

Sections 47(2) and 47(3) of the Act

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OBJECTIVE

1. This practice directive explains the Board’s administration of sections 47(2) and 47(3) of the *Workers Compensation Act* and the mandate and jurisdiction of the Board’s Section 47(2) Committee, and aids in the interpretation of *Assessment Manual Item: AP1-47-2*.

INTERPRETATIVE GUIDELINES

2. Section 47(2) of the *Act* directs an employer to pay the “full amount or capitalized value” of compensation payable to a worker of that employer for an injury that occurred during the period the employer failed to register, failed to report, or was in full or partial default of remittance of assessment. Section 47(3) permits the Board, if satisfied that the default was excusable, to relieve an employer in whole or in part from payment of the full amount or capitalized value determined in section 47(2).
3. Section 47(2) creates a public welfare offence which entails “a shift of emphasis from the protection of individual interests to the protection of public and social interests.”¹
4. There is a presumption in law that a public welfare offence is one of strict liability: on proof of the wrongdoing, the mental element is presumed; however, a perpetrator may escape liability by establishing the defence of reasonable care.²

¹ *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1312.

² The foremost statement on strict liability and the defence of reasonable care, and its effective origin in Canada, is *R. v. Sault Ste-Marie*, *supra*: “Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*: the doing of a prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.”

5. Strict liability requires that the Board need only establish the factual elements that constitute the default under the *Act* (that the employer failed to register, failed to report, or was in full or partial default of remittance of assessment). Thereafter, the onus shifts to the employer to establish on a balance of probabilities that it has a defence of due diligence.
6. Separate and distinct from the above, section 47(2) also directs that the Board collect from the defaulting employer the amount of assessment that would have been payable had the employer fully discharged its statutory duties to register, report, and remit as and when required by law and policy.

ADJUDICATIVE GUIDELINES

I THE SECTION 47(2) COMMITTEE

7. The Board's authority to determine whether an employer's default is excusable is delegated to the Section 47(2) Committee, which is a standing committee of the Board comprised of the following officers, or an individual delegated to act in a member's absence: (a) the Associate General Counsel, and (b) the Manager, Assessment Policy.
8. The Committee is not empowered to reconsider any of the following Board decisions:
 - (a) The legislative prerequisites of section 47(2); but may, in the face of patent error, refer the matter back to the appropriate decision-maker for clarification or reconsideration:
 - The firm was an employer under the *Act* as at the time of the accident which resulted in injury to the worker.
 - The worker was in the employ of the employer as at the time of the injury.
 - The worker's injury arose out of and in the course of employment with the employer.
 - (b) To collect from the employer the amount of assessment that would have been payable had the employer fully discharged its statutory duties to register, report, and remit as and when required by law and policy.

