DISCUSSION PAPER

1. TITLE

Clarification of the Reconsideration and Reopening Policies

2. ISSUE

Bill 63, the *Workers' Compensation Amendment Act (No. 2), 2002*, has been in effect for over a year. Workers' Compensation Board ("WCB") staff, appellate bodies and external stakeholders have raised a number of questions regarding the new legislation and policy. Three issues have been identified for clarification:

- what constitutes a reconsideration of a prior decision;
- under the grounds for a reopening, what constitutes a recurrence of an injury; and
- what is the difference between a reopening on application and a reopening on the WCB's own initiative.

3. BACKGROUND

i. Pre-Bill 63 System

The WCB administers the *Workers Compensation Act* ("*Act*") which gives the WCB legal authority to:

- set and enforce occupational health and safety standards to prevent workplace accidents;
- assist injured workers and their dependants through the provision of wage loss benefits, health care, vocational rehabilitation, permanent disability awards and survivor benefits; and
- assess employers and collect assessments to fund the WCB.

Many WCB decisions, particularly compensation decisions, involve the exercise of judgement or discretion on the part of the decision-maker. This means that there may be disagreement as to the outcome and a likelihood of appeals, and/or requests for reopening or reconsideration of prior decisions.

Prior to Bill 63, the legislation provided the WCB with broad discretionary power to reopen, rehear and redetermine prior decisions.[1]

[1] Former section 96(2) enabled the WCB at any time, at its discretion, to reopen, rehear and redetermine any matter, except a decision of the former Appeal Division.

ii. Bill 63 Legislative Changes

Bill 63 was enacted on March 3, 2003 to address issues regarding the lack of finality and certainty in the system as well as issues relating to the quality of decision-making and the appeal structure.

The Bill 63 policies are set out in Chapter 14, *Changing Previous Decisions*, of the *Rehabilitation Services & Claims Manual* ("*RS&CM*"), Volumes I and II. Policies AP1-96-1 and AP1-96-2 of the *Assessment Manual* ("*AM*") provide guidance on reconsiderations and fraud and misrepresentation.

The specific sections of note and related policies are set out below:

Reconsideration Provisions:

- Section 1 sets out the following definition of reconsideration:

  > "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 96(4) sets out the WCB's reconsideration authority as follows:

  > 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.

- Section 96(5) sets out the limitations on the WCB's reconsideration authority:

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

- Policy C14-103.01, *Changing Previous Decisions – Reconsiderations* of the *RS&CM*, provides, in part, that the WCB's reconsideration authority is intended to provide a quality assurance mechanism for the WCB. The WCB is given a time-limited opportunity to correct, on its own initiative, any errors it may have made. The policy also sets out the situations that have to be met in order for the WCB to reconsider a decision within the 75-day time period.

- Similar guidance on reconsideration of assessment matters is set out in Policy AP1-96-1 of the *AM*.

Reopening Provisions:

- Section 96(2) sets out the WCB's authority to reopen a previous decision as follows:

  > Despite subsection (1), at any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,
  >
  > (a) there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or
  >
  > (b) there has been a recurrence of a worker's injury.

- Section 96(3) also provides that if the WCB determines that the circumstances in section 96(2) justify a change in a previous decision respecting compensation or rehabilitation, the WCB may make a new decision that varies the previous decision or order.

- Policy C14-102.01, *Changing Previous Decisions – Reopenings*, of the *RS&CM* provides that reopening requests on application are appealed directly to the Workers' Compensation Appeal Tribunal ("WCAT"). However, the policy does not provide direction on how to distinguish between reopening a matter on the WCB's own initiative versus reopening a matter on application.

- With respect to the grounds for a reopening, policy provides that "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 WCB's knowledge about the worker's medical condition. It also notes that 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.

- While policy does not specifically define recurrence it does provide that a claim may be reopened for repeats of temporary disability, irrespective of whether a permanent disability award has been provided in respect of the compensable injury or disease. A claim may also be reopened for any permanent changes in the nature or degree of a worker's permanent disability. It also notes that a recurrence refers to the recurrence of the original injury without a second compensable or non-compensable injury.

