April 2, 2007

Memo to: Jill Callan
Chair
Workers' Compensation Appeal Tribunal

Memo from: Heather McDonald
Vice Chair
Workers' Compensation Appeal Tribunal

RE: Policy Items AP1-37-3 and AP1-96-1, Section 251 Referral
Date of Decisions: March 6, 2006 (RD #R0058832 and RD #R0068834)

This is a referral to the chair under section 251 of the *Workers Compensation Act* (Act). Policy items AP1-37-3 and AP1-96-1 of the *Assessment Manual* (Manual) provide that a Board decision to change a firm's classification does not constitute a reconsideration of a decision under section 96(4) of the Act and is therefore not subject to the time limitations in section 96(5) of the Act. I consider that insofar as these policies apply to circumstances such as those in the case at hand, where the Board changed the employers' classifications on the sole ground of Board error, they are so patently unreasonable that they are not capable of being supported by the Act and its regulations pursuant to section 251(1).

1.0 INTRODUCTION

These two appeals are traveling together. There is one legal counsel representing both employers. Legal counsel has filed a joint submission on behalf of the employers with respect to their respective appeals, as the issues are identical. In this memorandum I will refer to the two employers respectively as X Ltd. and PR Ltd.

Under section 239(1) of the Act, the employers are appealing decisions dated March 6, 2006 from the Review Division, Workers' Compensation Board (now operating as WorkSafeBC, hereinafter referred to as the Board). The Review Division confirmed earlier Board decisions from the Assessment Department (Department) which deleted Classification Unit (CU) 741013 [General Retail, not elsewhere specified (NES)] from

each employer's account, leaving only CU 741014 [Home Improvement Centre] on each account. The Board made January 1, 2006 the effective date for the change in classification to a sole CU, and that effective date was also confirmed by the Review Division.

On appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employers have provided jurisdictional arguments not presented to or considered by the Review Division. Before the Review Division, the employers focused on the merits of the Board's decisions to delete CU 741013 from their accounts.

In the WCAT appeal proceedings, the employers' first argument was that the Manual policies which provide that the Board's exercise of authority under section 37 of the Act does not constitute a reconsideration under section 96(4) or 96(5) of the Act, do not apply to situations where the Board seeks to change an existing CU assigned to an employer in order to correct an earlier Board error. For reasons which I will provide later in this memorandum, I disagree with the employers' submission on this point.

The employers' alternative argument, which I have found necessary to address, is that the Manual policies which provide that the Board's exercise of authority under section 37 of the Act is not a reconsideration under section 96(4) and 96(5) of the Act are so patently unreasonable they are not capable of being supported by the Act.

Pursuant to section 246(2)(i) of the Act and item #8.82 of WCAT's *Manual of Rules of Practice and Procedure*, I invited the Department to provide a written submission in the appeal proceedings, as I considered this would be of assistance in deciding the issues in an appeal. The Department did participate by providing a written submission.

2.0 RELEVANT LAW, INCLUDING STATUTORY AND POLICY PROVISIONS

Statutory Provisions

Section 96 of the Act was amended as of March 2003. Section 96(1) of the Act provides that, apart from WCAT's appeal authority under sections 239 and 240, the Board has exclusive jurisdiction to inquire into, hear and determine all matters and questions of fact and law arising under Part 1 of the Act.

The Act does not define "decision." Section 1 of the *Administrative Tribunals Act* (ATA), however, defines "decision" as including "a determination, an order or other decision." Pursuant to section 245.1 of the Act, the definitions in section 1 of the ATA apply to WCAT.

Section 1 of the Act defines "reconsider" 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 states that 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 Part 1 of the Act.

Section 96(5) of the Act provides that despite section 96(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.

Section 96(6) of the Act states that despite section 96(1), the Board may review a decision or order made under Part 1 of the Act but only as specifically provided in sections 96.2 to 96.5. Sections 96.2 through 96.5 describe the Board's Review Division process.

Section 96(7) of the Act states that despite section 96(1), the Board may at any time set aside any decision or order under Part 1 if the decision or order resulted from fraud or misrepresentation of the facts or circumstances upon which the decision or order was based.

Section 37(1) of the Act sets out eleven classes established for the purposes of assessment in order to maintain the accident fund.

Section 37(2) provides that the Board may do one or more of the following:

(a) create new classes in addition to those referred to in subsection (1);
(b) divide classes into subclasses and divide subclasses into further subclasses;
(c) consolidate or rearrange any existing classes and subclasses;
(d) assign an employer, independent operator or industry to one or more classes or subclasses;
(e) withdraw from a class

    (i) an employer, independent operator or industry,

(ii) a part of the class, or
(iii) a subclass or part of a subclass,

and transfer it to another class or subclass or form it into a separate class or subclass;

(f) withdraw from a subclass

(i) an employer, independent operator or industry,
(ii) a part of the subclass, or
(iii) another subclass or part of another subclass,

and transfer it to another class or subclass or form it into a separate class or subclass.

Section 37(3) of the Act says that if the Board exercises authority under section 37(2), it may make the adjustment and disposition of the funds, reserves and accounts of the classes and subclasses affected that the Board considers just and expedient.

Under section 37(4) of the Act, the Board is given authority for the purposes of transition in relation to the classes established by section 37(1) as enacted by section 31 of the *Labour Statutes Amendment Act, 1999*. For those transition purposes, the Board may

(a) assign or reassign employers, independent operators or industries to those classes as the Board considers advisable, and
(b) make the adjustment and disposition of the funds, reserves and accounts of the pre-existing classes that the Board considers advisable.

Section 250(2) of the Act states that WCAT "must make its decision based on the merits and justice of the case, but in so doing [WCAT] must apply a policy of the board of directors that is applicable in that case.

Section 250(2) of the Act states that WCAT "must make its decision based on the merits and justice of the case, but in so doing [WCAT] must apply a policy of the board of directors that is applicable in that case."

Section 251 provides that:

251 (1) The appeal tribunal may refuse to apply a policy of the board of directors only if the policy is so patently unreasonable that it is not capable of being supported by the Act and its regulations.

> (2) If, in an appeal, the appeal tribunal considers that a policy of the board of directors should not be applied, that issue must be referred to the chair and the appeal proceedings must be suspended until the chair makes a determination under subsection (4) or the board of directors makes a determination under subsection (6), as the case may be.
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> (3) As soon as practicable after an issue is referred under subsection (2), the chair must determine whether the policy should be applied.
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> (4) If the chair determines under subsection (3) that the policy should be applied, the chair must refer the matter back to the appeal tribunal and the tribunal is bound by that determination.
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> (5) If the chair determines under subsection (3) that the policy should not be applied, the chair must
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> (a) send a notice of this determination, including the chair's written reasons, to the board of directors, and
> (b) suspend any other appeal proceedings that are pending before the appeal tribunal and that the chair considers to be affected by the same policy until the board of directors makes a determination under subsection (6).
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> (6) Within 90 days after receipt of a notice under subsection (5) (a), the board of directors must review the policy and determine whether the appeal tribunal may refuse to apply it under subsection (1).

