

Reconsiderations

1.0 This Practice Direction:

- explains options when trying to have a Tribunal decision changed
- explains who can request a reconsideration
- provides examples of information parties should include in a reconsideration application
- outlines the threshold test, which must be passed to have a Tribunal decision reconsidered
- explains the reconsideration process
- explains how reconsiderations of interim decisions or rulings are handled
- identifies Tribunal decisions that will be useful to read in preparing a reconsideration application.

2.0 The Tribunal's Reconsideration Power

2.1 The *Workplace Safety and Insurance Act*, section 123(4), states that the Appeals Tribunal's decisions are final. Nevertheless, section 129 gives the Tribunal the discretion to reconsider a decision if the Tribunal considers that it is advisable to do so. Reconsiderations, however, are rarely granted. (For pre-1998 injuries and decisions, see the pre-1997 Act, sections 92 and 70, and section 123(1) and Part IX of the *Workplace Safety and Insurance Act*.)

2.2 A reconsideration is different from an appeal. Unlike an appeal of a Board decision, a party must provide a very good legal reason for a Tribunal decision to be reconsidered. A reconsideration will not be granted because a party disagrees with the decision and wants to re-argue the case. Other than a reconsideration, the only other option for having a Tribunal decision changed is to file an application for Judicial Review in the Superior Court of Justice – Divisional Court. Parties should also refer to section 9.0 below which explains the role of the Office of the Ombudsman.

2.3 A reconsideration involves two steps:

- 1) The Tribunal must decide whether it is advisable to reconsider the decision. This is called the threshold test;

- 2) If the threshold test is met, the Tribunal must decide whether the previous decision should be changed and, if so, how it should be changed. This is called the decision on the merits.

2.4 The Tribunal has developed a specific threshold test in its decisions to help Vice-Chairs and Panels weigh the need for finality in decision-making against the particular circumstances favouring reconsideration. The threshold test requires that generally, the Tribunal must find that there is a significant defect in the administrative process or content of the decision which, if corrected, would probably change the result of the original decision. The error and its effects must be significant enough to outweigh the general importance of decisions being final and the prejudice to any party of the decision being re-opened. (See *Decision No. 912/94R*)

2.5 The power to reconsider is discretionary. The Tribunal might decide that there is a good legal reason to reconsider a decision when:

- significant new evidence is discovered which was not available at the original hearing and which would likely have changed the outcome
- the decision overlooks an important piece of evidence (as opposed to rejecting the evidence or distinguishing it)
- the decision contains a clear error of law (for example, the decision does not apply the relevant sections of the *Workplace Safety and Insurance Act*)
- the decision contains a jurisdictional error (for example, the Tribunal decided an issue which it did not have the legal authority to decide).

2.6 The threshold test has been set out in numerous WSIAT decisions. See *Decision Nos. 303/95R; 762/91R3; 311/92LR; 2232/01R; 65/01R; 1220/00R2 and 1119/04R*. These and other Tribunal decisions are available on the Tribunal's website or from the Tribunal's Information Department.

3.0 The Reconsideration Request

3.1 The reconsideration procedure is flexible and can be varied to fit the needs of a particular case. The *Workplace Safety and Insurance Act* states in section 131 that the Appeals Tribunal may set its own practice and procedure. Most reconsideration requests are decided on the basis of written submissions; however, the Tribunal may require an oral hearing. The usual process is described below under sections 3.0 and 4.0.

- 3.2** The Tribunal is the last level of appeal for workplace safety and insurance matters in Ontario. Its decisions affect both workers and employers. Accordingly, finality of the decision-making process is extremely important. Therefore the Tribunal has determined that as a general practice, it is not advisable to reconsider a decision after more than six months has passed since the date of the decision. A delay of more than six months in making a reconsideration request is a factor which may be weighed in deciding whether it is advisable to reconsider the decision.
- 3.3** Only a party to a Tribunal decision or the Workplace Safety and Insurance Board can request a reconsideration. If a party has chosen not to participate in the hearing, it is unlikely that this party's reconsideration request will be granted. A reconsideration is not an appeal and consequently it must be argued differently. The issues to be decided are whether the decision should be reopened and whether there is a very good legal reason to change the result of the original decision. As such, it is a good idea for parties making a reconsideration request to have representation experienced with workplace safety and insurance matters.
- 3.4** The Tribunal may begin a reconsideration process on its own initiative. Unless the proposed change is only a clarification, the parties will be given an opportunity to make submissions on the threshold test. See section 7.0 below regarding clarifications.
- 4.0 The Threshold Test**
- 4.1** A party who wants a reconsideration (the Applicant) must complete the Reconsideration/Clarification Request form and explain why the decision should be reconsidered or clarified. See section 7.0 below on clarifications. Forms are available from the Tribunal and the Tribunal's website at www.wsiat.on.ca.
- 4.2** Completed forms should be sent to the attention of the Tribunal. Evidence supporting the request (for example, supporting documents or a signed witness statement) should be attached to the completed Reconsideration/Clarification Request form. Requests will not be processed until the Tribunal confirms that submissions are complete.
- 4.3** The Tribunal Chair may assign the reconsideration request to the original Vice-Chair or Panel. If a new Vice-Chair or Panel is assigned, the original case materials will be forwarded. If the original Vice-Chair or Panel is assigned, the original case materials will not be forwarded, however, they may be ordered should another copy be required. The Vice-Chair or Panel shall consider the reconsideration request and any previous decisions and may consider any written materials from previous proceedings.

