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WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

The Workers' Compensation Board of Nova Scotia

Discussion Paper

**Is Policy the Appropriate Tool to Address Stakeholder Issues Respecting
Medical Evidence of a Causal Connection between Chronic Pain and the
Original Compensable Injury?**

Date: January 21, 2008

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Distinguishing a causal connection between chronic pain and the original compensable injury from the *Cohen* decision

On December 7, 2007, the Nova Scotia Court of Appeal rendered the *Cohen* decision. In short, the decision means that injured workers who developed chronic pain before April 17, 1985 (this group of workers is sometimes called “pre-Charter” injured workers) are eligible to be assessed for chronic pain benefits.

In the Discussion Paper that follows, the WCB addresses issues pertaining to medical evidence that may be considered when adjudicating a causal connection between chronic pain and the original compensable injury, as required by the *Chronic Pain Regulations*.

It is important to emphasize that this issue (a casual connection between chronic pain and the original compensable injury) does not impact or alter the outcome of the *Cohen* decision. The issue discussed in this paper is about medical evidence to establish a connection between chronic pain and an original compensable injury.

To read more about the *Cohen* decision, please go to www.wcb.ns.ca . Under WCB News Room select the document titled “Nova Scotia Court Determines Injured Workers Who Developed Chronic Pain Before April 17, 1985 Are Eligible to BE Assessed for Chronic Pain Benefits”.

Executive Summary

At the WCB, Policies are formal statements of the Board of Directors' position on a given issue. Section 183(1) of the *Workers' Compensation Act* states:

For the purpose of this Act, "policy" means a written statement of policy adopted by the Board of Directors and designated by the Board of Directors in writing as a statement of policy.

Policies approved by the Board of Directors are binding on the Board, the Chair, every officer and every employee of the Board and on the Appeals Tribunal. This means that they become part of the legal framework.

In regard to medical evidence of a causal connection between chronic pain and the original compensable injury, the objective of the Policy development process was to determine whether a set of clear adjudicative criteria could be developed that would help decision makers determine whether a casual connection exists between chronic pain and the original compensable injury. Through research and analysis, the WCB has confirmed that the only rule that could be expressed in Policy is related to the legal test for causation ("but for"). This test is established law and does not require a Policy statement.

With respect to considering the medical evidence necessary to establish the required casual connection, the WCB has confirmed that there are no rules that apply to all claims. Although the WCB has identified discretionary factors that a decision maker may consider when determining the existence of a causal connection, these factors are not rules or adjudicative criteria that could be outlined in Policy to bind decision makers. Rather, they are factors to be considered on a case by case basis, having regard to the facts of each individual claim.

As a result, the WCB is contemplating whether Policy is the appropriate tool for addressing medical evidence of a causal connection between chronic pain and the original compensable injury. The reasons for this thinking include:

1. There are no definitive eligibility criteria;
2. The results of a jurisdictional scan indicate that no other Board in Canada has a Policy of this nature. To proceed with Policy development would set Nova Scotia apart from other Boards in Canada;
3. Outlining discretionary factors in a Policy that is binding on the WCB and WCAT may be perceived as an attempt to create a higher standard than that which exists in law; and
4. A Policy specific to chronic pain may be perceived as an attempt to treat a defined population of injured workers differently than others.

Therefore, the WCB is contemplating whether Policy development respecting medical evidence of a causal connection between chronic pain and the original compensable injury is appropriate. Rather, the WCB is considering whether this issue could be better addressed by developing a user-friendly Fact Sheet.

The WCB recognizes that claims adjudication is one of the Board's most important responsibilities. To ensure that the WCB communicates effectively with stakeholders, the WCB is committed to developing a plain language Fact Sheet that would contain information respecting key steps in the decision making process. This Fact Sheet would be used by WCB employees, and shared with WCAT to ensure that the process is transparent and understood by all stakeholders in the Workplace Safety and Insurance System. The Fact Sheet would also be distributed to stakeholders on the Key Stakeholder List and posted to the Workers' Compensation Board website.

Background – the Policy process

Setting the 2007 Policy agenda

Each year in setting the annual Policy agenda, the WCB undertakes a Policy issues identification process. This process involves the identification of Policy issues where the development of new and/or revision of existing Policy statements will improve consistency in decision making and/or assist the WCB in achieving its corporate/system goals.

