

WORK SAFE. FOR LIFE.
WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

Policy Background Paper:

Employer Access to Injured Worker Claim File Information

November 9, 2007

Table of Contents

1. Introduction	3
2. Executive Summary	5
3. Background	8
4. Legal Framework.....	9
5. Current Practice	12
6. Stage One of Stakeholder Consultation – Issue Identification.....	16
7. Options.....	17
8. Proposed Policy Revisions	25
9. Conclusion.....	31
Appendix 1 - Jurisdictional Information.....	32
Appendix 2 - Current Policy 10.3.5: Access by Employers to Information Contained in Clients' Claim Files.....	36
Appendix 3 - Draft Policy 10.3.5: Access by Employers to Information Contained in Clients Claim Files	39

1. Introduction

Each year, in setting the annual policy agenda, the WCB undertakes a policy issue identification process. This process involves the identification of policy issues where the development of new and/or the revision of existing policy statements will improve consistency in decision making and/or assist the WCB in achieving its corporate/system goals. Policy issues are identified through a number of sources including stakeholder input, our System partners Workers' Advisers Program [WAP], Workers' Compensation Appeals Tribunal [WCAT] and Occupational Health and Safety [OHS], WCB operations, and the WCB corporate business plan.

Stakeholder input is a critical step in the policy issue identification process. On November 29th, 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, in determining the overall prioritization of all the policy issues identified, the Board of Directors decided that those issues identified as a high priority by one or both stakeholder groups (Injured Workers/Labour and/or Employers) would be included on the 2007 Policy Agenda. *Policy 10.3.5 – Access by Employers to Information Contained in Clients' Claim Files*, was identified as a high priority by employers.

Employer Access - Policy Consultation Process

At various stages throughout the policy development process, the Board of Directors consults with stakeholders to seek their input on a policy issue. The Board of Directors has determined that *Policy 10.3.5 - Access by Employers to Information Contained in Clients' Claim Files* is a major policy issue and as such the WCB will use a two-staged policy consultation approach.

Stage one of consultation occurred throughout March - May of this year and provided stakeholders with an opportunity to identify their issues and concerns related to employer access to claim file information. The input received from stakeholders during this initial stage of consultation was considered by the WCB and informed the development of the revised draft employer access policy outlined in this paper.

This paper kicks-off stage two of consultation on the employer access policy issue and is intended to provide stakeholders with an opportunity to comment on draft revisions to *Policy 10.3.5 – Access by Employers to Information Contained in Clients' Claim Files*. The purpose of this discussion paper and draft policy is to provide stakeholders with an overview of the proposed changes to *Policy 10.3.5 – Access by Employers to Information Contained in Clients' Claim Files* and the supporting rationale. Prior to finalizing the revisions to this policy, the WCB would like to hear stakeholders' views on the suggested changes. The Board of Directors will consider the input received from stakeholders and will determine whether additional revisions are required to the draft

policy before making a final policy decision. The consultation period for this policy issue concludes on **January 11, 2008**. Please review the background paper and draft policy, and provide your written feedback by **January 11, 2008** to:

Name: Nancy Stacey

Policy Analyst

WCB of Nova Scotia

PO Box 1150

Halifax NS B3J 2Y2

E-mail: nancy.stacey@wcb.gov.ns.ca

This paper is also available at www.wcb.ns.ca under News & Events.

DEADLINE FOR COMMENTS: January 11, 2008

2. Executive Summary

The WCB Board of Directors included Policy 10.3.5 – *Access by Employers to Information Contained in Clients' Claim Files* on the 2007 Policy Agenda as a result of various consultations with stakeholders where this policy was identified by some employers as a high priority issue requiring review.

The *Workers' Compensation Act* (the *Act*) authorizes the WCB to collect and release information on injured workers to facilitate carrying out its legislated responsibilities related to claims adjudication and safe and timely return to work. This information is called “claim file information” and is considered to be all of the documents, records (ie. medical reports), letters, and correspondence that have been produced or collected about an injured worker in relation to their claim for compensation.

The WCB is able to release relevant claim file information (including actual copies of claim file documents and records under limited circumstances) to an injured worker's employer to: 1) support their participation in claims adjudication; 2) support the accommodation of an injured worker in safe and timely return to work; and 3) to improve/enhance their understanding of WCB decisions and the exercise of appeal rights. In 1996 the WCB Board of Directors approved Policy 10.3.5 – *Access by Employers to Information Contained in Clients' Claim Files* to provide guidance in the release of claim file documents and records to employers. The policy has not been reviewed since this time.

For a 45 day period throughout March/April/May 2007, the WCB consulted stakeholders on the specific issues they would like the WCB to consider as part of the policy review and development process. This first phase of consultation concluded on May 11th, 2007. During this initial consultation period, the WCB received 9 submissions from stakeholders outlining their issues and concerns with respect to employer access to injured worker claim file information.

Based on the first stage of the consultation process, the WCB identified/confirmed a number of key issues that require consideration as part of the review of this policy item. Overall, it is evident from the submissions received by the WCB that stakeholders have divergent views on the most appropriate approach to the release of claim file information to employers. Some employers believe revisions to the policy are required to clarify employer access to claim file information and to support better information sharing throughout the claim process which will facilitate their efforts to accommodate their injured workers during safe and timely return to work. Also, some employers have identified a need for copies of relevant documents prior to appeal to assist them in understanding decisions and determining whether to appeal a decision. In addition, they do not believe injured workers should have the ability to appeal a decision to release claim file information.

Injured Worker Associations and Labour generally believe the current level of employer access to claim file information is adequate and there is no legal authority to broaden

this access. In addition, they have expressed concern that any increase in access will lead to employer interference in claims adjudication. In contrast to Employers, Injured Worker Associations and Labour believe injured workers should be able to appeal a decision to release claim file information.

Based on analysis, the WCB has concluded that an expansion of access to injured worker claim file documents and records is not supported by the legal framework. The current policy allows employers to request copies of relevant documents and records after receiving an appealable decision and/or where they are a participant in an appeal. In practice, the WCB has interpreted the policy in a more conservative and perhaps inconsistent manner. This has resulted in employer access to claim file documents and records being generally limited to when an employer is a participant in an appeal. While the scope and intent of the current policy is considered to meet the needs of employers, changes to the policy are recommended to improve clarity, transparency, and consistency in decision making with respect to the release of claim file information.

The proposed revisions to Policy 10.3.5 *Access by Employers to Information Contained in Clients' Claim Files* do not change the intent of the policy. Rather, their purpose is to enhance consistency, clarity and transparency, while protecting injured worker privacy. In addition to revisions to the policy, the WCB is proposing the establishment of a Privacy Commissioner role at the WCB to support injured workers, employers, and WCB staff in understanding and applying Policy 10.3.5.

The WCB recommends the following changes to Policy 10.3.5 to enhance consistency, transparency, and clarity:

- Clarify that employers may request copies of relevant claim file documents and records once they have received an appealable decision or where they are a participant in an appeal;
- Add definitions of key terms;
- Clearly state that copies of claim file documents or records will not be released to an employer before the initial eligibility decision is made;
- State that employers will not be charged for the initial copy of claim file documents or records – treating employers the same as injured workers;
- Modernize language and reformat the policy to improve the clarity and enhance readability; and
- Add a preamble to set the tone and direction of the policy.

The WCB recommends the following changes to Policy 10.3.5 to protect injured worker privacy:

- Define the key terms “appealable decision” and “relevant” to explicitly state the limitations placed on employer access to injured worker claim file documents and records;
- Include in policy the WCB current practice of notifying injured workers when their employer has made a request for copies of claim file documents or records;

- Indicate that a copy of the documents or records released to an employer will be made available to the injured worker; and
- Include a statement requiring employers to maintain the confidentiality of claim file documents and records.

The WCB believes the proposed policy approach is consistent with and supports the overall strategic direction of the WSIS and the WCB. In particular, the proposed policy direction encourages open dialogue and relationship building between the WCB, employers and injured workers. Further, it promotes a proactive issue resolution type response that is less legalistic and aims to reduce an employer's need to appeal. Also, it assists in facilitating a successful return to work outcome by ensuring employers have the information they need to return injured workers to safe and suitable employment.