Relevant jurisprudence relating to the "patently unreasonable" test indicates that:

- "Patently unreasonable" means openly, clearly, evidently unreasonable: *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 S.C.R. 748.;

- The privative clause set out in section 96(1) of the Act requires the highest level of curial deference: *Canada Safeway v. B.C. (Workers' Compensation Board)* (1998), 59 B.C.L.R. (3d) 317 (C.A.);

Further, in *WCAT Decision #2005-01710* (April 7, 2005), the chair noted the description of the patently unreasonable standard provided in the *Core Services Review of the Workers' Compensation Board* (March 2002) [*Core Services Review* report]. That description said that the focus under the patently unreasonable standard involves "an interpretation of the Act which could not be rationally supported. This standard would

tolerate a possible interpretation of the Act, no matter how strained that interpretation might be, if otherwise lawful under the Act." In *WCAT Decision #2005-01710*, the chair adopted that description of the patently unreasonable standard as applicable in section 251 determinations, noting that it is a high standard requiring significant deference to the board of directors. The chair also went on to state as follows:

> In considering the application of the standard of patent unreasonableness to the matter before me, I must accept that statutory provisions are often capable of more than one interpretation and that there may be a variety of viable policy options through which a statutory provision may be implemented. It is clear from the use of the patent unreasonableness standard in section 251 that the Legislature did not intend that the section 251 process be invoked where a policy of the board of directors fails to reflect the most correct interpretation of the relevant statutory provisions but is not patently unreasonable.

Policy

Policy item AP1-37-3 in the Manual deals with changes in a firm's classification. The explanatory notes to the policy item state that the Board may do one or more of the following with respect to all or part of a firm's classification: (1) change an existing classification unit; (b) add a classification unit; or (c) delete a classification unit. The policy item states in part as follows:

> **A decision to change a firm's classification does not constitute a reconsideration of a decision under section 96(4) of the Act. Rather, the change constitutes 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 [*sic*] not apply.**
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> [bold emphasis added]

Policy item AP1-37-3 provides that the reasons for the Board changing a firm's classification fall into three 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 (c) 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.

Policy item AP1-37-3 also deals with the effective date of changes in classification. If there has been no change in a firm's operation but the firm was misclassified due to Board error, a classification change that results in an assessment "rate up" situation will be effective January 1st of the year following the date of the decision to change the firm's classification.

Policy item AP1-96-1, entitled "Reconsiderations, Review and Appeals, Reconsiderations of Decisions", gives a definition of "reconsideration." The policy item states in part as follows:

> 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:*
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> - the modification of an employer's assessment rate through experience rating;
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> - 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:*
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> - 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) decision as they related 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, does not constitute a reconsideration of a Board decision.**
>
> On 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 cancelling 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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> [italic and bold emphasis added]

Policy item AP1-96-1 goes on to state that 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 policy item says that 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.

With respect to the purpose of sections 96(4) and (5), policy item AP1-96-1 states in part as follows:

> 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.
>
> …
>
> 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.*
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> [italic emphasis added]

Policy item AP1-96-1 says that 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 <u>any</u> evidence or by any reasonable interference from the evidence;
- there has been a policy error such as:
  - applying an applicable policy clearly 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.

[reproduced as written]

Policy item C14-103.01 in Volume II of the *Rehabilitation Services and Claims Manual* (RSCM II) is entitled "Changing Previous Decisions – Reconsiderations." That policy discusses the purpose of sections 96(4) and 96(5) in terms almost identical to policy item AP1-96-1. Policy item C14-103-01 states in part as follows:

> The purpose of these amendments is to promote finality and certainty within the workers' compensation system.
>
> It is significant that section 96(4) only authorizes the Board to reconsider a decision or order "on its own initiative." This is to be contrasted with the Board's authority to reopen a matter "on its own initiative, or on application" under section 96(2). It is also to be contrasted with section 96.5 and section 256, which authorize a review officer and the appeal tribunal, respectively, to reconsider decisions on application in certain circumstances.
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> The use of the words "on own initiative" in section 96(4), with no provision for "on application", 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 for the Board. The Board is given a time limited opportunity to correct, on its own initiative, any incorrect decisions it may have made*.
>
> [italic emphasis added]

Policy item C14-103.01 also refers to the grounds for reconsideration under section 96(4) of the Act, advising that the Board may reconsider 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 interference from the evidence;

- There has been a policy error such as:
  - applying an applicable policy clearly incorrectly, or
  - not applying an applicable policy; or
- there has been a clear error of law, such as a failure by the Board to follow the express terms of the Act.

3.0 BACKGROUND

PR Ltd.'s WCAT Appeal (Re: RD# R0058832)

The employer operates a retail hardware store operation and a lumberyard. The store and the lumberyard each are on their own pieces of property, separated by an alley. The city in which the properties are located, taxes the two properties separately.

The evidence is that the employer runs the two operations as separate centres, with their own designated employees who work specifically in their own operation. The employees do not cross from one operation to the other. The store and the lumberyard each have its own designated payroll.

From a health and safety perspective, the evidence from the employer's office manager is that the retail store clerks work in the store operation in a relatively low hazard environment. They stock shelves, attend the cash registers, take orders and provide service to customers. They do not operate forklifts or lift heavy products. The lumberyard workers, however, encounter different occupational hazards in their work. All of the lumberyard workers require saw and forklift training, and must use personal protective equipment such as gloves, steel toe boots and eye protection when appropriate.

The employer started its operations in 1991 and registered with the Board in December 1990. The employer's description of industry initially assigned by the Board was "Building Supplies."

In a letter dated March 10, 1998, a Board accounts officer advised that a second classification (then #067302 – retail) was being added to the employer's registration effective January 21, 1998. According to the accounts officer, the basis of this decision was information that approximately 30% of the employer's revenue was derived from the warehousing operation, and approximately 70% of the employer's revenue was derived from the retail operation. Further, there were "separate workers for both of these industries."

As part of the change to the Board's classification structure in January 2000, the names of the employer's two classifications changed. The 1999 employer's remittance form said that the names were being changed as follows: "Building Supplies" was being changed to "Home Improvement Centre", and "Retail" was being changed to "General Retail NES." The employer says that these name changes did not affect its overall operations. Its lumberyard and retail hardware store operations continued to have separate classification units for assessment purposes, as had been the case since January 1998.

In May 2002, a Board assessment officer audited the employer's records. The officer's audit notes acknowledged the employer operated a hardware store operation and, as a separate classification, a "retail and home improvement building supplies" operation. The officer noted the employer maintained a separate payroll for each classification. The officer did not indicate the Board had erred in assigning the two classification units to the employer.