Stakeholder input is a critical step in the Policy issue identification process. On November 29, 2006 the WCB hosted a Fall Stakeholder Consultation session where stakeholders had an opportunity to discuss issues they would like considered in the development of the 2007 WCB Policy agenda. Injured Workers/Labour and Employers considered a number of Policy issues and prioritized them as either low or high priority.

In December 2006, the Board of Directors decided that those issues identified as a high priority by one or both stakeholders groups (Injured Workers/Labour and Employers) would be included on the 2007 Policy Agenda. As a result, medical evidence of a causal connection between chronic pain and the original compensable injury, identified as a high priority by Employers and the WCB, was included on the Policy agenda as an issue to be reviewed.

Policy consultation

The Policy development process involves a number of steps including stakeholder consultation, research, analysis, development, and implementation. When consulting on major Policy items, the WCB uses a two stage consultation approach. During the first stage, stakeholders have an opportunity to provide input on the specific issues surrounding the Policy item. During the second stage, stakeholders have an opportunity to provide input on the draft Policy.

Since the Board determined that medical evidence of a causal connection between chronic pain and the original compensable injury is a major Policy issue, the WCB initiated a two stage Policy consultation approach. The first stage of consultation occurred between April 16 and June 4, 2007. Stakeholders were provided with an opportunity to identify issues and concerns related to medical evidence of a causal connection between chronic pain and the original compensable injury.

On September 1, 2007, the WCB posted a Consultation Summary document to the website that provided a high-level overview of the issues raised during Stage I of the Policy consultation process.

Overall, stakeholder input indicated that there are diverging views on the appropriate application of the “causation test” and the factors that require consideration. Some employers felt that it is difficult to establish a direct causal link between the diagnosis of chronic pain and a compensable injury, and that the evaluation of chronic pain does not involve a thorough and objective analysis of the existence of pain or its root causes.

On the other hand, injured workers’ associations felt that the causal link is established in section 10(4) of the *Workers’ Compensation Act* (the *Act*), and that any attempt to deviate from section 10(4) will destroy the foundation upon which workers’ compensation is built.

The input received from stakeholders during Stage I of the consultation process was considered by the WCB and helped highlight important issues that were analyzed during the Policy development process.

Typically, at the second stage of the consultation process, stakeholders have an opportunity to provide input on a draft Policy statement. Throughout 2007, the WCB conducted extensive analysis regarding medical evidence of a causal connection between chronic pain and the original compensable injury. Based on the results of this analysis, the WCB is contemplating whether Policy is the most appropriate tool to address medical evidence of a causal connection between chronic pain and the original compensable injury.

Generally, the reason for this thinking is that in the workers’ compensation environment Policies approved by the Board of Directors are binding on both the WCB and Workers’ Compensation Appeals Tribunal (WCAT). Based on the research and analysis, it has been determined that there are no binding rules respecting medical evidence that could apply to all chronic pain claims. However, the research has identified discretionary factors that decision makers may consider on a case by case basis. As a result, the WCB is proposing the development of a Fact Sheet, rather than Policy, to address stakeholders’ issues respecting medical evidence of a causal connection between chronic pain and the original compensable injury.

The purpose of this discussion paper is to provide an overview of the WCB’s current thinking on this issue including: the findings of our analysis; the reasons for questioning whether Policy is the appropriate tool; and an alternative approach to address stakeholders’ issues respecting medical evidence of a causal connection between chronic pain and the original compensable injury.

The WCB recognizes that the issues related to medical evidence of a causal connection between chronic pain and the original compensable are important and need to be addressed. The WCB would like to hear stakeholders’ views on the use of a Fact Sheet, rather than Policy, to address stakeholders’ concerns respecting medical evidence of a causal connection between chronic pain and

the original compensable injury. You are encouraged to consider the material in this paper and provide comments in writing by **February 22, 2008** to:

Angela D. Peckford, Policy Analyst
Workers' Compensation Board of Nova Scotia
PO Box 1150, Halifax B3Y 2Y2
Email: angela.peckford@wcb.gov.ns.ca

Introduction - adjudicating chronic pain claims

Chronic pain is defined by section 10(A) of the *Act* as pain:

- (a) continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
- (b) disproportionate to the type of personal injury that precipitated, triggered or otherwise predated the pain

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of injury which indicate that the injury has not healed.