- The term recurrence is also referenced under section 32, reopenings over three years and section 35.1(8), the transitional provisions for Bill 49. Both sections refer to a "recurrence of a disability" while section 96(2), recurrence of an injury. Policy item #1.03 of the *RS&CM*, discusses the transitional provisions for Bill 49 in relation to recurrences of disability. The policy provides that if an injury occurred before June 30, 2002, and the disability recurs on or after June 30, 2002, the current

provisions apply to the recurrence. For the purposes of this policy, a recurrence includes any claim that is re-opened for:

- any additional period of temporary disability where no permanent disability award was previously provided in respect of the compensable injury or disease;
- any additional period of temporary disability where a permanent disability award was previously provided in respect of the compensable injury or disease; and,
- any permanent changes in the nature and degree of a worker's permanent disability.

- Policy C14-102.01, *Changing Previous Decisions – Reopenings*, of the *RS&CM* discusses the grounds to be met for a reopening and also provides that reopening requests on application are appealed directly to the WCAT. However, the policy does not provide direction on how to distinguish between reopening a matter on the WCB's own initiative versus reopening a matter on application.

4. DISCUSSION

A. RECONSIDERATION ISSUES

A reconsideration occurs when the WCB revisits a previous decision to determine whether the conclusions reached in that decision were valid. Where a reconsideration results in a previous decision being varied or cancelled, it may result in some retroactive application.

For example, the WCB may reconsider the initial wage rate set on a claim. If the original decision is varied, the result will either be an increase or a decrease in the wage rate and either additional benefits paid to the worker or funds owed to the WCB. As it is a reconsideration of the original decision, the change in benefit entitlement would be retroactive back to the date of the original decision.

The WCB may, on its own initiative, reconsider a previous decision within 75 days of the original decision. The 75-day time limit on reconsideration brings finality to decisions that were made in the past, and limits the retroactivity of decision-making. After the 75-day time limit, the WCB cannot go back and reconsider the original decision. The new legislation and policies are clear that the Review Division and the WCAT are the principle mechanisms for resolving disputes on decisions.

Since the introduction of the Bill 63 legislative and policy provisions, a number of questions have been raised regarding what does and does not constitute a reconsideration of a previous decision. Set out below is an overview of the key issues that have been raised.

i. New decisions on matters not previously adjudicated

The need to adjudicate new matters not previously decided and make decisions on these matters may occur at various points over the course of a claim or an employer's account. The limits in the legislation on reconsideration were not intended to restrict the WCB's ability to make new decisions in accordance with the *Act* and policy that do not question prior decisions.

In adjudicating a claim, the WCB must apply the applicable legislative and policy provisions. In so doing, a Board officer may consider a new matter that arises as a result of new information that is provided or a change in circumstances. New matters that arise based on new information or changing circumstances, which do not question a prior decision, may result in a new decision.

For example, decisions on a worker's entitlement to health care benefits under section 21 may be required at several points of time during a claim as the worker's medical condition improves or worsens and different health care treatment is required to aid in the worker's recovery and return to work. These new decisions would not constitute a reconsideration of the original entitlement decision. Another example would be the adjudication of further injury or occupational disease that arises as a consequence of a work injury.

A new matter may arise as a result of legislative provisions that expressly direct the WCB to make certain decisions or take certain actions at specified points in the claim. If the WCB fails to render these decisions or take these actions at the specified point, the Board officer must make the decision as soon as the error is discovered in order to fulfill the requirements of the *Act*. These decisions would have prospective application.

For example, under section 33.1(2) of the *Act*, if a worker's disability continues for ten cumulative weeks of benefits, the WCB must determine the amount of average earnings of the worker based on the worker's gross earnings for the 12-month period immediately preceding the date of the injury. In the event that the long-term average earnings review is not completed after ten cumulative weeks of benefits, the review must be undertaken as soon as the WCB becomes aware that the review has been missed.

Other examples of legislative provisions which provide express or explicit direction are section 34(2) on the deduction of CPP disability benefits from permanent disability periodic payments, section 32(2) on the deduction of permanent disability benefits on a reopening and section 23.5 which requires that the WCB must assess, within the 3-month period before the retirement benefit is payable to a worker, the need or continued need of the worker for services and personal supports under sections 16 and 21.