In May 2005, a different assessment officer (D), conducted an audit of the employer's operations. He found that the employer's second classification (General Retail NES) had been added based upon information the employer provided to the Board in the year 2000. D then found the Board had erred in adding this second classification. In a letter dated June 29, 2005 to the employer, D advised that pursuant to section 37 of the Act, he had deleted, effective January 1, 2006, the industrial classification General Retail NES from the employer's account. D explained as follows:

> In 2000 your firm had contacted the Board requesting the addition of the "General Retail NES" classification. Based on the information supplied the request was granted and the classification was added to your firm's profile. The addition of this classification was in error and did not comply with the overall industrial operations of your firm.
>
> The previously assigned classification of "Home Improvement Centre" cu 741014 had been created in 2000, when the Board amended its classification structures, to represent business operations such as yours. This classification was specifically created to cover "Home Improvement

> Centres" which includes the retail sales of home improvement and building supplies. All companies that are operating in a similar type of business are treated equal [*sic*] and should be registered in the same classification in order to not have an economic advantage over their competition.
>
> In accordance with Assessment Policy AP1-37-3(3)(b)(ii) the change in classification is considered a "Board Error" and would result in an increased assessment rate for payrolls previously included under the "General Retail NES" classification. Due to the increased assessment rate the Assessment Policy identifies the date of change to be "effective January 1st of the year following the date the error came to the Board's attention".
>
> I have enclosed a copy of the classification unit description for "Home Improvement Centre" cu 741014 for your review.

D also advised the employer that it could request a clarification of D's decision, or request a reconsideration by the audit manager. The letter stated that if the employer was still dissatisfied, it could request a review from the Review Division within 90 days of the date of the letter (June 29, 2005). D further advised that the Audit Section could not reconsider a decision once a request for review had been filed with the Review Division.

The employer challenged D's decision. On August 5, 2005, a research and evaluation analyst wrote to the employer. The analyst referred to Manual policy AP1-37-1, stating that it provided a rebuttable presumption that a firm would be classified in a single classification unit, based upon its industry. The presumption could be rebutted if the firm met the criteria for multiple classifications. After considering the employer's operations, the analyst found that the Board had correctly decided to classify the employer in the single CU 741014. The analyst noted that CU 741014 included retailers that retailed building supplies and material directly from lumberyards that are accessible to the public.

The employer requested a review from the Review Division. In the March 6, 2006 decision, the review officer confirmed the Board's decision to classify the employer in the single classification CU 741014. The review officer found that the employer was in the home improvement industry. He found that CU 741014's description included both hardware and lumber sales. He said that the CU description specifically referred to large retailers that operate a store targeting home improvement merchandise, and employers that retail building materials and supplies directly to the final consumers from lumberyards accessible to the public. Thus the review officer found that both the employer's hardware sales operation and its lumberyard "fit comfortably within

CU 741014". With respect to CU 741013, the review officer noted that its description included as examples some of the types of goods sold by the employer, but that it also indicated it was intended to include retail employers whose main operations did not match operations targeted by other sub-sector CUs. As the review officer found that the employer's operations were targeted by CU 741014, he found that CU 741014 was the best fit for the employer's operations.

In the proceedings before the assessment officer and the review officer, the employer did not rely on the jurisdictional argument that section 96(5) of the Act precluded the Board from reconsidering its decision to classify the employer in both CU 741014 and CU 741013.

X Ltd.'s WCAT Appeal (Re: RD #R0058834)

The background related to X Ltd. is very similar to that of PR Ltd. X Ltd operates a retail hardware store operation and a lumberyard in a different city than PR Ltd's operations. The retail hardware store and the lumberyard of X Ltd. are located on their own pieces of property separated by a roadway, and the property tax notices indicate that the city taxes each of the properties separately. As with PR Ltd, X has operated the hardware store and lumberyard as separate centres, with each of the two operations having their own designated employees who do not cross over into the other operations. Each operation has its own designated payroll. From an occupational health and safety perspective, the two operations are distinct.

From the record it is unclear when X Ltd. initially registered with the Board. The earliest document in the firm file is date stamped April 1950.

In the "Employer's report of 1965 Payroll and 1966 Estimated Payroll", the Board described X Ltd's industry classification as described as "Builder Supply." This description remained the same through to 2000, when the Board changed its industry classification system, and the name of the classification became "Home Improvement Centre."

In the 1970s and through to the mid 1980s, the Board assigned other classifications to X Ltd.'s account, such as "Carpet Laying", and "Electrical Wiring", but the last of those additional classifications was deleted effective December 1, 1984. From 1985 through 1999, there was only one assigned classification to X Ltd.'s account: "Builder Supply."

By letter dated February 21, 2000, a Board employer service representative (ESR) advised X Ltd. that a second classification, CU 741013 [General Retail] had been added to X Ltd.'s account, effective January 1, 2000. In a note dated February 21, 2000, the

ESR indicated that she had spoken with the owner of X Ltd., and as a result, she "felt that he should get the additional class as he was quite specific and re-emphasized the separate staff/payroll to run each element of his business."

Approximately five years later, a Board assessment officer, "C" conducted an audit of X Ltd.'s account. C determined that the addition of CU 741013 had been a Board error. In a letter dated May 16, 2005, C advised X Ltd. about the Board error, and also advised that CU 741013 would be deleted from its account, effective January 1, 2006. Thus thereafter the sole classification for X Ltd.'s operations would be CU 741014 [Home Improvement Centre].

X Ltd. requested a reconsideration of C's May 16, 2005 decision. As with PR Ltd, in an August 5, 2005 letter, a Board research and evaluation analyst upheld C's May 16, 2005 decision. X Ltd. then applied to the Review Division for a review of the August 5, 2005 decision of the analyst.

In a decision dated March 6, 2006, a Review Division review officer confirmed the analyst's August 5, 2005 decision. This was the same review officer that issued the March 6, 2006 decision regarding PR Ltd. The reasoning was the same in both decisions.

4.0 PRIOR CONSIDERATION OF POLICY

A. In *WCAT Decision #2005-02315* (May 4, 2005), the panel referred to Manual policy AP1-96-1. The appeal involved an August 3, 2004 reconsideration decision by the Board's Department of a July 7, 2004 decision that denied the employer's request to reverse a penalty imposed under section 38(2) of the Act and under Manual policy AP1-47-1. There was no issue raised or considered regarding the legality of Manual policy AP1-96-1 because the circumstances of the case did not bring the matter into question. The WCAT panel simply noted that under policy AP1-96-1, a Board officer had the authority to reconsider a prior Board officer's decision where one of the grounds for reconsideration was whether one or more of the reasons for reducing or cancelling a penalty under policy AP1-47-1 had been met. That ground for reconsideration is explicitly set out in policy AP1-96-1 as justification for a reconsideration by the Board.

B. In *WCAT Decision #2005-02642* (May 24, 2005), the panel considered the meaning of "decision" under the Act and Board policy, in the context of the modification of an employer's assessment rate through experience rating. The panel also considered Manual policy AP1-96-1 and the limitations on reconsidering decisions under section 96(5) of the Act.