When adjudicating chronic pain claims, it is important to highlight that chronic pain, in and of itself, is not recognized as an original compensable injury. First, a personal injury by accident arising out of and in the course of employment is accepted (or may be accepted) as compensable under the *Act*. Once this determination is made, the next step in the adjudication process is to determine whether the worker has chronic pain as defined by section 10(A) of the *Act*. If a worker meets these two criteria, it must then be determined whether chronic pain is causally connected to the original compensable injury.

Legal framework

Requirement for medical evidence of a causal connection

In October 2003, the Supreme Court of Canada held that injured workers with chronic pain must have the same access to the workers' compensation system as other injured workers, and an individual assessment should be conducted to determine appropriate programs and services.

In July 2004 (effective April 2004) the Governor in Council approved the *Chronic Pain Regulations* (the *Regulations*) that implement the chronic pain provisions set out in the legislation. Among other things, the *Regulations* require medical evidence of a causal connection between chronic pain and an original

compensable injury for an injured worker to be eligible for an assessment for chronic pain benefits and services. In particular, section 4 of the *Regulations* states:

A worker is entitled to an assessment to determine eligibility for benefits and services under these regulations if the medical evidence establishes that on or after April 17, 1985, the worker had chronic pain that was causally connected to an original compensable injury.

According to the *Regulations*, a causal connection is established by considering medical evidence. It is the requirement for medical evidence of a causal connection that was the primary focus of this Policy review. In particular, the intent of the Policy review was to determine whether adjudicative criteria could be identified, and outlined in Policy, to simplify and clarify the chronic pain decision making process. For instance, is there a certain type of medical evidence that must be present in all cases that could be included in Policy?

The test for causation versus the assessment of medical evidence

Between January and October 2007, the WCB conducted extensive research and analysis respecting the medical evidence necessary to establish a causal connection between chronic pain and the original compensable injury. It is important to highlight that the intent of the review was not to develop a legal test for causation, as this has been well established by the courts. Rather, the intent of the review was to determine whether specific medical evidence must be present in all cases to establish a causal connection between chronic pain and the original compensable injury. The distinction between the application of the test for causation and the review of medical evidence is important to understanding the appropriateness of a Policy response to this issue.

The legal test for causation

In reviewing medical evidence of a causal connection between chronic pain and the original compensable injury, the WCB did not intend to create a new legal test for causation. The legal test for causation is the “but for” test. This test has been established by the courts and recent direction, provided by the Supreme Court of Canada in *Hanke v. Resurface Corp.*, confirms that the primary test for causation is the “but for” test. In the context of chronic pain, the test to be applied is whether “but for” the original compensable injury, would the chronic pain have occurred.

“But for” is the causation test used in the adjudication of all injuries. Through research and analysis, it was determined that the causation test (“but for”) is the only binding rule in establishing causation that could be expressed in Policy.

Assessment of medical evidence

The *Regulations* set out the requirement for medical evidence of a causal connection between chronic pain and the original compensable injury. The WCB analyzed whether specific medical evidence must be present in a claim file for a decision maker to conclude that “but for” the original compensable injury the chronic pain would not have occurred.

Based on analysis, it was determined that there is no one piece of medical evidence common to all claims that must be present to establish a causal connection. Specifically, it was determined that there is no one piece of medical evidence that could lead a decision maker to conclude that there is a causal connection between chronic pain and the original compensable injury in all situations. A decision maker must consider all of the evidence on a case by case basis. The relevance of medical evidence, and the weight given to it, varies with the facts of each individual claim.

However, the analysis did identify discretionary factors that a decision maker *may consider* in determining whether a causal connection exists. Once again, the relevance of each factor must be determined on a case by case basis. In conducting a causation analysis, the following factors (or mix of factors) are considered:

(1) Timing of chronic pain

Timing is relevant because the *Regulations* state that an original compensable injury must pre-date the commencement of chronic pain. Pre-dating the commencement of chronic pain includes, among other things, aggravating or accelerating pre-existing chronic pain.