Finally, a new matter may arise when it has not been specifically addressed in a decision letter. When deciding on a matter, the WCB need only determine what is necessary in order to take the action required. If the original decision omitted the adjudication of a matter from the original decision, a new decision may be rendered on a new matter that does not result in a reconsideration of the original decision.

For example, a Board officer must determine whether an injury arose out of and in the course of the employment under section 5(1) in order to pay compensation benefits. However, when this decision is rendered, the WCB may not be able to define the exact nature and extent of the injury or injuries. As further medical information becomes available, the WCB may more precisely define the nature and extent of the injury or injuries that were accepted under the claim in a separate decision without invoking a reconsideration of the original decision. After the 75-day time limit, the Board officer cannot reconsider the original decision.

ii. Clerical or typographical error, accidental slip or omission that is minor or obvious

The Supreme Court of Canada has indicated that administrative tribunals may correct a typographical or clerical error, error in an agreed statement of facts, or a mathematical error. It has been held that the power to "clarify an ambiguity" remained, notwithstanding that the final decision has been made.[2] A similar approach has been taken by the prior Appeal Division and has also been adopted by the Review Division and the WCAT.

The limits on reconsideration do not prevent a Board officer from issuing an addendum to correct a clerical or typographical error in a decision. This may be done where the text of the decision did not correctly reflect the Board officer's intent. An example of a clerical error might include a Board officer incorrectly typing in a decision letter $25,000 rather than $52,000 for a worker's earnings, but it is clear from the claim that this was a simple typographical error.

Another example is where a Board officer inadvertently transposes the day and month of the date of an employer's registration with the WCB. While the date of registration is a decision, the correction of the inadvertent transposition of the day and month is not a reconsideration of the original decision.

An accidental slip or omission may occur when the decision as recorded does not clearly reflect the intention of the decision-maker.[3] For example, a decision letter states "I do accept the degenerative changes as part of the claim", however; the remainder of the letter and the memo on the claim clearly illustrate that the Board officer intended that the letter state "I do not accept".

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 final decision of a Board officer.

This process for correcting errors, slips or omissions, however, cannot be applied to change decisions in cases where additional information arises after 75 days that

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2 Donald J.M. Brown, Q.C. & The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, August 2002 – Update 2002-2 (Toronto: Canvasback Publishing, 2002) p. 12-91.

3 Robert W. Macaulay, Q.C. & James L.H. Sprague, B.A., LL.B., *Practice and Procedure Before Administrative Tribunals*, (2002 Thomson Canada Limited), p. 27A-31.

indicates that the original decision was incorrect, as this would constitute a reconsideration of the original decision.

In order to clarify the WCB's ability to correct errors, slips or omissions, an amendment to policy contained in both the *RS&CM* and the *AM* would be required.

B. REOPENING ISSUES

i. Grounds for reopening – recurrence of injury

As noted previously, the *Act* sets out two grounds for reopening:

- there has been a significant change in a worker's medical condition that the WCB has previously decided was compensable, or

- there has been a recurrence of a worker's injury.

Policy provides guidance on determining when there has been a significant change in a worker's medical condition. In order to meet this ground for reopening, medical evidence is required that the worker's accepted condition either worsened or improved. In these situations, the WCB may reopen the matter that was previously decided and adjust compensation benefits accordingly.

A recurrence of a worker's injury is not currently defined in the *Act* or policy. This has resulted in confusion for stakeholders between the two grounds for reopening and between a recurrence of a worker's injury under the reopening provision and a recurrence of a disability under the other provisions of the *Act*.

One approach to addressing this confusion may be to clarify in the reopening policy that a recurrence of an injury may result where the original injury, which had either resolved or stabilized, occurs again without a second intervening compensable injury. Where the recurrence of the injury limits the worker's ability to continue working, compensation benefits may be payable under the original claim. An example of where an injury might recur would be a compensable knee strain which resolves but after some period of time flares up again without a triggering or intervening second compensable injury. If the flare up of the knee strain requires the worker to stop working, compensation benefits may be payable.