The facts in *WCAT Decision #2005-02642* involved Board determinations in 1987, 1988 and 1989 in which the costs associated with a worker's serious injury were coded to the wrong CU bin. The employer's operations had been placed in three different classification "bins". The Board accepted the worker's claim for compensation and coded the costs to CU 010200 (logging) rather than to CU 010400 (pulp mills), despite the fact that the worker was employed in the employer's pulp mill. The wrong coding of the worker's claim increased the net experience rating costs for the employer by approximately $472,000.00.

The WCAT panel noted that more than 75 days had passed since 1987, 1988 and 1989. Thus, if "decisions" were rendered in those years, the Board could not reconsider them because of section 96(5) of the Act. The WCAT panel referred to Manual policy AP1-96-1, which gives examples of Board decisions which can be reconsidered under section 96(4) of the Act, and which would also be subject to the time limitations for reconsideration in section 96(5) of the Act. The panel noted that the first bulleted point in the policy examples was "the modification of an employer's assessment rate through experience rating", and the panel found that this example had direct application in the appeal. No issue was raised regarding the legality of policy AP1-96-1 and given the facts in the appeal, there was no reason for the panel to consider it.

The panel referred to that portion of policy AP1-37-3 which provides that a decision to change a firm's classification, including a decision stemming from a Board error, does not constitute a reconsideration of a decision under section 96(4) of the Act, and thus the time limits in section 96(5) of the Act also do not apply. The panel found that policy AP1-37-3 did not apply in the appeal, as the issue on appeal did not concern whether the employer's operations were properly classified. Thus the panel did not deal with policy AP1-37-3, as on the facts of the case, it did not apply. No issue was raised regarding the legality of policy AP1-37-3 and there was no reason for the panel to consider that issue.

The result of the appeal is interesting. The WCAT panel found that pursuant to Manual policy AP1-96-1, modification of an employer's assessment rate through experience rating is a decision subject to the limitations in section 96(5) of the Act. The panel went on to conclude as follows:

> I appreciate that, as a result of subsection 96(5) of the Act, the coding error and the Board decisions which flowed from that error cannot be reconsidered by the Board. The result is that the employer has paid more assessments than it would have been required to pay, had the claim been properly coded. I point out that had the Board miscoded the claim, with the result that the claim costs were allocated to a classification with a lower rate than was appropriate (if the worker had been a logger and the

> claim had been coded to the pulp mill classification), it would not have been open to the Board in 2003 to have asked the employer to pay it nearly $500,000.00 to make up for assessments the employer should have paid had the Board initially correctly coded the claim.
>
> *I appreciate that this is not a case where the Board's error benefited the employer. There will have been such cases. The finality associated with the terms of subsection 96(5) of the Act affects the Board, workers, dependants and employers, both beneficially and detrimentally. I cannot decline to recognize the effect of subsection 96(5) simply because the employer was detrimentally affected by that subsection or on the basis that the Board has been unjustly enriched.*
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> [italic emphasis added]

My research has not revealed any other WCAT decisions which deal specifically with the aspects of Manual policies AP1-37-3 and AP1-96-1 that are challenged by the employers in these appeals. I have found no WCAT decisions which deal with a challenge to the legality of these policies. Therefore the employers' appeals appear to be matters of first instance for WCAT.

5.0 ANALYSIS

First Position

The employers' first position is that their appeals clearly involved decisions on "individual matters", and that therefore, the decisions fall within policy AP1-96-1 as decisions that may be reconsidered under section 96(4) of the Act and are subject to the time limits for reconsideration in section 96(5) of the Act.

I am unable to agree with the employers' interpretation of policy AP1-96-1 on this point. This is not to say that I disagree that, apart from considering Board policy, the decisions in question would certainly be decisions on "individual matters." My disagreement lies with the employers' argument that the definition of "individual matters" in policy AP1-96-1 is intended to include the classification decisions affecting the employers in the case at hand.

First, I note that a decision to classify or reclassify an employer is not one of the examples provided in the policy's bulleted points of examples of decisions on "individual" matters. In and of itself, that would not be definitive as indicating that classification decisions affecting individual employers were not intended to be decisions on "individual matters." However, given that classification decisions with respect to individual employers are one of the most common types of Board decisions, and given

that these types of decisions would reasonably be viewed by many persons as "individual matters", their exclusion from the bulleted examples is noteworthy as a *casus omissus* ("case omitted"): see *Statutory Interpretation: Theory and Practice*, Randal N. Graham (2001, Emond Montgomery Publications Limited, Toronto, Canada) at page 105.

Second, policy AP1-96-1 is explicit that the exercise of the Board's authority to make changes to classes and subclasses, *including withdrawing an employer from a subclass and transferring the employer to another class or subclass,* does not constitute a reconsideration of a Board decision. The Board's decisions to delete the General Retail NES classification from each employer's account fall within policy AP1-96-1's explicit reference to the Board's authority to make changes to classes and subclasses, as the Board in effect withdrew part of the employers' operations from the General Retail NES classification, transferring those parts of the operations to the remaining Home Improvement Centre classification.

Third, policy AP1-37-3 is also explicit in stating that a change to firm's classification does not constitute a reconsideration of a decision under section 96(4) of the Act. Again, the Board's decisions to change each employer's classification by deleting the General Retail NES classification from their accounts, fall within this express policy. Policy AP1-37-3 says that rather than being "reconsiderations" of earlier classification decisions, such changes constitute the exercise of the Board's normal classification authority under section 37(2) of the Act. This express policy statement supports the interpretation of policy AP1-96-1 that a Board decision to change an employer's classification is not a decision on an "individual matter", is also not a "reconsideration" decision under section 96(4) of the Act, and is thus not subject to the 75-day rule in section 96(5) of the Act.

In interpreting Board assessment policy, it is important to interpret separate provisions in both their immediate context and in the context of the policy statement as a whole. See: *On the Construction of Statutes,* Sullivan and Driedger (2002, 4th ed., LexisNexis, Canada) at page 281. My conclusion is that when reading the policies AP-1-37-3 and AP1-96-1 together as a whole, it is clear that the Board intended that decisions involving the classification and reclassification of individual firms are not to be considered decisions involving "individual matters." Rather, in the policies the Board intended such decisions to fall within the scope of decisions involving the general matter of the Board's general exercise of classification authority under section 37(2) of the Act. The Board intended policies AP1-37-1 and AP1-96-1 to apply to the Board decisions, underlying these appeals, which changed the employers' classification from multiple classifications (two classifications) to single classifications by deleting the General Retail NES classification from their accounts. I am satisfied that policies AP1-37-1 and AP1-96-1

were intended to apply to the Board decisions in this case by characterizing them as decisions of a general nature under section 37(2) of the Act, not as reconsideration decisions subject to the 75-day rule in section 96(5) of the Act.

Accordingly, as I do not agree with the employers' position on this point, it has been necessary for me to address the employers' alternative submission, which relies on section 251 of the Act.