3. Background

The *Workers' Compensation Act* (the *Act*) authorizes the WCB to collect and release information on an injured worker to facilitate carrying out its legislated responsibilities related to claims adjudication and safe and timely return to work. The information collected about an injured worker is used to administer programs and deliver benefits and services related to:

- safe and timely return to work
- health care
- earnings replacement
- permanent impairment
- vocational rehabilitation
- prevention

Claim file information is considered to be all of the documents, records (ie. medical reports), letters, and correspondence that have been produced or collected about an injured worker in relation to their claim for compensation.

In 1996, the WCB introduced Policy 10.3.5 *Access by Employers to Information Contained in Clients' Claim Files* (Policy 10.3.5) as part of a series of new policies designed to assist in the implementation of the new *Workers' Compensation Act*. The intent of this policy was to provide guidance in the release of claim file documents and records to employers and put into effect the information sharing sections of the *Act*. See Appendix 2 - *Current Policy 10.3.5: Access by Employers to Information Contained in Clients' Claim Files* to view the current policy.

Through previous consultations with stakeholders, it has been suggested that Policy 10.3.5 is out of date, the language is confusing and lacks clarity, and key terms are left open for interpretation. Further it is believed the policy does not provide enough guidance to WCB staff on what types of claim file information may be released to an employer throughout the various stages of claims management.

For a 45 day period throughout March/April/May 2007, the WCB consulted stakeholders on the specific issues they would like the WCB to consider as part of the policy review and development process. This first phase of consultation concluded on May 11, 2007. During this initial consultation period, the WCB received 9 submissions from stakeholders outlining their issues and concerns with respect to employer access to injured worker claim file information. Considering stakeholder input, the WCB has drafted a revised employer access policy intended to:

- a) Achieve balance between employer access to relevant claim file information and the protection of injured worker privacy;
- b) Clarify employer access to injured worker claim file information;
- c) Encourage transparency in WCB decision making; and

c) Support consistent decision making.

Section 6 of this paper provides an overview of the submissions received by the WCB on this policy item and how the issues have been considered and incorporated into the proposed policy revisions.

4. Legal Framework

As noted above, the *Act* gives the WCB the authority to collect the information it needs to adjudicate injured workers' claims for benefits and services. The WCB's authority to release claim file information during claims adjudication (including copies of actual claim file documents) and return to work is governed by the *Freedom of Information and Protection of Privacy Act* (FOIPOP), the *Act*, and the principles of natural justice. Each component of the legal framework is discussed in more detail below.

FOIPOP

FOIPOP is the legal framework for the protection, disclosure, and access to information collected and held by government departments and public bodies in Nova Scotia. As a public body, the WCB is subject to FOIPOP. Pursuant to Section 192 of the *Act*, the WCB is explicitly directed to release information only in accordance with FOIPOP with a few limited exceptions. The purpose of FOIPOP is to:

- hold public bodies accountable for the information they collect and use;
- provide for the disclosure of government information with necessary exemptions; and
- protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.

FOIPOP attaches special protection to the personal information held by public bodies by assuming the disclosure of such information to anyone other than the person who the information is about, with some limited exceptions, is an unreasonable invasion of personal privacy. Personal information is defined in FOIPOP as recorded information about an identifiable individual, and includes:

- medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;
- employment or educational history; and
- finances, income, assets, liabilities, net worth, bank balances, financial history or activities.

FOIPOP does not consider the release of such information an invasion of personal privacy where:

- the person who the information is about has, in writing, consented to or requested the disclosure;
- there are compelling circumstances affecting anyone's health or safety;
- an enactment authorizes the disclosure (like the *Act*);
- the person who the information is about is a party to a litigation including a civil, criminal or administrative proceeding (like an appeal to a hearing officer); or
- the release has a reasonable and direct connection to the purpose for which it was collected and the release is necessary to operate a program of the public body.

In this context, this means the WCB may disclose an injured worker's claim file information to their employer if the *Act* authorizes the disclosure or any of the other conditions noted above are met.

The Workers' Compensation Act

The WCB's authority to release claim file information is derived from the information sharing powers of the WCB (Sections 192 and 193), the general rights and responsibilities of injured workers and employers under the *Act*, and the principles of natural justice¹. A more detailed explanation of the WCB's authority to release claim file information to employers follows below.

Sections 192 and 193 of the Act

Section 192 of the *Act* directs the WCB to release the information it collects only in accordance with FOIPOP with a few limited exceptions. Specifically, Section 192 of the *Act* states:

No person who is

- (a) a member of the Board of Directors;*
- (b) an officer or employee of the Board;*
- (c) a member or employee of the Appeals Tribunal; or*
- (d) a member of a Medical Review Commission panel,*

shall release any information obtained by virtue of the person's office or employment except in accordance with the Freedom of Information and Protection of Privacy Act, unless the information is released

- (e) in the performance of the person's office or employment;*
 - (f) with the approval of the Board of Directors or the Chief Appeal Commissioner;*
- or*

¹ Natural justice is a common law concept made up of basic rules and procedures to be followed by any person or body charged with the responsibility of determining disputes. The rules of natural justice require an adjudicator to act fairly, in good faith and without bias or conflict of interest. They also require an adjudicator to allow each party adequate opportunity to present its case and respond to the other party's case in an appeal situation. For a party, an employer or injured worker in the WCB context, to have an adequate opportunity to be heard or present their case – they must be provided access to the relevant documents or records, the evidence, upon which the WCB based a decision.

(g) pursuant to this Part.

This means the WCB is authorized to release claim file information outside the normal limitations established by FOIPOP where one or more of the situations named in Section 192 (e) (f) or (g) is present. It is clear the legislature intended FOIPOP to apply generally to the WCB. However, it was recognized, by including the “exceptions” in Section 192 (e), (f), and (g), there will be instances where it may be necessary to release claim file information outside the normal FOIPOP limitations to carry out the WCB’s responsibilities under the *Act*.

Section 193 of the *Act* deals specifically with the release of claim file documents or records to an employer and states employers may request copies of documents and records relevant to an appeal. It also prohibits the WCB from denying an employer access to records or documents upon which a decision in which the employer has a direct interest was based. Specifically, Section 193 states:

193 (3) *An employer, who is a participant in*

*(b) an appeal to a hearing officer,
may, subject to any procedure that may be adopted by the Board, receive a copy of any document or record in the Board's possession that the Board considers relevant to the appeal.*

(4) *No decision, order or ruling of the Board on an issue in which the employer has a direct interest shall be based on any document or record to which the employer has been denied access pursuant to this Section.*

Sections 193(3) and (4), read in conjunction with the concepts of natural justice together with the Board of Directors’ authority to approve the release of information outside the normal limitations of FOIPOP (in this instance done by way of Board approved Policy 10.3.5), enable the WCB to release relevant claim file information to an employer where an employer has received an appealable decision or is a participant in an appeal.

Rights and Responsibilities of Injured Workers and Employers

The WCB derives its authority to provide employers summary claim file information in decisions and during safe and timely return to work from the general rights and responsibilities imposed under the *Act*, as well as the WCB’s role as administrator of the compensation system.

Under the *Act*, employers and injured workers have the right to participate in claim adjudication and the right to appeal WCB decisions. Section 188 of the *Act* states:

*Both the worker and the worker's employer may participate in
(a) any adjudication made pursuant to Section 185;*

Section 197 of the Act states:

197 (1) *Any worker or the workers employer may request that an appeal from a decision made pursuant to Section 185 be heard by a hearing officer*

.....

(4) *The participants in an appeal pursuant to this Section are*
(a) in the case of a decision respecting compensation, the worker and the workers employer;

The Act does not specifically direct the WCB to provide copies of decisions to either workers or employers. However, neither injured workers nor employers could exercise their rights to participate in or appeal WCB decisions if they did not receive decisions that explain how the WCB arrived at its conclusion. To deny employers copies of decisions would be a violation of natural justice and a denial of due process.

Further, Sections 89 – 101 of the Act impose re-employment and accommodation responsibilities on some employers. In particular, Sections 90 and 91 state:

90 The employer of a worker shall offer to re-employ a worker, in accordance with Sections 89 to 101, where the worker

(a) has been unable to work as a result of the injury; and

(b) had been employed by the employer, at the date of the injury, for at least twelve continuous months.