Two common situations where a recurrence of an injury might occur are set out below:

- A worker has a compensable injury for which temporary disability benefits are paid. The injury resolves and the claim is closed, but later becomes disabling again without any intervening new injury. The result is that the worker may be entitled to an additional period of temporary and/or permanent disability compensation under the original claim.

- A worker has a compensable injury for which temporary disability benefits are paid and a permanent disability award is granted. The compensable condition has stabilized, but later occurs again without any intervening new injury. The

result is that the claim may be reopened for an additional period of temporary and/or additional permanent disability compensation under the original claim.

While the two grounds for reopening may be quite separate, there may be situations where it may be determined that the both grounds are satisfied for a reopening.

ii. On application versus on own initiative

Section 96(2) provides that at any time, either on application or on the WCB's own initiative, the WCB may reopen a matter. However, neither the legislation, nor policy, currently provides direction on the terms "on application" or "on own initiative". The *Act* does direct, however, that a reopening "on application" will result in the referral of any dispute directly to the WCAT. Reopening considerations undertaken on the WCB's own initiative are first reviewed by the Review Division.

Based on the direction of the *Act*, the Review Division is required on each request for review of a decision, to determine whether the decision is a reopening made on application. If so, the Review Division must reject the review and refer it to the WCAT.

In practice, it is very difficult for the Review Division to determine whether a reopening decision was triggered by an application from a worker or an employer. This determination, however, is critical as it results in either the issue being referred to the WCAT or being reviewed by the Review Division.

The reason for this difficulty is that as set out under section 96(1), the WCB has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under Part 1 of the *Act*. As the WCB functions as an inquiry system, Board officers are regularly considering information provided by workers, employers, health care providers, representatives and other parties regarding a claim. The Board officers also inquire into different matters and gather information in the course of adjudicating a claim. Based on the information provided or gathered, the Board officer may render a decision on whether to reopen a claim.

In many cases the reason for a review of information may arise as a result of the receipt of a physician's status report on a worker, or a worker's request for additional benefits. The material received does not normally stipulate that a worker is requesting a reopening of a claim.

The former Compensation Services Division provided guidance on the difference between a reopening on application and a reopening on the WCB's own initiative in Practice Directive #58, Reopenings, as amended on July 1, 2003. The directive provides that a reopening request will be considered "on application" only where a formal reopening request has been made by a worker or employer, and it refers to at least one of the criteria in section 96(2). The directive also lists situations in which the WCB's decision under section 96(2) will not be considered as being "on application" including where there has been a general request to "reopen" a claim by a worker.

The Review Division, in Decision No. 2523, dated October 2, 2003, also addressed this issue and concluded that in order to be considered an "application", the worker must

refer specifically to section 96(2) or must use language substantially similar to that section. The Review officer determined that a general request for benefits did not constitute an application within the meaning of section 96(2) of the *Act*. The Review officer considered that this conclusion was considered the one that best fit the intent of the system and the general way in which the WCB adjudicates claims.

A WCAT panel, in Decision #2003-04322 dated December 24, 2003, considered Review Division decision No. 2523 and its interpretation of "on application". In the WCAT decision, the panel adopted the reasoning in Review Division Decision No. 2523.

The WCAT panel noted that the adoption of a narrow interpretation of "on application" in section 96(2) gives rise to a more liberal approach by the Review Division of its jurisdiction. The WCAT panel considered that this interpretation has several advantages:

(i) it permits a broader consideration of the complex and interrelated issues which often arise in connection with reopening decisions under section 96(2);

(ii) it reduces the amount of "procedural" complexity in having some issues under review by the Review Division while the reopening decision is under appeal to the WCAT at the same time; and

(iii) it supports the potential for resolution of issues at a lower level in the review and appeal structures.

After considering the alternative approaches, the WCAT panel accepted the reasoning from the October 2, 2003 Review Division decision as the basis for determining whether the Review Division or the WCAT is the appropriate body for addressing objections to decisions made under section 96(2) of the *Act*. The WCAT panel then referred this issue to the former Policy and Regulation Development Bureau for consideration of policy development.