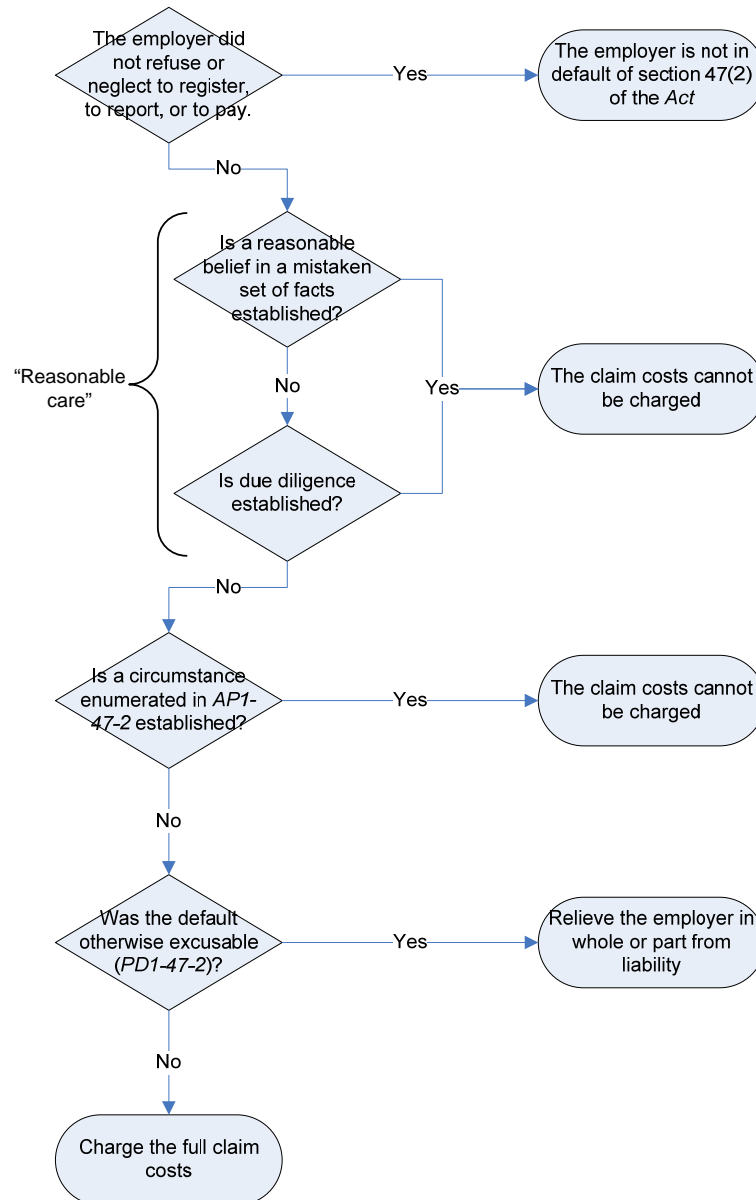
Although each said determination constitutes a decision under the *Act*, a request for review of any such determination must be made to the Review Division.

9. The Committee is charged to decide or determine the following under sections 47(2) and 47(3) of the *Act*:
 - (a) Whether an employer has refused or neglected to make or transmit a payroll return or other statement required to be furnished by the employer; or

- (b) Whether an employer has refused or neglected to pay an assessment, or the provisional amount of an assessment, or an instalment or part of it; and
- (c) In either case, whether or not the default was excusable to relieve the employer in full or in part from liability for such refusal or neglect.

II THE ADJUDICATIVE FRAMEWORK

10. The Committee’s adjudicative framework is represented schematically as follows:



A Employer refused or neglected to register, to report, or to pay an assessment

11. The Committee determines whether, on a balance of probabilities, the employer has refused or neglected to register, to report, or to pay an assessment, in full or in part.
12. As the offence under section 47(2) is one of strict liability; the Board, once having established on a balance of probabilities that an employer failed to register, failed to report, or fail to pay an assessment, in full or in part, is relieved of having to prove anything further: liability is presumed, and the onus shifts to the employer to establish reasonable care on a balance of probabilities.

B A “reasonable care defence”

13. The Committee determines whether, on a balance of probabilities, the employer has established a “reasonable care defence”, through either a reasonable belief in a mistaken set of facts, or due diligence.³
14. If a reasonable care defence is established, the offence under section 47(2) is not established; and, accordingly, there can be no liability for any claims costs paid or payable.

(1) A mistaken set of facts

15. A reasonable belief in a mistaken set of facts requires consideration of each of the following:
 - (a) The employer’s belief which involves consideration as to the employer’s state of mind and whether or not the employer believed in a mistaken set of facts; and
 - (b) Whether or not such belief, if proven, was reasonable in all the circumstances.
16. If an employer claims belief in a mistaken set of facts (that is, that an honest mistake was made), the employer is required to show that all reasonable steps were taken to obtain the correct information. If the employer failed to make reasonable inquiries to determine the facts, or if the employer knew the facts but failed to draw the correct conclusion as to its obligations, the defence of reasonable mistake will not be available.