The Section 251 Issue - Submissions

The employers submit that if Manual policies AP1-96-1 and AP1-37-3 apply such that the Board's decisions to correct previous Board classification decisions are not "reconsiderations" under section 96(5)(a) of the Act, then the policies are so patently unreasonable they are not capable of being supported by the Act.

The employers' position is that the Board's initial determinations to assign General Retail NES to their accounts, being classification determinations made by the Board under Part 1 of the Act, were "decisions" made under Part 1 of the Act. The employers also take the position that the Board decisions to delete the General Retail NES classification from their accounts, constituted "reconsideration" decisions under section 96(4), but outside of the 75-day rule in section 96(5) of the Act. The employers say that the deletions were "reconsiderations" because they involved the Board considering the matters addressed in the previous decisions to add General Retail NES, to determine whether those conclusions were valid. As the Board decided to change those earlier decisions (effectively cancelling them by deleting the General Retail NES classification), the Board redetermined or "reconsidered" its earlier decisions.

I note that although the Act does not define "decision", the ATA definition which refers to "a determination, an order or other decision", would appear to capture the Board initial determinations in this case to assign General Retail NES to the employers' accounts. The employers would have been able to appeal (to the former Appeal Division under the former version of the Act) those initial determinations.

I also note that on the face of it, the Board's subsequent decisions to delete the General Retail NES classification, would appear to fall within the definition of "reconsider" in section 1 of the Act, as well as within the policy definitions of "reconsideration" in policy C14-103.01 as well as in AP1-96-1. This is because the subsequent decisions were new decisions in matters previously decided by the Board. The Board was considering anew, matters addressed in the previous decisions to determine whether the conclusions reached in those decisions were correct. The Board found that the earlier decisions were wrong in classifying the employers in General Retail NES, and effectively cancelled those decisions by deleting the CU.

The employers submit that section 96(5)(a) of the Act is very clear on its face. The employers acknowledge that although statutory provisions are often capable of more than one interpretation and that there may be a variety of viable policy options through which statutory provisions may be implemented, section 96(5)(a) is not one of those types of statutory provisions. The employers say that section 96(5)(a) is succinct: it states that the Board does not have the authority to reconsider a decision or order made under Part 1 of the Act if more than 75 days have elapsed since that decision or order was made. The employers submit that the Board does not have the jurisdiction to provide itself with an authority, by means of enacting a policy, which the enabling legislation does not permit.

The employers further observe that the Act provides an exception to the 75-day rule prohibiting reconsideration of a decision, in the case where the initial decision resulted from fraud or misrepresentation of the facts or circumstances upon which the decision or order was made. The employers say that the Board does not have the authority to create additional exceptions to the 75-day rule in the Act by means of adopting policy.

It is important to emphasize that in these cases, the employers and the Board are in agreement that the circumstances referred to in section 96(7) of the Act, namely fraud or misrepresentation resulting in the need for the Board to change an earlier decision, do not apply. The Department's submission expressly acknowledges that the Board's reason for changing the employers' classifications, by way of deleting the General Retail NES classification, was Board error.

The employers say that sections 96(4) and 96(5) clearly apply to decisions on issues that fall within the Department's jurisdiction under Part 1 of the Act. Section 37 falls within Part 1 of the Act, and is therefore covered by sections 96(4) and (5). The employers submit that if the Legislature had intended to exclude decisions made by the Board under section 37 from the application of sections 96(4) and 96(5), it could easily have done so in the Act. The employers submit that it is not appropriate or lawful for the Board to achieve an objective through policy which the Legislature did not contemplate or mandate through the enabling legislation.

The employers note that Manual policy AP1-37-3 identifies three main categories when the Board may change a firm's classification. In this case, the Board advanced "Board error" as the reason for the change. The employers submit that sections 96(4) and 96(5)(a) of the Act are directly applicable to the Board's desire to correct a decisional error it has previously made. The employers say that the Board does not have the statutory authority to correct its own decisional error once 75 days have elapsed from the date that the decisional error was made; nor can the Board give itself that authority by way of policy. The employers go on to state:

> By way of comparison, the other two "main categories" for a change to be made to a firm's classification are that the firm's operations have changed and that the firm is now misclassified, and that the firm was misclassified based on the firm's non-compliance with reporting requirements, which includes fraud and misrepresentation.
>
> With respect to the former reason, the change in the firm's operations would result in a new classification decision being made based on changed circumstances. Such a new decision would not, in our submission, constitute a reconsideration. This reason for change is obviously not applicable to [the employers], since there had been no significant change in their respective operations from the date that [they were assigned their] second classification (retail) to the time that the decision was made by the WCB Assessment Department to delete the second classification from [the employers'] WCB account.
>
> With respect to the second reason, as noted previously Section 96(7) provides the WCB with the authority to reconsider an earlier decision that resulted from fraud or misrepresentation of the facts or circumstances upon which the decision was based. Once again, these circumstances are not applicable in the case of [the employers].

The Department's view is that section 37 of the Act constitutes a complete statutory code governing the classification of firms, including the creation and division of a classification system and the assignment and reassignment of firms within that system. The Board characterizes section 37 as intended to be a "dynamic authority which permits the Board to structure and populate the classification system, as and when needed, in order to effectively discharge its mandates within the diversity, complexity, and mutability of British Columbia's economy." The Department says that the purpose of section 37 is to ensure that firms are "correctly and dynamically classified" under the classification system.

The Department takes the position that section 37 of the Act is "an independent authority not limited by" section 96(5) of the Act. The Board says that the Legislature never intended section 96(5) to apply to section 37 of the Act, and therefore section 96(5) does not impact on the Board's authority to administer, maintain and regulate the employer classification system. The Department refers to a written statement the Board made on November 26, 2002 (*Changing Board Decisions and Orders – Assessments)* when Bill 63 was introduced:

> The authority under section 37(2) is distinct from the Board's reconsideration authority under section 96(4) and (5). For example, when the Board withdraws an employer from a subclass and transfers it to another class or subclass, the Board is not reconsidering the initial classification decision, but exercising specific authority under section 37(2)(f).

The Department relies on section 8 of the *Interpretation Act* and *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at 7 for the proposition that the interpretive approach to sections 37 and 96 of the Act should be a liberal one which gives effect to both provisions with a view to the essential purpose of the Act. Any ambiguity or uncertainty between the two provisions should be resolved by reference to the Act's overall purpose of "equitable assessment of firms." The Department submits that "the social and systemic disadvantages of unendingly assigning a firm into the Employer Classification System substantially outweigh the value secured by upholding the principle of finality."

The Department refers to the principle of statutory interpretation that assumes the legislature does not intend to produce absurd consequences. Absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (see Sullivan and Driedger, earlier cited, at pages 2443 – 244). The Department says that it would be an absurd consequence, extremely unreasonable and inequitable, and contrary to the purpose of Division 4 of Part 1 of the Act (leaving the classification system pointless or futile), to interpret the Board's authority to assign a firm or withdraw a firm from a classification unit as being subject to section 96(5) of the Act.