In order to ensure that all parties in the system are aware of the approach being taken with respect to reopenings, it is proposed that policy be developed to provide that, in order for a reopening consideration to be an "application", the worker must refer specifically to section 96(2) or must use language substantially similar to that section.

The submission of information such as medical reports, requests for wage loss benefits or requests for vocational rehabilitation assistance would not constitute an application for a reopening. These would be considered as part of the normal investigation process on a claim and decisions rendered as a result of this information would be appealed to the Review Division.

It is considered that adopting this approach in policy would not prejudice a worker or employer, as any decision of the Review Division on a reopening issue is appealable to the WCAT.

5. OPTIONS AND IMPLICATIONS

OPTION 1 – Status quo

Policy would not be amended to address the issues raised regarding reconsiderations and reopenings.

Implications:

- Uncertainty would continue regarding what constitutes a reconsideration.
- Lack of clarity would continue regarding what constitutes a recurrence of an injury for purposes of a reopening.
- The reopening policy would not clarify the difference between a reopening on application and a reopening on the WCB's own initiative.

OPTION 2 – Amend the reconsideration policies in the *RS&CM* and the *AM*

Under this option, the reconsideration policies would be amended to clarify that the following do not constitute a reconsideration of a previous decision:

- New decisions on matters not previously adjudicated; and
- Correction of errors, slips and omissions.

Implications:

- Would provide clarity to WCB staff, workers, employers and other parties regarding the application of the reconsideration provisions.
- Would address questions raised by workers and employers regarding the application of the reconsideration provisions.
- Would not address issues raised regarding reopenings.

OPTION 3 – Policy would be amended to clarify the phrase "recurrence of an injury"

Under this option, it is proposed that policy be clarified to provide that a recurrence of an injury may result where the original injury, which had either resolved or stabilized, occurs again without a second intervening compensable injury. Where the recurrence of the original injury limits the worker's ability to continue working, additional compensation benefits may be payable under the original claim. Policy would also provide examples of situations where a recurrence might result.

Implications:

- Would address the concerns raised by stakeholders regarding the lack of clarity with respect to recurrences of injuries.

- Would improve consistency in decision-making.

- Would not provide clarity on what constitutes a reconsideration and what is the difference between a reopening on application versus a reopening on own initiative.

OPTION 4 – Policy would be amended to clarify what constitutes a reopening on application versus a reopening on the WCB's own initiative

Under this option, it is proposed that policy be developed to provide that, in order for a reopening consideration to be an "application", the worker must refer specifically to section 96(2) or must use language substantially similar to that section.

Policy would also provide that the submission of information such as medical reports, requests for wage loss benefits or requests for vocational rehabilitation assistance would not constitute an application for a reopening. This information would be considered as part of the normal investigation process on a claim and decisions rendered as a result of this information would be appealed to the Review Division.

Implications:

- Would adopt an approach to defining reopenings that is consistent with the intent of the legislation.

- Would adopt an approach in policy that has been confirmed by the Review Division and the WCAT.

- Would not prejudice a worker or employer, as any decision of the Review Division on a reopening issue is appealable to the WCAT.

- Would result in appellants having to first request a review from the Review Division before being able to appeal to the WCAT. Some appellants would prefer to have access to the two levels of review and appeal, while others would prefer to go directly to the WCAT for a final decision.

- Would not provide clarity on what constitutes a reconsideration and what is a recurrence of an injury.

OPTION 5 – Policy would be amended to reflect the changes proposed in options 2, 3 and 4

Under this option, policies in the *RS&CM* and the *AM* would be revised to reflect the changes proposed in options 2, 3 and 4.

Implications

- This option would most fully address the issues raised by stakeholders regarding the reconsideration and reopening policies.

- As otherwise noted under options 2, 3 and 4.

6. CONSULTATION

Stakeholders are invited to provide feedback on the options provided and may provide any additional comments that may be relevant to this issue.

Stakeholder comments will be accepted until **July 16, 2004**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

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The WCB's governing body, the Board of Directors, will consider the opinions expressed by stakeholders before it adopts any amendments to the current policies. Please note that all comments become part of the Policy and Research Division's database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.