91 (1) The employer shall, in order to fulfill the employer's obligations pursuant to Sections 89 to 101, accommodate the work or the workplace to the needs of a worker who requires accommodation as a result of the injury to the extent that the accommodation does not cause the employer undue hardship.

These obligations cannot be met unless employers have claim file information relevant to the re-employment and accommodation of injured workers. By fulfilling these obligations, employers also assist injured workers in fulfilling their responsibility of reducing or eliminating any permanent impairment and loss of earnings resulting from the injury as required by the Act.

5. Current Practice

Essentially, there are two forms of claim file information that may be released to employers:

- Summaries of the information contained in the “source” documents in a claim file; This information is often referred to as “summary” claim file information and is used in decision writing, verbal updates, letters, correspondence, and return to work plans; and

- Copies of actual documents or records that provide specific details about the injured worker (The WCB generally refers to these as “source” documents) including medical reports, chart notes, and income statements.

Typically, the WCB is proactive in releasing summary claim file information to employers to ensure an understanding of its decisions, claim status, and to facilitate safe and timely return to work. In an effort to protect the privacy of injured workers the WCB places restrictions, by way of Policy 10.3.5, on the release of actual copies of claim file documents to an employer. The WCB will only release copies of actual claim file documents or records to an employer where they have:

- received an appealable decision or are a participant in an appeal;
- made the request in writing; and
- identified an issue in dispute or concerns with material either contained in, or which the employer has reason to believe was omitted from, the appealable decision.

In 2006 the WCB received 62 requests from employers for copies of information contained in injured worker claim files. In all of these cases, with the exception of 2, the employer was a participant in an appeal. In the remaining two situations, the employers were considering filing a notice of appeal.

The following two sections of the paper explain in more detail the practice of the WCB as it relates to claim file information release in two situations:

- A) release of summary claim file information during claim adjudication and return to work; and
- B) release of claim file documents and records relevant to an appealable decision or during appeals.

A - Release of Summary Claim File Information During Claim Adjudication and Return to Work

The WCB is able to provide employers with summary claim file information that is relevant to:

- 1) decisions; or
- 2) the accommodation of an injured worker during safe and timely return-to-work.

1 - Decisions

In 2006, 31,810 new claims were filed with the WCB. Each of these claims was adjudicated (decisions made) by the WCB to determine eligibility/entitlement to WCB benefits or services. Typically, where a claim is accepted, the WCB makes a series of decisions throughout the claims management process. Decisions made by the WCB are generally provided to injured workers and employers in one of two forms:

- standard letters generated by the claims database; or
- “reasoned decisions”

The content of a standard letter varies depending on the subject matter but is typically brief and to the point – indicating the nature of the specific benefit or service that the WCB has approved.

Reasoned decisions are more detailed documents that include a summary of the claim file information the WCB considers relevant to a decision, including:

- a description of the injury;
- general diagnosis information; and
- factors considered in reaching the decision.

Reasoned decisions are not issued in all cases. Rather, reasoned decisions are typically provided:

- when the WCB is denying an injured worker’s claim for benefits or services;
- at significant milestones in the claim process (ie. decisions related to Vocational Rehabilitation, Permanent Impairment Benefits, and Extended Earnings Replacement Benefits); or
- at an employer’s request.

Generally, decisions related to initial eligibility take the form of a standard letter unless the WCB has not accepted the claim or an employer has specifically requested a “reasoned decision”. The rationale for this practice is that the vast majority of claims are straight forward and the evidence clearly establishes that the injury arose out of and in the course of employment and no concerns or objections have been expressed by either the employer or injured worker.

2- Accommodation During Safe and Timely Return to Work

The WCB is committed to ensuring injured workers return to work in a safe and timely manner after a compensable injury. To achieve a safe and timely return to work an employer must be an active participant in the process to ensure injured workers are returned to suitable employment with appropriate accommodation of the work environment and/or the type of work being done. To achieve a successful return to work outcome, employers require access to certain claim file information. Typically, the WCB provides employers with this information in a summary form. Information relevant to the accommodation of an injured worker during safe and timely return to work may consist of:

- general injury diagnosis;
- return to work date;
- functional abilities of the worker (ie. how long they can stand, the amount they can lift); and

- limitations in relation to job functions (ie. physical or psychological).

This information is often communicated to the employer verbally through case conferencing, or in written correspondence, including copies of functional assessments, or in return to work plans.

B - Release of Claim File Documents and Records Relevant to an Appealable Decision or During Appeals

As discussed earlier, Policy 10.3.5 allows the release of actual copies of relevant claim file documents in two situations: when an appealable decision has been made; or when an employer is a participant in an appeal, if the employer has made the request in writing.

While the current policy provides for the release of copies of claim file documents and records once an appealable decision has been made, in practice the WCB has interpreted the policy in a more conservative manner and employer access to claim file documents and records has been generally limited to when an employer is a participant in an appeal. In 1996, when Policy 10.3.5 was introduced, personal privacy was becoming a more prominent social value. At the same time employers were not, for the most part, actively engaged in the compensation system and typically did not request copies of claim file documents or records. The WCB believes these factors may have contributed to the narrow interpretation of the policy. In recent years, increased employer engagement, and the WCB's emphasis on safe and timely return to work has highlighted employers' need to access relevant claim file documents and records outside the appeal process.

Where an employer has decided to appeal a decision or participate in an injured worker's appeal, they may request in writing a copy of claim file documents or records relevant to the appeal. The employer must submit a form indicating the decision under appeal (there may be several decisions associated with a particular issue) and any concerns with material either contained in or which the employer has reasons to believe was omitted from, the appealable decision.

Upon receipt of an employer request, the WCB will contact the injured worker and inform him/her that their employer has requested a copy of claim file documents. Any questions or concerns expressed by the injured worker are addressed at this time. The claim file is reviewed and the WCB determines what documents or records (or portions thereof) are relevant to the appeal. The relevant documents are provided to the employer and the injured worker is informed of the release.

Every appeal is different and, therefore, the documents considered relevant to an appeal and released to an employer will vary. Generally speaking, however, the WCB does not consider documents or records containing the following information relevant to an appeal:

- medical reports (including chart notes) that do not have a direct impact on the issue under appeal
- injured worker's finances, banking information, direct deposit enrolment forms, copies of personal cheques, social insurance numbers
- garnishment orders and related documents
- other court orders
- social service or welfare benefit documents
- employment insurance documents
- Canada Revenue Agency information
- reference to criminal records

Fees charged for copying claim file documents or records

The current practice of the WCB is to provide injured workers with an initial copy of claim file documents or records free of charge. The WCB charges a fee for subsequent copies of file material previously copied at the request of the injured worker. Currently Policy 10.3.5 directs the WCB to charge employers a fee for initial copies of relevant claim file documents and records related to the cost of staff salaries for the time taken to review the file. The practice of the WCB has (for approximately the last 1.5 years) been to treat employers and injured workers the same and not charge employers for the first copy of a file. This practice is inconsistent with the current policy.

Release of Claim File Information With Injured Worker Consent

Where an employer wants access to information the WCB does not consider relevant to either a decision or return to work, the employer may seek the injured worker's consent for the release. Where consent is provided the information may be released and the WCB may impose conditions on the release.

Jurisdictional Information

See *Appendix 1 Jurisdictional Information* for more detail on claim file information release practices across the country.

6. Stage One of Stakeholder Consultation – Issue Identification

For a 45 day period throughout March/April/May 2007, the WCB consulted stakeholders on the specific issues they would like the WCB to consider as part of the policy review and development process. This first phase of consultation concluded on May 11th 2007. During this initial consultation period, the WCB received 9 submissions from stakeholders outlining their issues and concerns with respect to employer access to injured worker claim file information.

Based on the first stage of the consultation process, the WCB identified/confirmed a number of key issues that require consideration as part of the review of the current policy on employer access to injured worker claim file information. Overall, it is evident from the submissions received by the WCB that stakeholders have divergent views on the most appropriate approach to the release of claim file information to employers.

Some employers believe revisions to the policy are required to clarify employer access to claim file information and to support better information sharing throughout the claim process which will facilitate their efforts to accommodate their injured worker's during safe and timely return to work. Also, some employers have identified a need for copies of relevant documents prior to appeal to assist them in understanding decisions and determining whether to appeal a decision. In addition, they do not believe injured workers should have the ability to appeal a decision to release claim file information.