The Department says that a determination of a firm's classification within the Employer Classification System is not intended to be and cannot be an immutable decision. In the real world, firms change the industries in which they operate, and it would be absurd, inequitable and against the principle of modified collective liability, to cement a firm into a classification notwithstanding the fact that the possibility of change is foreseeable.

The Department says that for a firm to be classified only once (or perhaps more than once if a reclassification is within 75 days of the original classification) would violate the following principles of assessment that underlie the Act: (a) a firm is assigned to a CU on the basis of the industry in which the firm is operating; (b) each CU is made up of a relatively homogeneous group of firms who are considered by the Board to be peers and competitors in an industry; (c) the assessment rate for an industry should reflect the costs of compensation and prevention for that industry.

The Department says that the intent of section 96(5) of the Act is to mirror the common law doctrine of *functus officio* within the administrative law context. It relies on *Chandler*

v. Alberta Association of Architects, [1989] 2 S.C.R. 848 (*Chandler*) for the proposition there is a general rule that once an administrative tribunal has reached a final decision in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change in circumstances – the tribunal can only do so if authorized by statute, for example. The Court in *Chandler*, however, went on to say that the principle of finality should be not be strictly applied where "there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation." (at 862).

The Department says that there is no expectation of finality within the context of Division 4 of Part 1 of the Act, or the Act as a whole, in the sense that there is an expectation that a classification decision is to be final and immutable. The Department submits that the doctrine of *functus officio* does not apply to the decisions in the appeals at hand, because the doctrine is contingent upon a tribunal having reached a final decision in respect to the matter that is before it in accordance with its enabling statute, and no such "final decision" is envisaged or feasible within the Board's Employer Classification System.

With the foregoing principles in mind, the Department submits that the word "decision" in sections 96(4) and 96(5) of the Act does not refer to Board determinations that involve the classification or reclassification of individual employers. "Decision" in sections 96(4) and 96(5) is intended to mean a final determination. No final decision is ever envisaged or applicable under the Board's authority in section 37 of the Act to maintain and regulate the classification system. Therefore section 96(5) of the Act is never engaged.

The Department referred to the employers' submission that acknowledges the Board's authority to change classifications if a firm's operations change. The Department says that assertion follows neither the general rule in the doctrine of *functus officio* nor the Act's definition of "reconsider." This is because the doctrine of *functus officio*, as a general rule, does not allow a tribunal to revisit a decision because of a change in circumstances, and this can happen only if authorized by statute. Further, contrary to the employers' assertion, "changed circumstances" would constitute a reconsideration because the plain language of sections 1 and 96(5) indicate that a decision based on changed circumstances would nonetheless be a "new decision" varying (or cancelling) a previous decision (whether or not the prior decision was made in error would be irrelevant).

In any event, the Department agrees that a new classification decision is not a reconsideration, and thus the employers' "changed circumstances" exception to

reconsideration is superfluous. The Department says that a new classification decision is an exercise of specific authority under section 37(2) of the Act, which is not contingent on changed circumstances.

The Department says that the employers' submission relating to "changed circumstances" reflects another viable interpretation of the interplay between sections 37 and 96(5) of the Act: namely, that notwithstanding section 96(5), the Board has authority to reassign a firm within the classification system if there has been a change in the firm's operations. Thus one viable interpretation is that section 37 of the Act is not wholly subject to section 96(5) of the Act. See *WCAT Decision #2005-01710*, earlier cited.

The Department submits that if there are a variety of viable policy options through which sections 37 and 96(5) may be interpreted, the section 251 process should not be invoked merely because one interpretation is considered better than another.

The Department refers to the interpretive principle of "coherence", submitting that legislative provisions are intended to work together as a whole. Thus statutory provisions should be interpreted to avoid conflict or to resolve conflict by either (a) interpreting to avoid conflict; (b) acknowledging the paramountcy of some categories of legislation over others; (c) implied exception; and (d) implied repeal.

The Department submits that there is no conflict between sections 37 and 96(5) of the Act. It says that arguably each provision may apply if a firm changes the industry in which it is operating and the Board exercises its authority under section 37 to withdraw the firm from one classification and assign it to another. However, if there has been no change and the Board is exercising its section 37 authority "prospectively", then section 96(5) would not apply because the powers to withdraw and assign are explicit in section 37 and are necessarily prospective.

The Department concludes that the Board's interpretation of the interplay between sections 37 and 96(5) of the Act is not patently unreasonable because the interpretation is not so flawed that it cannot be rationally supported by the Act. The Department says that the Board's interpretation results from the following interpretive presumptions:

a. General words are intended to give way to the particular; for the more detailed a provision is, the more likely it is to have been tailored to fit the precise circumstance of a case falling within it.

b. Whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive

sense would overrule the former, the particular enactment must be operative and the general enactment must be taken to effect only the other parts of the statute to which it properly may apply.

c. When the Legislature has given its attention to a separate subject, and made provision for it, a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly.

The employers respond that they are not advocating that the Board's determination of a firm's classification is "immutable" under section 37. They acknowledge that there is the foreseeable possibility of a firm, sometime later, changing the industry in which it operates.

Neither do the employers suggest that section 37 is capable of more than one interpretation, so that section 96(5) may be applicable under one interpretation but not another (that is, when a firm's circumstances change). Their position is that certain determinations made by the Board under section 37, namely those involving a change in a firm's circumstances, would not meet the definition of "reconsider" in section 1 of the Act. The employers emphasize that there was no change of circumstances in their situations. Both employers and the Board agree that the change in classification was based solely on a Board finding of "Board error."

The employers clarify their position that in a situation of changed firm circumstances resulting in a Board change to a firm's classification, there is no "reconsideration" involved in the reclassification. The circumstances before the Board would be different than the circumstances involved in the initial classification decision. Thus this would not be a new decision in a matter previously decided. It would be a new decision regarding a matter not previously decided.

The employers say that the Department has jumped to a conclusion that section 96(5) does not apply when the Board is exercising a specific statutory authority, in this case, making a classification decision under section 37 of the Act. But the employers suggest that the same premise would be equally applicable to almost any Board determination under Part 1 of the Act. For example, sections 29 and 30 of the Act provide the Board with specific and mandatory authority to provide temporary total and temporary partial disability payments to an injured worker. The employers say that based upon the Department's argument, section 96(5) would be inapplicable when the Board exercised this specific authority. To accept the Department's argument would render section 96(5) superfluous.

The Section 251 Issue – Analysis

In making this referral to the chair under section 251 of the Act, I am limiting my consideration to the circumstances of the appeals before me. The circumstances of these appeals involve the Board changing a firm's classification where there have been no changes (relevant to classification issues) in the operations of the firm. In this case the sole reason for the Board's decision to reclassify the employers was "Board error." I have concluded that insofar as the Manual policies provide that the reclassification of a firm by the Board in such circumstances is not a reconsideration under section 96(4) of the Act and therefore not subject to the time limitations in section 96(5), the policies are so patently unreasonable that they cannot be supported by the Act and its regulations.

