

# COMPENSATION PRACTICE AND QUALITY DEPARTMENT

## PRACTICE DIRECTIVE # C14-2

**TOPIC:** Reconsiderations

**ISSUE DATE:** March 31, 2005  
(Amended: Aug. 11, 2006, June 1, 2007 & Nov. 30, 2007)

### Objective

This practice directive provides guidance to Board officers on their ability to reconsider previous decisions and replaces Practice Directive #59, *Reconsiderations*. Consequential amendments have been made to Practice Directive #C9-4, *Initial and Long-Term Average Earnings*.

### Law & Policy

“Reconsider” is defined in section 1 of the *Workers Compensation Act* (the “Act”) as meaning to make a new decision in a matter previously decided where the new decision confirms, varies or cancels the previous decision or order.

Section 96(4) of the *Act* authorizes the WCB to reconsider decisions on its own initiative, subject to the confines set out in section 96(5). Section 96(5) places limits on the WCB’s ability to reconsider and specifies that decisions cannot be reconsidered if 75 days have elapsed since the decision was made, or if a review has been requested or an appeal filed with respect to the decision.

*Rehabilitation Services & Claims Manual* (“RSCM”) Policy item #C14-103.01, *Changing Previous Decisions – Reconsiderations*, describes the purpose of the reconsideration provisions, sets out the grounds for reconsideration and explains the restrictions on reconsideration. Policy item #C14-103.01 also clarifies that the WCB may correct administrative errors and that since doing so does not change the substance of the decision, it does not constitute a reconsideration.

RSCM Policy item #C14-101.01, *Changing Previous Decisions – General*, clarifies that adjudicating a new matter not previously decided does not constitute a reconsideration or reopening.

### Adjudicative Guidelines

#### (A) *Restrictions on Reconsideration - The 75-Day Rule*

It is not possible to reconsider a decision if 75 days have elapsed since the decision was made or if a review has been requested or an appeal filed with respect to that decision (even if it is within 75 days of the decision). For purposes of determining the 75-day period, a decision is made when it is communicated to the affected party, either verbally or in writing. A letter will be provided to the

parties in accordance with the requirements of RSCM Policy item #99.20, *Notification of Decisions*. Where Policy item #99.20 does not require a letter to be sent, officers should ensure that they record the verbal communication of the decision on the claim file.

Where an officer is unable to change a decision because of the limits on reconsideration (i.e. 75 day period has expired), other decisions made on the claim have to be consistent with that decision. In other words, in cases where a decision cannot be reconsidered, the officer cannot act as though the decision has been reconsidered. For example, an officer receives new evidence that convinces him/her that the worker's injury did not arise out of and in the course of employment. However, more than 75 days have elapsed since the claim was accepted and as a result, the decision cannot be reconsidered. The officer cannot relieve the employer of costs under section 42 (RSCM Policy item #113.10) because he/she thinks the claim should not have been accepted. Removing the costs from the claim would be inconsistent with the eligibility decision that remains as accepted.

### **(B) Reconsideration Process**

The *Act* specifies that reconsiderations are completed on the WCB's own initiative, rather than on application by one of the parties to the decision. There is no obligation placed on a Board officer to reconsider a decision. However, where a worker or employer requests a reconsideration and the Board officer decides not to reconsider, the Board officer sends a letter which:

- acknowledges receipt of the request
- advises that he/she is not going to reconsider the decision, and
- if appropriate, reminds the party of the right to request a review of the decision.

The Board officer should not discuss the merits of the claim in this letter as it may then appear that a reconsideration has been completed.

When a Board officer conducts a reconsideration, it may result in the Board officer making a new decision that varies or cancels the previous decision or, alternatively, the Board officer may make a new decision that confirms the previous decision.

RSCM Policy item #C14-103.01 clarifies that reconsideration means the making of the new decision and not the starting of the reconsideration process leading to a new decision. The entire reconsideration process (i.e. making the new decision) must be completed prior to the 75-day period expiring or a review/appeal being initiated. For example, where a Board officer realizes that he/she would like to amend a wage rate set on a claim, but is unable to gather all of the earnings information necessary to make a new wage rate decision within 75 days of the date of the original decision, a reconsideration is not possible. It is not sufficient for Board officers to indicate that they wish to revisit the previous decision.

A reconsideration decision is not “made” for the purpose of the 75-day time limit in section 96(5) until the final decision resulting from the reconsideration process has been recorded in the claim file and communicated in some form to the affected party or parties. At that point, the decision-making function is complete and the new decision has been “made”, whether that decision simply confirms, varies or reverses the prior decision.

**The Board officer will provide a letter to the parties, together with notice of their right to request a review of the new decision. The letter should state that the Board officer has conducted a reconsideration.**

### **(C) Effect of Reconsideration – Declaring Overpayments**

When a Board officer reconsiders a previous decision and the result is a new decision that varies or cancels the previous decision, that new decision constitutes a redetermination of those matters and applies retroactively.

When a decision is reconsidered and the new decision results in the worker being entitled to less compensation, there is no automatic recovery of money previously paid out. Board officers should consider RSCM Policy item #48.41, *When Does an Overpayment of Compensation Occur?*, to determine whether money paid in error may be recovered as a collectible overpayment. The money may be recovered if the overpayment resulted from an administrative error, fraud or misrepresentation, or a decision made, or action taken, that is outside the statutory authority of the WCB, but not if the compensation was paid because of a decisional error.