Injured Worker Associations and Labour generally believe the current level of employer access to claim file information is adequate and there is no legal authority to broaden this access. In addition, they have expressed concern that any increase in access will lead to employer interference in claims adjudication. In contrast to Employers, Injured Worker Associations and Labour believe injured workers should be able to appeal claim file information release decisions.

A summary of stakeholder submissions (*Employer Access to Injured Worker Claim File Information: Consultation Summary*) is posted on the WCB website at www.wcn.ns.ca.

7. Options

Through the consultation process stakeholders raised a series of issues related to employer access to injured worker claim file information. The WCB has been able to synthesize them into two major issues:

Issue # 1: Scope of Policy 10.3.5; and

Issue # 2: Appeal of WCB decision to release information.

Based on research and analysis, a number of options were identified as possible responses to these major issues. The options for each issue are explored in more detail below.

Issue # 1: Scope of Policy 10.3.5

One of the key issues raised by employers during consultation was that the WCB should release more information during the claims process without the need to appeal. In turn, Injured Workers' Associations/Labour indicated the current policy provides adequate access and no additional information should be released.

Based on analysis, the WCB has concluded the current policy meets the information needs of employers with regard to copies of actual claim file documents and records, and that an expansion of employer access is not supported by the legal framework. The WCB recognizes existing Policy 10.3.5 has at times, been interpreted by WCB employees more conservatively than the language actually intended by limiting access to an appeal situation. However, the current policy statement allows employers to request copies of relevant documents once an appealable decision has been made.

The current Policy 10.3.5 does not codify or provide guidance on the release of summaries of relevant claim file information (summary claim file information) in decisions, correspondence, or return to work plans. The WCB's approach to the release of summary claim file information is guided by the *Act* and internal procedure.

While the scope and intent of the current policy is considered to meet the information needs of employers with regard to access to actual copies of relevant claim file documents and records, the language contained in the current policy is broad and does not clearly communicate the WCB's intended approach to the release of claim file documents and records. In addition, it does not address the release of relevant summary claim file information. Recognizing there is an opportunity to improve clarity and transparency without expanding the circumstances under which the WCB will release claim file information (both summary claim file information and actual copies of claim file documents or records) the WCB considered three options:

- Option # 1: *Revise Policy 10.3.5 to Not Charge Employers for the Initial Copy of Claim File Documents or Records and Make Housekeeping Changes*
- Option # 2: Clarify Intent of Policy 10.3.5 by changing the language to ensure clear understanding of the circumstances in which copies of claim file documents or records may be released to an employer and make changes proposed in Option # 1. **[Recommended Option]**
- Option # 3: Clarify intent of current Policy 10.3.5 as outlined in Option # 2 and expand the scope to include the provision of summary claim file information during claim adjudication and return - to – work

Option # 1: Revise Policy 10.3.5 to Not Charge Employers for the Initial Copy of Claim File Documents or Records and Make Housekeeping Changes

Under this option, the intent and scope of Policy 10.3.5 would be maintained. However, the WCB proposes 3 changes designed to update the policy and reflect the current practice of not charging employers for the initial copy of claim file documents or records. This would be done by:

- 1) Revising the policy to not charge employers for the initial copy of claim file documents. This change will formalize current practice and treat injured workers and employers the same.

2) Changing the policy title to *Access by Employers to Information Contained in Injured Workers' Claim Files* to ensure it reflects current terminology being used by the WCB.

3) Re-formatting the policy to make it easier to read.

In analyzing the strengths and weaknesses of this option the WCB considered the following points:

- The policy is consistent with the WSIS goal of creating a less legalistic system as it does not require the employer to appeal a decision to gain access to relevant claim file documents or records.
- The WCB believes the policy meets employer information needs.
- The current policy directs that employers will be charged a fee for copies of claim file documents and records. Injured workers, through other WCB policy, are not charged for the initial copy of their claim file.² This means a different standard is applied to the workplace parties.
- Some stakeholders have indicated that the current policy is unclear and the intent is not well understood.
- The current policy does not define key terms such as “relevant” and “appealable decision” leaving them open to interpretation and causing confusion and lack of clarity.
- The current policy is silent on whether claim file documents or records can be released prior to an initial eligibility decision.
- The policy is silent on an employer’s duty to maintain the confidentiality of injured worker claim file documents and records.
- It does not address the release of summary claim file information in decisions and during safe and timely return to work.

Option # 2: Clarify Intent of Policy 10.3.5 and make changes proposed in Option #1
[Recommended Option]

The WCB acknowledges that Policy 10.3.5 is over 10 years old and may require updating to reflect current day terminology. Under this option, the overall objective is to improve clarity and transparency without changing the original intent of the policy. As with *Option # 1*, the intent and scope of Policy 10.3.5 would be maintained. This would be done by:

² WCB Policy 10.3.4: Photocopying of Clients' Files, effective February 1, 1996, states: “1. A file will be copied once and provided free of charge to the client or the client's representative. The written request will be placed on the client's file. Subsequent information in the same file(s) will be copied, if requested. 2. There will be a charge applied in an amount determined by the Board for second and subsequent copies of file material previously copied at the request of the client or the client's representative. It is the responsibility of the person requesting the information to make sure that the copied file(s) is/are transferred when and if the client chooses a new representative.”

- 1) Simplifying the language to clearly communicate that employers may request copies of relevant documents or records after an appealable decision has been rendered and/or where the employer is a participant in an appeal;
- 2) Defining key terms used in the current policy: “appealable decision“, “claim file“, “confidentiality” “employer“, “relevant” to ensure the intent of the policy is clear and consistently applied;
- 3) Explicitly stating the WCB cannot release copies of claim file documents before it has made an initial eligibility decision. This is consistent with the current policy that directs the release of copies of claim file documents and records once an appealable decision has been rendered. Implicit in this direction is that copies will not be released prior to the decision being made. The addition of a statement to this effect will clarify this intent;
- 4) Including a statement requiring employers to maintain the confidentiality of claim file documents; and
- 5) Making the changes proposed in Option # 1.

In analyzing the strengths and weaknesses of this option the WCB considered the following points:

- It improves consistency and transparency by defining key terms used in the Policy.
- Enhances the protection of injured worker privacy by ensuring a consistent understanding of the concept of “relevance”.
- It is consistent with injured worker position that employer access to claim file information should not be changed.
- It treats injured workers and employers the same with regard to the fees charged for the initial copy of claim file documents and records.
- The WSIS goal of a less legalistic system and the WCB’s goal of safe and timely return to work will continue to be supported.
- It does not address the release of summary claim file information in decisions and during safe and timely return to work.

Option # 3: Clarify content of current Policy 10.3.5 and expand the scope to include communication during claim adjudication and return - to – work

As discussed earlier, the WCB makes a distinction between: 1) summary claim file information that may be released to employers in “reasoned decisions”, status updates, and return to work plans, and 2) actual copies of relevant claim file documents and records such as medical reports, that may be released to employers upon written request after an appealable decision has been made and/or during an appeal.

Current Policy 10.3.5 addresses the release of actual copies of claim file documents and records but is silent on the release of summary claim file information. The WCB does not have a policy statement that outlines the type of summary claim file information that may be provided, without a formal written request, to employers during claim adjudication or safe and timely return to work.

Under this option, revisions to the policy would include the clarification changes proposed under option # 2 and an expansion of the current scope of the policy to codify the WCB's practice of releasing relevant summary claim file information during claims adjudication and safe and timely return to work. This option would address:

- how summary claim file information will be communicated during claim adjudication and return to work (ie. verbally, decisions, return to work plans); and
- the type of summary claim file information considered relevant to a decision or safe and timely return to work.