In stating that the Legislature never intended sections 96(4) and 96(5) to apply to section 37 of the Act, the Department has referred to a November 2002 statement made by the Board which essentially confirms the statements in the policies under consideration. It did not refer to statements by the Legislature or by the core reviewer in the *Core Services Review* report (earlier cited).

At the beginning of chapter 5 ("Reconsiderations/Reopenings") of the *Core Services Review* report, the core reviewer indicated that he was asked to address the following questions in his Terms of Reference:

> Should there be time limits on the ability to obtain reconsideration of past decisions with respect to compensation, occupational health and safety, employer assessment or classification matters? If so, what should these limitations be?

In considering recommendations for amendments to the reconsideration and reopening provisions of the Act, the core reviewer was not restricting himself to compensation matters. The report is clear that he was considering assessment and classification decisions as included within the ambit of proposed change.

The core reviewer noted that in the then existing legislation, the Board had very broad powers to reconsider its previous decisions, including decisions dealing with occupational health and safety under Part 3 of the Act. The former section 96(2) of the Act referred to the Board's discretion to, at any time, "reopen, rehear and redetermine" any matter (except an Appeal Division decision) with which it had dealt. Section 113(2) of the Act in Part 3 of the Act, echoed section 96(2).

The core reviewer voiced his opinion that the broad statutory discretion granted the Board to reconsider any decision meant that most matters could never be considered to be "final." In his view, such a broad reconsideration power for the Board precluded any

finality to a matter with which it had previously dealt. The core reviewer recommended that, subject to one exception only, the Board's existing power of reconsideration should be deleted from the Act. He recommended that the Act be amended so that *any decision of the Board* (see page 102) should be considered final and conclusive, subject to any specified avenue of appeal. The core reviewer expressly stated that:

> …the WCB would no longer have the authority to "reconsider" (ie: to retroactively change) *any prior decision* rendered by it, whether the decision was rendered before or after the anticipated changes to the *Act*.
>
> [at page 104, italic emphasis added]

The one exception was described as follows:

> …it is my recommendation that a party aggrieved by a decision rendered by an initial decision-maker should have the opportunity to request the WCB to reconsider the matter. Whether or not the WCB agrees to conduct such a reconsideration should be left within the discretion of the WCB. However, the WCB's authority to reconsider the decision of the initial decision-maker should cease upon the earlier of:
>
> (i) the expiry of 75 days from the date that the decision by the initial decision-maker was communicated, in writing, to the affected parties, or
>
> (ii) the date that the aggrieved party of interest applies for an internal review of the disputed decision.

In making this recommendation, the core reviewer did not limit or restrict the type of decisions within the ambit of "reconsideration" and subject to the time limits on the Board's authority to reconsider its earlier decisions. Notably, for the purposes of the issue in these appeal proceedings, the core reviewer did not exclude classification decisions from the time limit on the Board's authority to reconsider.

Although I have reviewed the portions of the Official Report of the Debates of the Legislative Assembly (*Hansard*) on the proposed Bill 63 amendments relating to the Board's authority to reconsider under section 96 of the Act, I did not find the debates helpful in identifying the Legislature's intent regarding whether Board classification decisions are included in the ambit of section 96(4). The debates did not expressly deal with this issue.

Ultimately, the Legislature adopted, for the most part, the core reviewer's recommendations on this matter. It is interesting to note in enacting section 96(4) of the Act, the Legislature indicated that the reconsideration power be one for the Board's own initiative. (This of course does not preclude the Board from basing a reconsideration on information that a party may have brought forward). The Legislature also limited the reconsideration power in section 96(4) to decisions or orders that the Board had made under Part 1 of the Act. Part 1 of the Act includes classification decisions under section 37 of the Act.

The authority to change previous Board decisions made under Part 3 of the Act (occupational health and safety) is excluded from section 96(4). Instead, the authority is referred to in the amended section 113(2) of the Act. This structure follows the structure of the former provisions of the Act. Under section 113(2) of the Act, the Board has the authority *at any time*, on its own initiative, to "make a new decision or order varying or cancelling" a previous decision or order respecting any matter within the Board's jurisdiction under Part 3 of the Act. This authority does not apply when review or appeal proceedings are in process applicable to the particular decision or order at issue, unless the decision or order resulted from fraud or misrepresentation of the facts or circumstances upon which the decision or order was based.

The following six points, in my view, are a strong indication that the Legislature did intend that Board classification decisions be included within the scope of sections 96(4) and 96(5) of the Act:

1. Section 37 of the Act was already a significant provision in the Act at the time of the *Core Review Report* and at the time of the Bill 63 amendments;

2. The core reviewer makes it clear in his report that he was specifically requested to consider the issue of finality of Board decisions, with assessment and classification decisions included in the scope of that consideration, in addition to compensation and occupational health and safety decisions;

3. The core reviewer did not exclude assessment and/or classification decisions from the scope of his recommendations on time limits for the Board's reconsideration authority. His recommendation was clear that there should be finality to all Board decisions apart from the specific time-limited reconsideration authority;

4. In enacting the amendments, in section 113 in Part 3 of the Act, the Legislature specifically addressed the finality of occupational health and safety decisions. Therefore, although occupational health and safety decisions are not included within the ambit of sections 96(4) and 96(5) of the Act, there is express provision elsewhere in the statute on the "finality issue" for those types of decisions;

5. In enacting the amendments, the Legislature specifically addressed the issue as to when it intended the time limits in section 96(5) to be inapplicable. These specific exceptions are found in sections 96(6) and 96(7) of the Act. It would have been a simple matter for the Legislature to have also indicated in a separate subsection that section 96(5) would not apply to any decision (or certain described decisions) made by the Board under section 37 of the Act. It would have been a simple matter for the Board to have indicated that the definition of "reconsider" in the Act and/or section 96(4) of the Act was not intended to include decisions within the Board's section 37 authority to manage the employer classification system;

6. It is notable that in enacting a revised section 113 of the Act, the Legislature did not place time limits on the Board's authority to reconsider occupational health and safety decisions. One would expect that if the Legislature intended that the Board to have a similarly unrestricted authority to change its classification decisions, that in the Bill 63 statutory amendments the Legislature would have treated classification decisions in a way similar to occupational health and safety decisions.

I disagree with the Department's submission that the employers' position in these appeals in effect characterizes every Board classification decision as an "immutable" decision. The employers recognize that a change in operations may affect a firm's industry classification. Their position is that the definition of "reconsider" does not include a new matter for adjudication, and that a Board consideration of new or changed operational circumstances would constitute a new matter for adjudication not subject to section 96(4) or 96(5) of the Act.