Although chronic pain must follow the original compensable injury, timing by itself does not necessarily establish a causal connection. The requirement for chronic pain to follow an original compensable injury is already outlined in section 10E of the *Act* (and repeated in the *Regulations*) and does not need to be captured in Policy.

(2) Continuity of pain

Generally, continuity means uninterrupted duration. In the context of chronic pain, continuity means that pain continues uninterrupted from the time of the original compensable injury to the present. Continuity of pain is relevant to the causation analysis in that a break in the continuity of pain may indicate a break in the causal connection.

When considering continuity, there are two important things to highlight. First, while the presence of ongoing pain may be relevant to a chronic pain diagnosis, it is not relevant to the causal connection analysis. Second, a break in pain does not necessarily establish a break in the causal connection. The reason for a break in pain must simply be explored by the decision maker.

Since the absence of continuity does not definitively break the causal connection in all cases, continuity is not a mandatory criterion that can be included in Policy.

(3) Symptoms of usual pain are consistent with the original compensable injury

The symptoms of usual pain are consistent with the original compensable injury if the medical evidence establishes that the original compensable injury is a medical condition that causes usual pain. The original compensable injury is a medical condition that causes usual pain if pain is explained physiologically, neurologically, or psychologically. This means that pain is explained in terms of tissue damage, nerve damage, or a psychological/psychiatric disorder (per DSM-IV).

If the symptoms of usual pain are consistent with the original compensable injury then the existence of a causal connection between some types of disproportionate pain and the original compensable injury may be enhanced.

However, compatibility is not required to establish a causal connection because the current state of medical knowledge may be inadequate to explain some chronic pain conditions. Since the current state of medical knowledge may be inadequate to explain some chronic pain conditions, there are no definitive criteria that could be outlined in Policy that would apply to all claims.

(4) The relationship between chronic pain and injury

The nature of the original compensable injury, the severity of trauma, and how the parts of the body affected by the original compensable injury are consistent with, or related to, the parts of the body affected by chronic pain, may be relevant to the causation analysis.

Since the relevance of medical evidence varies with the facts of each individual claim, once again, there is no binding rule that would apply to all claims.

(5) Other relevant factors

In seeking to establish a causal connection between chronic pain and the original compensable injury, a decision-maker also must consider evidence of a causal connection between chronic pain and factors that are not related to the compensable injury.

Although the factors discussed above may help establish, or break, the causal connection, no one factor would apply to all chronic pain claims. The medical literature simply does not provide a uniform explanation respecting the determination of a causal connection between chronic pain and a wide range of injuries or diseases.

The medical evidence, and the relevance of the medical evidence, must be considered on a case by case basis, having regard to the facts of each individual claim.

Policy at the WCB

Policy is a common term used by government, public agencies, and private businesses. Although the term policy is used frequently, it does not have the same meaning in all environments. At times, policy refers to the process of making important government decisions. For example, a high-level plan that sets out priorities and goals is considered policy. At other times, a policy may be a guideline that is not binding but helps the organization realize goals and objectives.

At the WCB, Policies are formal statements of the Board of Directors' position on a given issue. Section 183(1) of the *Workers' Compensation Act* states:

For the purpose of this Act, "policy" means a written statement of policy adopted by the Board of Directors and designated by the Board of Directors in writing as a statement of policy

Policies approved by the Board of Directors are binding on the WCB and the Workers' Compensation Appeals Tribunal (WCAT). This means that they become part of the legal framework.

At the WCB, Policies are developed for a variety of reasons. Policies are often required to explain how discretionary authority in the *Act* will be interpreted and applied by the WCB. A Policy position may be required to clarify a legislative or regulatory requirement, or to ensure consistent interpretation of the legislative and regulatory framework. In all cases, Policies are binding rules that must be followed by decision makers.

Policy may not be the appropriate tool

In regard to medical evidence of a causal connection between chronic pain and the original compensable injury, the objective of the Policy development process was to determine whether a set of clear adjudicative criteria could be developed

that would help decision makers determine whether a casual connection exists between chronic pain and the original compensable injury. Through research and analysis, the WCB has confirmed that the only rule that could be expressed in Policy is related to the legal test for causation (“but for”). This test is established law and does not require a Policy statement.