³ In *WCAT Decision Number: WCAT-2010-00125* at para. 50, the vice-chair posited the following as the minimum requirement for establishing a reasonable care defence: “*I am not satisfied that either (a) a reasonable belief in a mistaken set of facts, or (b) due diligence has been established. At a minimum, either of those forms of a reasonable care defence would have required the employer to have contacted the Board to ascertain the worker’s status.*”

17. The mistake must be a mistake of fact, not a mistake of law;⁴ for an employer is expected to take the steps necessary to inform itself of the laws that apply to its activities.

(2) Due diligence

18. Due diligence requires demonstrated reasonable, though unsuccessful efforts to comply, or an inability to comply because of extraordinary conditions or lack of resources.⁵

19. The due diligence defence must relate to the commission of the prohibited act, not some broader notion of acting reasonably.⁶

C The “circumstances” enumerated in AP1-47-2

20. If a reasonable care defence is not established, the Committee considers and applies the “circumstances” enumerated in *AP1-47-2*; and if any such circumstance applies, the claim costs cannot be charged.

21. The minimum for claims costs is \$300.

D Whether the “default was excusable”

22. If neither a “reasonable care defence” nor an *AP1-47-2* “circumstance” is established, the Committee determines whether the “default was excusable”; and, if satisfied that the “default was excusable, may ... relieve the employer in whole or in part from liability” under section 47(2).

23. In so doing, the Committee considers the purposes and objects of the *Act*; the merits and justice of the individual case; and, for mitigation purposes, again considers the “reasonable care defence” factors and may consider, among other measures, the following:⁷

(a) The nature and extent of the business.

(b) The employer’s ability to comprehend its obligations under the *Act* and policy.

⁴ *R. v. Cancoil Thermal Corp and Parkinson* (1986), 27 C.C.C. (3d) 295 (Ont. C.A.) 298 at pp 301 and 304.

⁵ A fundamental element of due diligence of every business in British Columbia is to ensure compliance with the laws of the province. Registration as an employer and compliance with the *Act* and policy are patently part of the expected responsibilities of every employer – as much so as collecting and remitting taxes and complying with minimum wage requirements.

⁶ *R. v. Kurtzman* (1991), 4 O.R. (3d) 416 (Ont. C.A.) at page 429; see also *R. v. Alexander* (1999), N.J. No. 19 (Nfld. C.A.) per Green J.A. at para 18.

⁷ As the *Act* is silent with respect to the criteria that the Board may take into consideration under subsection 47(3), the Board has the discretion to determine the appropriate criteria, subject to the proviso that the criteria must be related to the purposes and objects of the *Act*.

- (c) Reliance on an accountant or lawyer to ensure registration or to transmit required information and assessments on the employer's behalf.
- (d) Reliance on reasonable but mistaken advice from a Board officer.

The employer must prove on the balance of probabilities that it relied on the Board officer's mistaken advice and that such reliance was reasonable.⁸ This requires the employer to establish each of the following five elements on a balance of probabilities:

- it considered the legal consequences of its actions and sought advice;
 - the advice was given by an appropriate officer (that is, an officer charged to administer or enforce Division 4 of Part 1 of the *Act*);
 - the advice was erroneous;
 - it relied upon the erroneous advice; and
 - its reliance upon the erroneous advice was reasonable.
- (e) The employer's pre and post-breach history with the Board or another workers' compensation system.
 - (f) A reasonable belief that a subcontractor was registered or that a worker was an independent employer or that a previous contact with the Board (e.g., a Prevention Officer) was sufficient for registration.
 - (g) The impact of the charge on the business, including the likelihood of irreparable harm.
 - (h) The economic benefit of non-compliance, including any competitive advantage arising from delayed or avoided costs.

⁸ *R v. Jorgenson*, (1995) 102 C.C.C (3rd) 97 (SCC); *Levis (City) v. Tetreault*; *Levis (City) v. 2629-4470 Quebec Inc.*, [2006] 1 S.C.R. 420.