In analyzing the strengths and weaknesses of this option the WCB considered the following points:

- Consistency and transparency are improved by defining key terms used in the policy.
- It enhances the protection of injured worker privacy by ensuring a consistent understanding of the concept of "relevance".
- It is consistent with the injured worker position that employer access to claim file information should not be changed.
- The WSIS goal of a less legalistic system and the WCB's goal of safe and timely return to work will continue to be supported.
- The type of summary claim file information released in decisions and during safe and timely return to work is determined on a case by case basis. The circumstances of each return to work situation are different and the information relevant to the accommodation will vary. Therefore, codifying practice in policy may not be appropriate. Clarifying the WCB's approach to the release of summary claim file information could be communicated through other communications tools such as updates to public relations materials including the Employer and Worker handbooks.
- The scope of the current policy would be expanded and may be perceived as an expansion of WCB release practices.

Recommendation

The WCB recommends Option # 2: Clarify Intent of Policy 10.3.5 and make changes proposed in Option #1.

In arriving at its recommendation the WCB considered the strengths and weaknesses of all the options. The WCB recommends Option # 2 because it: 1) maintains the current

scope of the policy, 2) clarifies intent of the policy, and 3) protects the privacy of injured workers.

Maintains current scope of the Policy 10.3.5

As discussed previously, the WCB's legal and policy framework does not support increasing employer access to injured worker claim file documents and records. The WCB is not authorized to provide employers with more access to injured worker claim file documents or records.

The WCB recognizes the need to be transparent about when and how it will release summary claim file information. While the WCB could codify in the Policy the WCB's practice of releasing relevant summary claim file information during claims adjudication and safe and timely return to work it does not believe policy is the best tool for communicating this information. The reasoning behind this belief is the recognition that the circumstances of each return to work situation are different and the information relevant to the accommodation will vary. Therefore, codifying practice in policy may not be appropriate. However, the WCB does believe it is important to clearly communicate to stakeholders the WCB's general approach to the release of claim file information during claims adjudication and return to work. As a result, the WCB is suggesting key communication documents, such as the Worker/Employer handbooks be revised to include information on this issue.

Clarifies intent of Policy 10.3.5

Through consultation and analysis it has become apparent the intent of Policy 10.3.5 is not clearly understood by WCB staff and in some cases has been interpreted conservatively or perhaps applied inconsistently. Option # 2 clarifies that employers may request access to injured worker claim file documents and records once an appealable decision has been made and/or where they are a participant in an appeal. This option would also include definitions of key terms to further clarify intent.

Protects injured worker privacy

The WCB believes injured workers' personal privacy must be protected. The recommended option defines key terms thereby clarifying the limits on employer access to claim file documents and records. It also clearly states that employers must maintain the confidentiality of claim file documents and records.

Issue # 2: Appeal of WCB decision to release information

As noted previously, through the consultation process, Injured Worker Associations/Labour and employers have raised the issue of whether claim file information release decisions are appealable decisions.

Generally speaking, all decisions – including claim file information release decisions – are appealable decisions and follow the normal appeal process of the WCB. The WCB recognizes that the nature of claim file information decisions differs from other claim decisions in that it is difficult to reverse the impact of these decisions if an error occurs.

The approach to appeals of claim file information varies across jurisdictions. Some provinces having a distinct process for claim file information decisions, while others allow appeals through the normal appeal channels. In analyzing this issue, the WCB explored the following options:

- Option # 1: Do not release claim file documents or records until after the appeal period for the information release decision has passed
- Option # 2: Establish formal channels for stakeholders to express concerns with claim file information during decision making process

Option # 1: Do not release claim file documents or records until after the appeal period for the information release decision has passed

Under this option, the WCB would issue a decision in relation to the release of relevant claim file documents or records requested by an employer, but not release the claim file documents to an employer until after the appeal period had passed. If either an injured worker or employer appealed the information release decision to a hearing officer, the implementation of the decision would be further delayed until a decision was rendered by the hearing officer.

In analyzing the strengths and weaknesses of this option the WCB considered the following points:

- This option would result in a minimum 30 day (the length of time an injured worker would have to appeal a WCB claim file information release decision to a hearing officer) delay in the release of claim file documents to an employer. If the injured worker or employer appealed the release decision, the delay could increase to a total of 90 days (an additional 60 days for a hearing officer to render a decision).
- Employers would likely need to request extensions of appeal time limits to accommodate the 30 – 90 day delay in receiving claim file documents.
- Increases the legalistic nature of the system.
- Treats these decisions differently than other decisions.
- May overload the existing appeal system.

Option # 2: Establish formal channels for stakeholders to express concerns with claim file information release decisions [Recommended Option]

In this option, the WCB would formalize, by way of policy, a notification process where an injured worker would be contacted by the WCB and inform him/her that their employer has requested a copy of their claim file documents or records. At this time the

WCB would explain the process for claim file information release and what may be considered relevant to an appealable decision or appeal. During this step in the process, the injured worker would have an opportunity to identify specific documents or information he/she has concerns about being released. The decision maker would take this into consideration as they determine the relevance of particular documents or records.

To further enhance this process, the WCB is also proposing to establish a Privacy Commissioner role within the organization. It is intended the Privacy Commissioner would have extensive WCB experience and would provide advice and support to staff who are responsible for reviewing claim files and determining the relevant documents for release. In addition, the Privacy Commissioner would be a contact for stakeholders who continue to have concerns following their initial conversation with the WCB and could mediate any disputes.

Once the WCB renders its decision to release claim file documents or records the injured worker would be notified the release has occurred. At this time, the injured worker would have the right to appeal the decision through the normal appeal process if they disagree with the decision.

In analyzing the strengths and weaknesses of this option the WCB considered the following points:

- Establishes formal opportunities for injured workers to express/share concerns about claim file information release.
- Encourages transparency and consistency of WCB practice.
- No significant delays in decision implementation.
- Supports a less legalistic system by taking a “problem solving” approach to information release concerns or disputes.
- Treats all decisions in the same manner.
- No significant impact on the appeal system.
- Creates a more “friendly” environment for resolving disputes/disagreements.
- Consistent with current practice.

Recommendation

The WCB recommends Option # 2: Establish formal channels for stakeholders to express concerns with claim file information release decisions. In arriving at its recommendation the WCB considered the strengths and weaknesses of the options. The WCB recommends Option # 2 because it: 1) Offers a balanced approach to employer access to claim file information 2) Supports a less legalistic system.

Offers a balanced approach to employer access to claim file information

Option # 2 offers a balanced approach to employer access to claim file information. It does not delay the release of claim file information, and injured workers a formal way to express concerns about the release of their claim file information. By not significantly delaying the release of claim file information, employers are able to gain access to information in a timely manner so they are able to use it to support safe and timely return to work or decide if they want to appeal a decision. The establishment of formal channels for injured workers to express concerns prior to release of information to their employer enables the WCB decision maker to consider the concerns and ensure only relevant claim file information is released.

Supports a less legalistic system

Option # 2 takes a problem solving approach whereby the objective is to improve communication and address the concerns of stakeholders rather than formalize disputes.

8. Proposed Policy Revisions

To implement the recommendations proposed in this discussion document for addressing (a) revisions to Policy 10.3.5 and (b) appeals of WCB claim file information decisions, revisions to Policy 10.3.5 are necessary.

Overall, the objective of this proposed draft policy is to improve clarity and transparency, while at the same time maintaining the original intent and scope of the existing policy and protecting the privacy of injured workers.

At a high level, the WCB recommends the following changes to Policy 10.3.5 to improve transparency, clarity and consistency in application of the Policy:

- Clarify that employers may request copies of relevant claim file documents and records once they have received an appealable decision or where they are a participant in an appeal;
- Add definitions of key terms;
- Clearly state that copies of claim file documents or records will not be released to an employer before the initial eligibility decision is made;
- State that employers will not be charged for the initial copy of claim file documents or records – treating them the same as injured workers.
- Modernize language and reformat the policy to improve the clarity and enhance readability; and
- Add a preamble to the policy to set the tone and direction of the policy.

At a high level, the WCB recommends the following changes to Policy 10.3.5 to improve the protection of injured worker privacy:

- Define the key terms “appealable decision” and “relevant” to explicitly state the limitations placed on employer access to injured worker claim file documents and records;
- Include in policy the WCB current practice of notifying injured workers their employer has made a request for copies of claim file documents or records;
- Indicate that a copy of the documents or records released to an employer will be made available to the injured worker; and
- Include a statement requiring employers to maintain confidentiality of claim file documents.

In addition to revisions to the policy, the WCB is proposing the establishment of a Privacy Commissioner role at the WCB to support injured workers, employers, and WCB staff in understanding and applying Policy 10.3.5.