- 4.4** If the Vice-Chair or Panel decides that the reconsideration request does not have any prospect of success, it will not seek submissions from other parties. The Tribunal will issue a decision explaining why the threshold test has not been met. The decision will be sent to the Applicant, any party of record and the Board.
- 4.5** If the Vice-Chair or Panel decides that the reconsideration request makes an arguable case, the case will be referred for processing. The Tribunal will provide the Reconsideration materials to all parties to the original hearing (including the Respondent) and ask them to complete a Reconsideration Request Response form and make submissions on the threshold test. *Note: If a party declined to participate in the original hearing, the Tribunal will not normally ask for submissions from that party.*
- 4.6** The Respondent will have three weeks to respond in writing to the reconsideration request. The submissions should be sent to the Tribunal and also to the Applicant.
- 4.7** The Applicant will have two weeks to make a written reply to the Respondent's submissions. The Applicant's reply should be sent to the Tribunal and to the Respondent. *Note: The Applicant's reply is sent to the Respondent for information only. Submissions are complete at this point unless the Tribunal requests additional information.*
- 4.8** Due to limited staff and adjudicative resources dedicated to handling reconsideration requests, the Chair or his or her delegate may decide not to assign a reconsideration request for review by a Vice-Chair or Panel if the request repeats the substance of a previous unsuccessful reconsideration request. Therefore, it is very important to raise all possible arguments and issues and provide strong evidence on the first reconsideration request. See: *Decision No. 871/02R2*
- 5.0 Decision On The Merits**
- 5.1** If the threshold test is not met, the merits of the original Tribunal decision will not be reviewed. If the threshold test is met, the case will be reconsidered and a new decision made on the merits. If the threshold test is met with respect to only part of a decision, only that part of the decision will be reconsidered on the merits.
- 5.2** Notice of hearing on the merits will be given only to parties who participated in the original hearing, unless the VC or Panel directs that all parties receive notice of the hearing.

- 5.3** The Tribunal may give instructions about the procedure to be followed on the decision on the merits. For example, if credibility is not an issue, it may not be necessary to hold an oral hearing on the merits. Unless otherwise ordered, the decision on the merits will be made by the Vice-Chair or Panel who decided the threshold question.
- 5.4** In some cases, it may be appropriate to combine the hearings on the threshold test and the merits.

6.0 Interim Decisions and Rulings

- 6.1** An interim decision or ruling is a declaration from a Vice-Chair or Panel that may be in the form of a memorandum or a formal released decision ending in an “I”. An interim decision or ruling does not finally dispose of an issue under appeal. These types of rulings may be procedural or substantive and are made prior to a final decision in an appeal being released. Most often, interim decisions will provide direction on how to proceed with an appeal. It is advisable that the Tribunal receive a reconsideration request for an interim decision as soon as possible as the appeal would continue to be heard. A decision will be presumed to be received by the parties five days after the date it was mailed unless there is evidence to the contrary.
- 6.2** Reconsideration requests of interim decisions will usually be dealt with by the Vice-Chair or Panel who is seized with the appeal. If no Vice-Chair or Panel is seized, one will be assigned to address the reconsideration request.
- 6.3** Reconsideration requests of interim decisions must be handled quickly because processing of an appeal cannot continue until the reconsideration request is resolved. Accordingly, the reconsideration form is not usually required and the specific procedure to be followed is at the discretion of the Vice-Chair or Panel assigned.

7.0 Technical Errors and Omissions

- 7.1** Some reconsideration requests do not question the result in a decision but identify an omission, ambiguity or misstatement. If the problem identified in the Reconsideration/ Clarification Request form does not affect the substance of the original decision, the Tribunal may correct the omission, misstatement or ambiguity without asking for submissions.

- 7.2** The Vice-Chair or Panel reviewing the request will decide whether the request involves a clarification required by an omission, misstatement or ambiguity, or a reconsideration.
- 7.3** If an omission, misstatement or ambiguity does not affect the substance of a decision, the Tribunal may correct the omission, misstatement or ambiguity on its own motion without asking for submissions.
- 8.0 Requests For Reconsideration From The Board**
- 8.1** Where the Board has difficulty implementing a decision, it may bring this to the Tribunal's attention. The Tribunal will consider whether there is an ambiguity or misstatement which can be clarified without asking for submissions from the parties.
- 8.2** The Tribunal will ask the parties for submissions on the threshold question if the Board raises an issue which may affect the substance of a decision.
- 9.0 Ombudsman Ontario**
- 9.1** The Office of Ombudsman Ontario investigates complaints about provincial government organizations. The Ombudsman may help you resolve your problem and request changes to how provincial government agencies work. Further information can be found at the website for the Ombudsman Ontario at **www.ombudsman.on.ca**.
- 9.2** An Ombudsman investigation may result in new evidence or submissions which are relevant to a party's reconsideration request. Where a party complains to the Ombudsman, the Tribunal will not process any reconsideration request until the Ombudsman's Office indicates that the investigation is complete.
- 9.3** Correspondence from the Ombudsman may cause the Tribunal to begin a reconsideration process on its own initiative. Except for clarifications, the parties will be asked for submissions on the threshold test before the Tribunal decides whether it is advisable to re-open a decision. In a case which involves the Ombudsman, the reconsideration process is flexible and may be varied as appropriate.

10.0 Reconsiderations of Section 31 (Right To Sue) Applications

10.1 Please see the Tribunal's *Practice Direction: Right to Sue Applications*.

Dated at Toronto, Ontario this first day of October, 2007
Workplace Safety and Insurance Appeals Tribunal
I.J. Strachan, Tribunal Chair