### **(D) New Matters - Health Care and VR**

RSCM Policy item #C14-101.01, *Changing Previous Decisions – General*, clarifies that the reopening and reconsideration provisions are not intended to restrict the WCB’s ability to adjudicate new matters not previously decided. These include situations where the *Act* gives the WCB broad discretion to make entitlement decisions over the course of a claim, such as entitlement to health care or vocational rehabilitation (“VR”) benefits.

Where new information is received or a change in circumstances occurs after a previous decision was made, a Board officer may make a new decision regarding entitlement to further health care benefits and VR services. A Board officer may also make a new decision that a worker is entitled to a referral for VR services. Similarly, a Board officer may make a new decision to modify, replace or discontinue a VR plan. Such new decisions do not constitute a reconsideration of a previous decision and are applied on a prospective basis only.

For example, a Board officer approves 4 weeks of massage therapy for an injured worker at the outset of the claim. Several weeks after completing the massage

treatment, the worker commences a graduated return to work and as a result of the return to employment duties, the worker's recovery slows so his physician recommends a further 4 weeks of massage therapy. As long as the Board officer had not previously decided that the worker was not entitled to any future massage treatments, the Board officer may make a new decision regarding the worker's entitlement to a further 4 weeks of massage therapy as a new matter not previously decided. The new entitlement decision does not constitute a reopening or a reconsideration.

### **(E) Implementation of Review Division and WCAT Decisions**

The reconsideration and reopening provisions do not apply to limit the WCB's ability to implement Review Division ("RD") and Workers' Compensation Appeal Tribunal ("WCAT") decisions.

The RD and the WCAT may make a decision to confirm, vary or cancel the decision under review or appeal. The RD may also make a decision to refer a matter back to the WCB with or without directions under section 96.4(8)(b). Decisions of the RD and WCAT must be complied with by the WCB in accordance with section 96.4(9) and section 255 of the *Act*.

Where the implementation of a RD or WCAT decision requires the Board officer to make a determination, it is a new decision and does not constitute a reconsideration, even if the matter had been considered prior to the review or appeal.

Where the RD or WCAT varies or cancels a decision, other WCB decisions that depend on, or result from, the decision may also be invalidated. The reconsideration and reopening provisions do not apply to constrain the Board officer's ability to fully implement the RD or WCAT decision.

### **(F) Request for Review Withdrawn**

A decision cannot be reconsidered if a request for review of that decision has been filed with the Review Division (section 96(5)(b) of the *Act*). The authority to reconsider the decision is not reinstated if the request for review is withdrawn.

In circumstances where the officer wishes to change a decision because of new information or an error they've discovered, but a review of the decision has already been requested, the officer should consider using the *Expedited Referral Process*. The *Expedited Referral Process* between the Review Division and WES allows officers in WES to contact the duty officer in the Review Division and explain the nature of the error or new information. The duty officer may then choose to refer the decision back to WES, with or without directions, on an expedited basis.

### **(G) Missed Ten-Week Rate Review**

Where the ten-week rate review, as required by section 33.1 of the *Act*, is missed and benefits have been paid at the initial rate set on the claim after the ten-week period, the review is conducted when the Board officer notices the error. Making the long-term rate decision is a new matter and the reconsideration and reopening policies do not apply.

Section 1 of the *Act* defines “initial payment period” as ending on the last day of the tenth week for which compensation is payable to the worker for a temporary disability. After the initial payment period concludes, compensation is paid to the worker in accordance with the long-term rate set on the claim. Therefore, if the rate review is not conducted until some time after the ten-week mark, retroactive adjustments are required. If the worker is paid wage loss compensation for more than ten weeks at a higher initial rate, then a recoverable overpayment would result in accordance with Policy item #48.41 and the costs are removed from the employer’s account. The failure to conduct the rate review at the prescribed time was an error that resulted in payment being made outside the statutory authority of the WCB. Conversely, if the worker is paid wage loss compensation at a lower initial rate for more than ten weeks, then the Board officer will make a retroactive payment to the worker.

**(H) *Preliminary Determinations and Provisional Rates***

A preliminary determination is not a decision, but rather an interim administrative action taken to provide temporary financial relief to a worker until the WCB has the information necessary to make a decision on the validity of a claim. A preliminary determination does not constitute a decision so the reconsideration provisions do not apply. However, the reconsideration provisions apply once a decision is made. See RSCM Policy item #96.21, *Preliminary Determinations*.

Setting a provisional rate pursuant to RSCM Policy item #65.04, *Provisional Rates*, when there is a delay in obtaining information required to make a decision about a worker’s average net earnings, is another example of a preliminary determination. A Board officer cannot reconsider a wage rate decision by setting a provisional rate because a reconsideration requires the Board officer to make a new decision.

**(I) *Retroactive Earnings Adjustments***

Wage rate decisions are subject to the reconsideration provisions. Therefore, a Board officer cannot amend a wage rate where further earnings information is received more than 75 days after the wage rate decision was made. This is true even in cases where the worker’s salary has been increased or reduced retroactively.

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**CROSS REFERENCES:** See also PD #C14-3, *Reopenings*, PD #C14-1 - *Bill 63 Effective Dates & Transition Rules for Reopenings, Reconsiderations, Reviews & Appeals*

**HISTORY:**

This item was amended on August 11, 2006 to clarify existing corporate practice regarding when a decision is "made" for the purposes of the 75-day limit on reconsiderations. The information on requests for review withdrawn was added on June 1, 2007. Clarification regarding the need for consistency in decisions made on a claim was added November 30, 2007.

**APPLICATION:**

This practice directive was developed to provide guidance on RSCM Policy items #C14-101.01 and #C14-103.01, which were amended effective January 1, 2005.