The WCB believes the recommended options result in a fair, reasonable, and balanced approach to employer access and the protection of privacy of injured worker claim file information.

This following describes in more detail the specific changes to Policy 10.3.5 being proposed and the supporting rationale.

Language and Structural changes

In an effort to improve the clarity and enhance the readability of the policy the WCB is proposing minor changes to the language and structure of the policy. The proposed changes include:

- Replace the term “client” with “injured worker” and “Board” with “WCB”.
- Replace the term “information” with the phrase “documents or records” to reflect the language in the *Act* and emphasize that an employer is not necessarily entitled to all the information contained in a claim file.
- Replace the term “appeal” with the phrase “appeal to a hearing officer” and replace the term “contained” with “referenced” to add clarity. In the current policy, an employer must express concern with information “contained” in an appealable decision when making a request for information. The WCB believes the use of the word is not grammatically correct and recommends using “referenced” instead.
- Reorganize the sections of the policy to improve readability and comprehension.

Addition of a Preamble

The current policy contains a general statement about the balance between protecting injured worker privacy and providing employers with the information used in decisions. This statement is currently located at the end of the policy. Typically, statements of this nature are intended to establish the tone and direction of a policy and are included at the beginning of a policy. As a result, the WCB proposes moving this statement to the

preamble at beginning of the policy. In addition, it is proposed the statement “In so doing, the Board has tried to make its appeal processes fair to all concerned” be removed as it is misleading and gives the impression the policy applies only to an appeal situation.

Addition of Definitions

The current policy does not define any key terms used in the policy statement. The WCB proposes the inclusion of the following definitions to improve clarity, transparency, and consistency in decision making:

“claim file” means the file for recording information used in the adjudication and administration of an injured worker’s claim for WCB benefits and services. It is comprised of records and documents collected as part of the administration of the claim. This includes, but is not limited to, correspondence, decisions, medical reports, other service provider reports/assessments, and financial information.

“confidentiality” means the obligation of an organization to protect the information entrusted to it and not misuse or wrongfully disclose it.³

“employer” means the worker’s employer at the time of the compensable injury or the employer who is responsible for the cost of the worker’s claim, as determined by the WCB.

The WCB also recommends the addition of definitions for the terms “appealable decision” and “relevant”. These definitions are critical to understanding the scope and intent of the policy:

“appealable decision” means a determination, order or ruling of the WCB made pursuant to Part I of the Workers’ Compensation Act (the Act) capable of being appealed.

The inclusion of this definition makes it clear that employers may request copies of claim file documents or records during the period in which they have appeal rights. Unless granted an extension, this is 30 days from the date an employer is notified of a decision. Part of the reason for allowing employers to request copies of relevant claim file documents or records is to allow them to make an informed decision on whether to exercise their appeal rights. Where an employer no longer has the right to appeal a decision, it is not reasonable to allow them continued access to the claim file documents or records.

³ This definition is taken from the Pan-Canadian Health Information Privacy and Confidentiality Framework, Health and the Information Highway Division, Health Canada, January 27, 2005.

Defining the term “relevant” is significant to the interpretation of the policy as it sets out the standard that must be satisfied before copies of claim file document or records will be released to an employer. The WCB proposes the following definition:

“relevant” means, in reference to claim file documents and records, having a direct bearing on an appeal to a hearing officer or being indispensable to understanding a decision.⁴

It is believed this proposed definition of “relevant” is balanced and fair as it provides employers access to the claim file information necessary to understand a decision or participate in an appeal, while at the same time placing limits on what the WCB will release to ensure the privacy of injured workers is protected. In exploring potential definitions of “relevance” the WCB considered definitions used in other jurisdictions. Some definitions, such as the one used by Manitoba, considers information to be relevant “if it is required to determine entitlement to, or the amount of, compensation benefits or services”. The definition was considered too broad. Other jurisdictions, such as Newfoundland, have a more specific, or precise definition. The definition proposed by the WCB is based on the Newfoundland definition.

Clarification of access to copies of relevant claim file documents or records

Currently, Policy 10.3.5 indicates that an employer may request access to claim file information after an appealable decision has been made. The term “appealable decision” is not defined, but was intended to capture any decision of the WCB whether or not the decision was under appeal.

To clarify the actual intent of the policy, it is proposed the policy be revised to clearly state an employer may request a copy of relevant claim file documents, records, or portions thereof, once an appealable decision has been made or where they are a participant in an appeal.

Clarification of employer access prior to initial eligibility decision

Policy 10.3.5 is silent on whether an employer may request access to claim file documents or records before the WCB has made an initial eligibility decision. That is, the WCB’s decision on whether the injury is work-related.

It is proposed the policy be revised to clarify that copies of claim file documents or records will not be released to an employer before the initial eligibility decision is made.

The *Act* provides authority to release claim file documents only once an appealable decision has been rendered. Where no decision has been made, the WCB has no authority to consider an employer’s request for claim file records or documents. In

⁴ This definition is based on the Newfoundland WHSCC description of relevancy in Policy GP-01 INFORMATION PROTECTION AND ACCESS: “The Commission shall determine relevance in terms of information which has a direct bearing on, or which is indispensable in order to discuss, the disputed issue(s).”

addition, there is often very little information (accident report and physician report) contained in a claim file at the initial stages of a claim for compensation.

The WCB will, of course, communicate with both employers and injured workers prior to an initial eligibility decision and answer questions related to process and claim status. In addition, the WCB will consider any evidence submitted by injured workers or employers when making initial eligibility decisions. Also, an employer may object to the acceptance of a claim if they wish by documenting the objection on the injury report and making a submission. Once a decision is made, employers may request a copy claim file documents or records relevant to the decision or appeal the decision.

Notification of injured worker of employer request for copies of claim file documents

Currently, Policy 10.3.5 only requires the WCB to advise injured workers when claim file information is being released to their employer. By way of practice, the WCB also tends to notify injured workers when their employer has submitted a request for copies of claim file documents or records.

It is believed that injured workers have a legitimate interest in knowing if their employer has requested copies of claim file documents. Claim files contain personal information and injured workers should know when this information may be released to their employer. Therefore, the WCB proposes the practice of notifying injured workers their employer has made a request for copies of claim file documents or records be codified in policy. By having this knowledge, the injured worker will have an opportunity to express concerns about the release of claim file documents or records. This will be taken into consideration by the decision maker. If the documents are considered relevant, they will be released to the employer.

The codification of this practice in policy also will provide the WCB with the opportunity to explain the process and what documents or records are generally considered relevant to an appealable decision or an appeal. Where an injured worker still has concerns, they may contact the WCB Privacy Commissioner as proposed as part of the policy recommendation.

Indicate that a copy of the documents or records released to an employer will be made available to the injured worker;

The current policy does not specify that a copy of the claim file documents or records released to an employer are available to the injured worker. This statement clarifies that an injured worker may obtain a copy of the documents or records released to their employer under this policy.

In considering approaches to providing an injured worker with a copy of the claim file documents released to their employer the WCB sought a solution that would make it easy for an injured worker to get the documents and protect the privacy and security of

claim file documents. With these considerations in mind the WCB considered two approaches to revising Policy 10.3.5:

- 1) state that the WCB will automatically provide injured workers with a copy of the documents released to their employer; or
- 2) state that the WCB will make the documents “available” to an injured worker **(recommended)**

In approach 1) the WCB would automatically provide injured workers with a copy of the documents at the same time they are sent to their employer. The injured worker would not be contacted and would not be required to make a request. The WCB is not recommending this approach because it is believed automatic provision of the copied documents to injured workers without any context explaining these documents may cause concern or alarm to some injured workers – in particular those who have not viewed or requested a copy of their file in the past. In addition, claim file documents contain highly personal and sometimes sensitive information. With automatic provision of the documents, the injured worker’s consent to send the documents has not been obtained and the potential exists that the package could be misplaced during delivery or received by someone in the home other than the injured worker. In some instances an injured worker may want the documents sent to an address other than the one listed on the WCB computer system.