At page 103 of the *Core Review Report*, the core reviewer recognized that "A balance must be achieved between finality of previous decisions rendered by the WCB/appellate system and the ability of the worker's compensation system to respond to new circumstances." To that end, the core reviewer recommended that the amendments to the Act provide for "reopenings", a situation in which the validity of a previous Board decision would not be questioned, but which would constitute a "new matter for adjudication" under the Act considering new or changed circumstances from those considered in the previous Board decision.

The Legislature provided for "reopenings" in section 96(2) of the Act, although the amendments restrict the circumstances for "reopenings" to claim situations involving a significant change in a worker's compensable medical condition, or a recurrence of a claim injury. Section 96(2) does not contemplate reopenings for assessment or classification matters previously decided by the Board.

Nevertheless, my interpretation of the Supreme Court of Canada decisions in *Grillas v. Minister of Manpower and Immigration*, [1972] 2 S.C.R. 577 and in *Chandler* are that a continuing jurisdiction for the Board to change a firm's industry classification because of "changed circumstances" may be implied from section 96(1)(h)of the Act, which refers to the Board's jurisdiction over industry classifications. The Supreme Court of Canada's recognition of such a continuing jurisdiction in administrative tribunals was based on the need to accommodate changing circumstances.

Further, I agree with the employers that "changed circumstances" of a firm's operation would not fall within the scope of the Act's definition of "reconsider" or policy AP1-96-1's definition of reconsideration. In considering changed operational circumstances affecting a firm's industry classification, the Board would not be considering "the matters addressed in a previous decision anew to determine whether the conclusions reached were valid" (see policy AP1-96-1). Rather, the Board would be considering new matters not previously adjudicated by the Board. Thus the Board would be making a new decision based on different circumstances not previously adjudicated. Such a new adjudication would not constitute a reconsideration under section 96(4) of the Act subject to the time limits under section 96(5) of the Act.

In any event, my views in the last several paragraphs are not necessary to decide the issues in this referral memorandum. The circumstances of these appeals do not involve the Board changing the employers' industry classifications because of new or changed operational circumstances. I restrict my findings in this memorandum to the situations of the Board changing a firm's industry classification due to Board error, not in reliance on a change in the firm's operational circumstances.

In the decisions involved in these appeals, on its own initiative, the Board has changed its earlier classification decisions to correct what it has perceived to be "incorrect" decisions it has made with respect to the employers. This situation falls precisely within the explanation of the purpose of sections 96(4) and 96(5) of the Act, provided in policy AP1-96-1. The policy explains that the Board's reconsideration authority is intended to provide a quality assurance mechanism by the Board, with the Board given a time-limited opportunity to vary or cancel, on its own initiative, any incorrect decisions it may have made. The definition of "reconsider" in the Act applies to the decisions in these appeals, because the Board has made new decisions in matters "previously decided", with the new decisions varying or cancelling the previous decisions.

I have considered the Department's arguments regarding the interpretative principles supporting a liberal interpretation with a view to the essential purposes of the Act, a presumption against absurd consequences, a recognition that legislative provisions are intended to work together as a whole, and a presumption that the general is intended to give way to the particular. I agree with the employers' response that the same

principles, taken to the extent as suggested by the Department, would apply to almost any Board decision under the Act, and would essentially negate sections 96(4) and 96(5). This constitutes an interpretation of the Act that cannot be rationally supported.

For example, it is an essential purpose under section 5 of Part 1 of the Act that the Board "must" pay compensation to a worker who has sustained a personal injury arising out of and in the course of the employment. If the Board has made a decisional error and has denied compensation to such a worker, sections 96(4) and 96(5) of the Act provide that the Board cannot rectify its error by reconsidering the matter beyond 75 days after the initial decision. Where there are no review or appeal proceedings in process, where fraud or misrepresentation do not underlie the initial Board decision, and where there are no changed circumstances, the Board has no authority to change the decision. Some may consider this to be unreasonable, inequitable or even absurd, but the Legislature has clearly indicated that the principle of finality trumps the mandatory duty of the Board to pay compensation under section 5 of the Act. To interpret otherwise would be to negate the effect of sections 96(4) and 96(5) in compensation decisions. This would constitute an obviously unreasonable interpretation.

The foregoing situation in the compensation claims context is no more absurd or contrary to an essential purpose of the Act than the situation in the appeals at hand, where the Board considers it rendering the classification system "pointless or futile" to have maintained what it perceives to be incorrect classification decisions affecting certain employers. I refer to the comments, earlier cited, made by the panel in *WCAT Decision #2005-02642*, that the finality associated with the terms of sections 96(4) and 96(5) affect the Board, workers, dependants and employers, both beneficially and detrimentally. One cannot decline to recognize the effect of these statutory provisions simply because arguably the Board's classification system has been detrimentally affected or the employers have been unjustly enriched.

Further, to accept the Department's submission regarding the interplay between general and particular provisions would also, in my view, render sections 96(4) and 96(5) meaningless. This would constitute an interpretation that is openly, clearly, evidently unreasonable. As the employers have pointed out, the compensation provisions of the Act (see sections 5, 29 and 30) provide the Board with specific and indeed mandatory authority to provide temporary total and partial disability payments to an injured worker. Nevertheless, it is clearly the intent of the Legislature that these specific provisions of the Act are subject to sections 96(4) and 96(5) of the Act. Similarly, for the reasons I have earlier outlined regarding the scope of sections 96(4) and 96(5) as including within their ambit the Board's authority to assign employers to and withdraw employers from industry classifications, I am satisfied that the Board's authority to change a firm's classification due to Board error alone, in a situation where there has been no change in the firm's operations, does come within the scope of these statutory provisions.

6.0 CONCLUSION

For the reasons I have earlier provided, I am unable to "read down" policies AP1-37-3 and AP1-96-1 to interpret them as not applying to the Board's decisions to reclassify the employers in these appeals. Further, again for reasons earlier given, I am also not able to interpret sections 96(4) and 96(5) of the Act as not applying to the Board's decisions in these appeals, as to do so would, in my view, effectively negate any meaning to those provisions.

Therefore, in these appeal circumstances where the Board has reclassified the employers based solely for the reason of Board error, I am satisfied that section 96(4) and 96(5) of the Act apply to the Board decisions to delete CU 741013 (General Retail NES) from the employers' accounts. I am satisfied that insofar as policies AP1-37-3 and AP1-96-1 provide that sections 96(4) and 96(5) do not apply to the Board's decisions to delete CU 741013 from the employers' accounts, they are so patently unreasonable that they are not capable of being supported by the Act and its regulations. This is because to apply the policies' interpretation of sections 96(4) and 96(5) would in effect negate the effect of those statutory provisions, because they would also not apply to other Board decisions in compensation matters, for example. This amounts to an interpretation of the Act which cannot be rationally supported, as there would be no reason for the existence of these provisions in the statute.

Pursuant to section 251(2) of the Act, I refer the section 251(1) issue to the chair, and the appeal proceedings with respect to both employers' appeals are suspended.

Heather McDonald
Vice Chair

HM/dw