

Practice Directive 1-47-2 (A)

Section 47(2) Committee

Effective January 1, 2004

Practice

The Section 47(2) Committee is a standing committee of the Board and is comprised of the following individuals, or an individual delegated in writing to act in a member's absence: (a) either of the Board's General Counsel or Associate General Counsel, and (b) the Manager, Assessment Policy.

The Committee is authorised to decide or determine the following under subsections 47(2)¹ and 47(3)² of the *Workers Compensation Act* (the "Act"):

- whether an employer has refused or neglected to make or transmit a payroll return or other statement required to be furnished by the employer, or
- whether an employer has refused or neglected to pay an assessment, or the provisional amount of an assessment, or an instalment or part of it, and
- in either case, whether or not the default was excusable to relieve the employer in full or in part from liability for such refusal or neglect.

The Committee is not empowered to readjudicate the legislative prerequisites of subsection 47(2) of the *Act*; but may, in the face of patent error, refer the matter back to the appropriate decision-maker for clarification or reconsideration.

THE ADJUDICATIVE PROCESS

The Committee determines:

1. Whether, on a balance of probabilities, the employer has refused or neglected to register, to report, or to pay an assessment, in full or in part.³
2. Whether, on a balance of probabilities, the employer has established a "reasonable care defence", through either (a) a reasonable belief in a mistaken set of facts, or (b) due diligence.

¹ Subsection 47(2) of the *Act* directs the Board to collect from an employer the full amount or capitalised value of compensation payable to a worker of that employer for an injury that occurred during the period the employer failed to register, failed to report, or was in full or partial default of remittance of assessment.

² Subsection 47(2) of the *Act* is directory, however, subsection 47(3) of the *Act* grants the Board discretion in exercising its duty under subsection 47(2).

³ The offence under subsection 47(2) is one of strict liability; and, therefore, the Board, once having established on a balance of probabilities that an employer failed to register, failed to report, or to pay an assessment, in full or in part, is relieved of having to prove anything further: fault is presumed, and the onus shifts to the employer to establish reasonable care on a balance of probabilities.

- (a) A reasonable belief in a mistaken set of facts requires that the mistake be both honest and reasonable. If an employer claims an honest mistake was made, the employer is required to show that all reasonable steps were taken to obtain the correct information. If the employer failed to make reasonable inquiries to determine the facts, or if the employer knew the facts but failed to draw the correct conclusion as to its obligations, the defence of reasonable mistake will not be available.

The mistake must be a mistake of fact, not a mistake of law; for an employer is expected to take the steps necessary to inform itself of the laws that apply to its activities.

- (b) Due diligence requires demonstrated reasonable, though unsuccessful efforts to comply, or an inability to comply because of extraordinary conditions or lack of resources.

If a “reasonable care defence” is established, the offence under subsection 47(2) is not proven; and, accordingly, there can be no liability for any compensation paid or payable.

3. If a “reasonable care defence” is not established, the Committee considers and applies the “circumstances” enumerated in *Assessment Policy 1-47-2*, and if any such circumstance applies the claim costs can not be charged.
4. If neither a “reasonable care defence” nor an *Assessment Policy 1-47-2* “circumstance” is established, the Committee determines whether the “default was excusable”,⁴ and, if satisfied that the “default was excusable, may ... relieve the employer in whole or in part from liability” under subsection 47(2). In so doing, the Committee considers the purposes and objects of the *Act*; the merits and justice of the individual case; and, for mitigation purposes, again considers the “reasonable care defence” factors and may consider, *inter alia*, the following:⁵
 - (a) The nature and extent of the business.
 - (b) The employer’s ability to comprehend its obligations under the *Act* and policy.
 - (c) Reliance on an accountant or lawyer to ensure registration or to transmit required information and assessments on the employer’s behalf.
 - (d) Reliance on reasonable but mistaken advice from a Board officer.
 - (e) The employer’s pre and post-breach history with the Board or another workers’ compensation system.
 - (f) A belief that a sub-contractor was registered or that a worker was an independent employer or that a previous contact with the Board (e.g. Prevention Officer) was sufficient for registration.
 - (g) The impact of the charge on the business, including the likelihood of irreparable harm.
 - (h) The economic benefit of non-compliance, including any competitive advantage arising from delayed or avoided costs.

⁴ Subsection 47(3) of the *Act*.

⁵ As the *Act* is silent with respect to the criteria that the Board may take into consideration under subsection 47(3), the Board has the discretion to determine the appropriate criteria, subject to the proviso that the criteria must be related to the purpose and object of the *Act*.