In approach 2) the WCB would revise Policy 10.3.5 to state the documents will be made “available” to the injured worker. The statement does not direct how the documents will be provided. Instead, it provides the WCB the flexibility to facilitate injured worker access to the documents in a more personal way. Initially, the WCB would call the injured worker, explain that the employer has requested a copy of relevant claim file information, and ask the worker if they want a copy of the documents released to their employer and confirm the injured worker’s address. The injured worker will not be required to complete a form or initiate a request for the documents – making the process easy and straight forward for injured workers. The use of the term “available” will also allow the WCB to change “how” the documents are provided to ensure the best possible service.

No employer fee for initial copies of claim file documents or records

The current Policy 10.3.5 states the WCB will charge employers a fee related to the cost of staff salaries for reviewing files. Injured workers, on the other hand, are not charged for the initial copy of claim file documents or records but are charged a fee for second and subsequent copies of file material previously copied at the request of the injured worker. Given that both employers and workers are participants in the adjudication process and have appeal rights under the *Act*, it may not be considered fair or balanced to apply a different standard to employers with regard to fees for copies. As a result, it is proposed the same fee arrangement be applicable to both employers and injured workers.

Employer required to maintain confidentiality of claim file documents

The current policy 10.3.5 does not specify the purposes for which injured worker claim file documents or records may be used by employers. It is proposed a new section be added to the policy to include a statement requiring employers to maintain the confidentiality of claim file documents.

To view the draft policy see *Appendix 3 Draft Policy 10.3.5: Access by Employers to Information Contained in Clients' Claim Files (Changes Indicated by ~~Strikeouts~~ (deletions) and Underlines (additions))*.

9. Conclusion

We are interested in hearing your comments on the proposed changes presented in this paper. In particular, we would like you to answer the following questions:

- Do you agree/disagree with the proposed revisions to the WCB employer access to claim file information policy? Please explain.
- Are there additional changes you would like to see included in the revised employer access to claim file information policy?

All comments will be considered as the WCB finalizes revisions to the employer access to claim file information policy.

Please review the background paper and provide your written feedback by **January 11, 2008** to:

Name: Nancy Stacey
Policy Analyst
WCB of Nova Scotia
PO Box 1150
Halifax NS B3J 2Y2

E-mail: nancy.stacey@wcb.gov.ns.ca

This paper is also available at www.wcb.ns.ca under News & Events.

DEADLINE FOR COMMENTS: **January 11, 2008**

Appendix 1 Jurisdictional Information

Claim file information release practice varies across the country due in large part to differences in legislation. Generally speaking, all release copies of claim file documents where an employer is a participant in an appeal. Saskatchewan and Ontario will release copies claim file documents to an employer where they have expressed the intention to appeal. Alberta, New Brunswick, and NT/NU will release copies of claim file documents prior to review/appeal upon written request from the employer. All jurisdictions will release summary level claim file information relevant to the administration of a claim.

In Manitoba injured workers may object to the release of claim file documents during appeals. In Ontario and Saskatchewan an injured worker may object where the employer has requested access based on an intention to appeal. In NT/NU an injured worker may object to release of medical documents during return to work and claim adjudication.

The table below provides more detail on claim file information release across the country.

Claim File Information Release Across Canada

Jurisdiction	Claim File Information Practice
Alberta	<p>Release Prior to Appeal The WCB will release claim file information :</p> <ul style="list-style-type: none"> • generally, when the injured worker provides written consent; or • necessary for the management of the claim. <p>The legislation directs the WCB to provide a progress report upon request, and copies of decisions that include a summary of medical information. In practice, upon request of the employer, the WCB releases copies of claim file documents for return-to-work planning, understanding the progress of medical treatment and vocational rehabilitation decisions.</p> <p>Release at Appeal The legislation allows employers to access relevant claim file information, relevant to a decision under review.</p> <p>Explanation of Relevance No definition or detailed explanation in policy or legislation.</p>
British Columbia	<p>Release Prior to Appeal Worksafe BC provides employers the information the “need to know” during claim adjudication and return to work. This includes:</p> <ul style="list-style-type: none"> • the nature and cause of the injury; • when the worker is expected back to work; • whether the worker will need light duties or other accommodations; • summary of functional capacity evaluations; and • decisions (a more general version than is provided to the worker) <p>Release at Appeal Employers are provided access once a reconsideration or appeal is initiated.</p>

Jurisdiction	Claim File Information Practice
	<p>They are provided the same access as the worker.</p> <p>Explanation Relevance No definition or detailed explanation in policy or legislation.</p>
<p>New Brunswick</p>	<p>Release Prior to Appeal The WHSCC will provide copies of decisions on key claim-related decisions that include reasons for the decision and a copy of any correspondence that is sent to the injured worker.</p> <p>Upon written request the WHSCC will provide:</p> <ul style="list-style-type: none"> • full access to correspondence section of the file • full access to the remainder of the file – but the WHSCC may block out or remove references to other injured workers and certain medical information containing personal information that is not relevant to the claim-related injury. <p>Release at Appeal Employers may request a copy of the file where they are a participant in an appeal.</p> <p>Explanation of Relevance No definition or detailed explanation in policy or legislation.</p>
<p>Manitoba</p>	<p>Release Prior to Appeal The WCB will disclose limited information to the employer where they are satisfied the employer needs the information for a WCB program purpose. The WCB will not provide copies of medical reports before reconsideration or appeal has been initiated. However, a summary of the information may be provided where the employer shows it is required for a WCB program purpose.</p> <p>Release at Appeal During appeal the WCB will provide the employer access to relevant documents. The injured worker may appeal the decision to release the information as provided for in the legislation.</p> <p>Explanation of Relevance “Relevant information is that information which has bearing on or reference to the matter at hand. In the WCB context, information is relevant if it is required to determine entitlement to, or the amount of, compensation benefits or services.”</p>
<p>Newfoundland</p>	<p>Release Prior to Appeal During claim adjudication and return to work the WHSCC provide employers:</p> <ul style="list-style-type: none"> • Return to work plans • Vocational rehabilitation information • Claim cost information • Decision letters • Appeal letters <p>Employers must obtain written consent of the worker to access other claim file documents</p> <p>Release at Appeal Where a decision is under review, the WHSCC may release further claim file information to the employer. The WHSCC will determine the whether information is relevant to a reconsideration.</p> <p>Explanation of Relevance “The Commission shall determine relevance in terms of information which has a direct bearing on, or which is indispensable in order to discuss, the disputed issue(s).”</p>
<p>NT/NU</p>	<p>Release Prior to Appeal</p>

Jurisdiction	Claim File Information Practice
	<p>The WCB may release relevant medical information in a worker's claim file. The WCB will notify the worker of the request and will allow the worker 30 days to object to the release of medical information. If the worker objects, the WCB may grant the employer access, deny the employer access, or allow restricted access. The WCB may provide the employer with a summary of relevant medical information.</p> <p>The worker's prior approval is not required for the employer to access non-medical information. The WCB shall notify the worker what information was accessed by the employer.</p> <p>The legislation states an employer may request a report of the progress being made by the worker.</p> <p>Release at Appeal Where a decision is under review or appeal an employer may request access to relevant medical and non-medical information in the claim file. The employer must identify a specific issue that is to be reviewed or appealed.</p> <p>Explanation of Relevance No definition or detailed explanation in policy or legislation.</p>
Ontario	<p>Release Prior to Appeal Employers are entitled to verbal status information about the claim, written status information, and/or copies of decision letters. They are generally not entitled to copies of actual claim file documents unless they have expressed the intention to appeal a decision.</p> <p>Release at Appeal The WSIB will provide employers copies of claim file documents relevant to an issue in dispute. Normally, information on file that has no bearing on a worker's entitlement to benefits would not be considered relevant to an issue in dispute and would not be provided.</p> <p>Relevance "Normally, information on file that has no bearing on a worker's entitlement to benefits would not be considered relevant to an issue in dispute and would not be released to employers."</p> <p>Relevance No definition or detailed explanation in policy or legislation.</p>
PEI	<p>Release Prior to Appeal The WCB will provide employers claim decisions and functional abilities assessments.</p> <p>Release at Appeal The WCB will release claim file information which is relevant to the issue in dispute.</p> <p>Explanation of Relevance "means information that is required to determine entitlement to, or the amount of, compensation benefits or services."</p>
Quebec	<p>Release Prior to Appeal The Board will provide a health professional identified by the employer access to the medical and physical rehabilitation record of the worker. The healthcare professional may provide the employer a summary of the information that enable the employer to exercise their rights under the legislation.</p> <p>Release at Appeal No references.</p> <p>Explanation of Relevance No definition or detailed explanation in policy or legislation.</p>
Saskatchewan	Release Prior to Appeal