With respect to considering the medical evidence necessary to establish a casual connection, the WCB has confirmed that there are no rules that apply to all claims. The discretionary factors identified are not rules or adjudicative criteria that could be outlined in Policy to bind decision makers. Rather, they are factors to consider on a case by case basis, having regard to the facts of each individual claim.

As a result, the WCB is contemplating whether Policy is the appropriate tool for addressing medical evidence of a causal connection between chronic pain and the original compensable injury. The reasons for this thinking include:

1. No definitive eligibility criteria
 - Typically, Policy is a tool used to establish rules that bind a decision maker. The analysis determined that the only binding rule is the legal test for causation. This test is established law and does not require a Policy statement.
 - There are no binding rules respecting medical evidence, or the relevance of the medical evidence, that could apply to all chronic pain claims.
 - Given that Policy is binding on decision makers at the WCB and WCAT, it would be unusual to have a binding Policy comprised of non-binding discretionary factors.
2. Jurisdictional scan
 - No other workers’ compensation board in Canada has a detailed Policy outlining the evidence necessary to determine a causal connection between chronic pain and the original compensable injury.
 - To proceed with a Policy would set the Workers’ Compensation Board of Nova Scotia apart from other boards in Canada.
3. Perception of creating a higher standard
 - Recognizing that Policy is a legally binding document, developing a Policy that is comprised of a list of discretionary factors for evaluating medical evidence may be viewed as an effort to pre-determine the relevance of evidence. This may be perceived as an attempt to create a higher standard than that which exists in law.

- The relevance of medical evidence must be considered on a case by case basis.
4. Treating a defined population differently
- Currently, the WCB Policy Manual does not contain Policies respecting the medical evidence to be considered in the adjudication of causation for all other injuries or diseases.
 - A Policy respecting medical evidence of a casual connection between chronic pain and the original compensable injury may be viewed as an attempt to treat a defined population of injured workers differently than others.

For the reasons outlined in this document, the WCB is contemplating whether Policy development (respecting medical evidence of a causal connection between chronic pain and the original compensable injury) is appropriate. Rather, the WCB is considering whether stakeholders' issues (respecting medical evidence of a causal connection) could be addressed by developing a user-friendly Fact Sheet.

Fact Sheets to address medical evidence of a causal connection between chronic pain and the original compensable injury

Stakeholders' concerns respecting medical evidence of a causal connection between chronic pain and the original compensable injury could be addressed through the development of an adjudicative Fact Sheet. The Fact Sheet could include a decision making tree, an explanation regarding the legal test for causation and how it is used in adjudication, the factors to consider when determining whether the medical evidence establishes a causal connection, and general questions and answers.

The Fact Sheet could contain information explaining key steps in the decision making process, including the following:

- How a personal injury by accident arising out of and in the course of employment is accepted under the *Act*.
- Application of the presumption in favor of injured workers under section 10(4) of the *Act*.
- The definition of chronic pain under section 10(A) of the *Act*, and how it is applied.
- A description of the causal connection test and how it is applied.
- The factors that a decision maker may consider to determine whether the medical evidence establishes a causal connection between chronic pain and the original compensable injury.

The WCB recognizes that claims adjudication is one of the Board's most important responsibilities. To ensure that the WCB communicates effectively with stakeholders, the WCB is committed to developing a plain language Fact Sheet respecting medical evidence of a causal connection between chronic pain and the original compensable injury. This Fact Sheet would be used by WCB employees, and shared with WCAT, to ensure that the process is transparent and understood by all stakeholders in the Workplace Safety and Insurance System. The Fact Sheet would also be distributed to stakeholders on the Key Stakeholder List and posted to the Workers' Compensation Board website.

The WCB would like to hear your views

The WCB recognizes that the issues, raised by stakeholders, respecting medical evidence of a causal connection between chronic pain and the original compensable injury are important. The WCB would like to hear stakeholders' views respecting the use of a Fact Sheet, rather than Policy, to address stakeholders' concerns. You are encouraged to consider the material in this paper and provide comments in writing by February 22, 2008 to:

Angela D. Peckford, Policy Analyst
Workers' Compensation Board of Nova Scotia
PO Box 1150, Halifax B3Y 2Y2
Email: angela.peckford@wcb.gov.ns.ca