. The ability to correct these types of errors, slips or omissions would not be considered a reconsideration of the original decision, as it would not change the intent of the original decision made by the Board officer.

This process for correcting errors, slips or omissions, however, cannot be applied to change previous decisions.

PRACTICE

For any relevant PRACTICE information, readers should consult the Practice Directives available on the ~~WCB~~**WorkSafeBC** website.

EFFECTIVE DATE:	November 1, 2007 January 1, 2005
AUTHORITY:	ss. 1, 39(6), 96(2) and 221 of the <i>Workers Compensation Act</i> .
CROSS REFERENCES:	See also Penalties (AP1-47-1); Fraud and Misrepresentation (AP1-96-2) in the <i>Assessment Manual</i> .
HISTORY:	Changes to policy to clarify that the correction of administrative errors and the implementation of Review Division and Workers' Compensation Appeal Tribunal decisions do not constitute a reconsideration effective January 1, 2005 and applied to all decisions on or after that date. Consequential changes made in accordance with the <i>Workers Compensation Amendment Act (No. 2), 2002</i> and applied to all reconsiderations on or after March 3, 2003. Replaces Policy No. 10:40:00 of the <i>Assessment Policy Manual</i> . This Item results from the 2002 "editorial" consolidation of all assessment policies into the <i>Assessment Manual</i> . The POLICY in this Item continues the substantive requirements of the policies and items referred to in the

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HISTORY as they existed prior to the Effective Date, with any wording changes necessary to reflect legislative and other changes since the policies and items referred to in the history were issued.

APPLICATION:

Applies to all decisions, including appellate decisions, on or after November 1, 2007. ~~Applies to all decisions on and after January 1, 2005.~~