Jurisdiction	Claim File Information Practice
	<p>The WCB outlines the workers restrictions so the employer may accommodate them during return-to-work.</p> <p>An employer may request in writing copies of relevant documents where they intend to appeal. The WCB will review the documents prior to release and remove non-relevant information.</p> <p>Release at Appeal Same as above.</p> <p>Explanation of Relevance No definition or detailed explanation in policy or legislation.</p>
Yukon	<p>Release Prior to Appeal The WCB will release relevant claim file information to an employer. Relevant Information means information that pertains only to the compensable disability.</p> <p>An employer of a worker who has made a claim for compensation will be notified of important benchmark decisions like initial claim acceptance, benefit levels, and whether a worker is fit to return to work.</p> <p>The WCB will provide a progress report to an employer upon receipt of a written request. The report will contain:</p> <ul style="list-style-type: none"> • the current status of the worker regarding their fitness to return to work; • whether the worker will be sent outside of the territory for medical or rehabilitation; • any proposed or active rehabilitation plan. <p>Release at Appeal An employer who is a party to a review under section or an appeal may, upon written request, examine and copy any information in the board's possession that the board considers relevant.</p> <p>Explanation of Relevance Relevant Information means information that pertains only to the compensable disability, and is not a disclosure of personal information which constitutes an unjustified invasion of personal privacy or confidentiality of the worker.</p>

Appendix 2
Current Policy 10.3.5:
Access by Employers to Information Contained in Clients' Claim Files



POLICY

NUMBER: 10. 3. 5

Effective Date: February 1, 1996	Topic:	Access by Employers to Information Contained in Clients' Claim Files
Date Issued: December 1, 1995	Section:	General Policies
Date Approved by Board of Directors: October 4, 1995	Subsection:	Administration

Policy Statement

1. A worker's employer is entitled to request access to information in the worker's claim file after an appealable decision has been made.
2. Only the information in the worker's claim file which is relevant to the appealable decision may be released to the worker's employer. Board staff will have the responsibility of reviewing claim files to determine which information is relevant.
3. Information from a claim file will only be released if the employer submits a written request for access to such information and states a reason for requesting access. The reason should make reference to concerns with material either contained in or which the employer has reason to believe was omitted from, the appealable decision.
4. The worker will be advised whenever information is being released to the employer.
5. The employer will be charged a fee related to the cost of staff salaries for reviewing files.

Guidelines

1. A worker who has received a decision on a claim from the Board is entitled, upon written request, to receive a copy of all the information in his/her file.
2. A worker's employer has the right to participate after an appealable decision has been made. The employer can:
 - a) file an internal appeal of the decision; and/or
 - b) submit written arguments and/or oral evidence regarding an appeal launched either by itself (the employer) or the worker.

**Guidelines
(continued)**

3. The Board, in developing its policy on access by employers to claim file information, has sought to strike an equitable balance between (a) protecting workers' privacy; and (b) providing employers with access to the information the Board used in making its decision(s) regarding claims.

In so doing, the Board has tried to make its appeal processes fair to all concerned.

Application

This Policy applies to all decisions made on or after February 1, 1996.

References

Workers' Compensation Act (Chapter 10, Acts of 1994 - 95), Section 193.

Executive Corporate Secretary

Appendix 3

Draft Policy 10.3.5: *Access by Employers to Information Contained in Clients' Claim Files*

**(Changes Indicated
by ~~Strikeouts~~ (deletions) and Underlines (additions))**



DRAFT POLICY

NUMBER: 10. 3. 5R

Effective Date:	Topic:	<u>Access by Employers to Information Contained in Clients' Claim Files Access to and release of copies of injured worker claim file documents and records</u>
Date Issued:	Section:	General Policies
Date Approved by Board of Directors:	Subsection:	Administration

Preamble

3. The Workers' Compensation Board (WCB) Board, in developing ~~it's this~~ policy ~~on access by employers to claim file information~~, has sought to strike an equitable balance between (a) protecting injured workers' privacy; and (b) providing employers ~~with~~ access to the information in claim files the WCB Board used in making ~~its~~ decision(s) regarding claims.

~~In so doing, the Board has tried to make its appeal processes fair to all concerned.~~

Definitions

"claim file" means the file for recording information used in the adjudication and administration of an injured worker's claim for WCB benefits and services. It is comprised of records and documents collected as part of the administration of the claim. This includes, but is not limited to, correspondence, decisions, medical reports, other service provider reports/assessments, and financial information.

"confidentiality" means the obligation of an organization to protect the information entrusted to it and not misuse or wrongfully disclose it.

"appealable decision" means a determination, order or ruling of the WCB made pursuant to Part I of the Workers Compensation Act (the Act) capable of being appealed.

“employer” means the worker’s employer at the time of the compensable injury and/or the employer who is responsible for the cost of the worker’s claim, as determined by the WCB.

“relevant” means, in reference to claim file documents and records, having a direct bearing on an appeal to a hearing officer or being indispensable to understanding a decision.

Policy Statement

1. The WCB will provide an injured worker a copy of all the information in their claim file where the injured worker has:
 - a) received a decision on a claim; and
 - b) made a request in writing for a copy of their claim file.

2. An injured worker’s employer ~~is entitled to~~ may request, in writing, a copy of injured worker claim file documents or records relevant to:
 - a) an appealable decision; or
 - b) an appeal to a hearing officer in which they are a participant.

~~A worker's employer is entitled to request access to information in the worker's claim file after an appealable decision has been made.~~

- ~~2.3.~~ Only the ~~information~~ documents or records, or portions thereof, in the injured worker's claim file which ~~is~~ are relevant to the appealable decision or the appeal to a hearing officer may be released to the injured worker's employer. ~~Board~~ WCB staff will ~~have the responsibility of reviewing claim files to determine which documents or records are information is~~ relevant.

- ~~3. 4.~~ Information from a claim file will only be released if the employer submits a written request for access to such information and states a reason for requesting access. In making a request pursuant to Section 2 of this policy, The reason should make reference to concerns the employer must indicate a concern with material either contained referenced in the appealable decision or which the employer has reason to believe was omitted from, the appealable decision.

- ~~5.~~ Copies of claim file documents will not be released to an employer before the WCB has made its initial eligibility decision with respect to an injured worker claim. Specifically, this decision is a determination of whether a personal injury by accident arose out of and in the course of employment.

- ~~4. 6.~~ The injured worker will be notified ~~advised~~ whenever
 - a) their employer has made a request pursuant to Section 2.; and
 - b) the WCB has information is being released copies of claim file documents or records pursuant to this policy to the employer.

7. A copy of the claim file documents or records released to an employer pursuant to this policy will be made available to the injured worker.

~~5. 8. An initial copy of claim file documents and records requested pursuant to Section 1. or 2. of this policy will be provided free of charge. Employers or injured workers who make requests for copies of documents already provided will be charged an administration fee related to the cost of staff salaries for reviewing files.~~

9. Copies of claim file documents or records disclosed to an employer are confidential and may be used by an employer only for the administration of a worker's compensation claim.

~~The employer will be charged a fee related to the cost of staff salaries for reviewing files.~~

Guidelines

- ~~1. A worker who has received a decision on a claim from the Board is entitled, upon written request, to receive a copy of all the information in his/her file.~~
- ~~2. A worker's employer has the right to participate after an appealable decision has been made. The employer can:
 - ~~a) file an internal appeal of the decision; and/or~~
 - ~~b) submit written arguments and/or oral evidence regarding an appeal launched either by itself (the employer) or the worker.~~~~

Guidelines

~~(continued)~~ _____

Application

~~This Policy applies to all decisions made on or after February 1, 1996. This policy applies to requests for claim file documents or records made on or after [INSERT DATE].~~

References

Workers' Compensation Act (Chapter 10, Acts of 1994 - 95), Sections: 183, 185, 188, 193, 197.

Executive Corporate Secretary

