



**Program Policy Background Paper:  
General Entitlement – Arising out of and in the Course of Employment**

**June 08, 2009**

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## **1. INTRODUCTION**

In setting the program policy agenda, the Workers' Compensation Board of Nova Scotia (the "WCB") undertakes a program policy issue identification process. This process involves the identification of program policy issues where the development of new and/or the revision of existing program policy statements will improve consistency in decision making and/or assist the WCB in achieving its corporate/system goals. Program policy issues are identified through a number of sources including stakeholder input, our Workplace Safety and Insurance System (WSIS) partners: the Workers' Advisers Program (WAP), the Workers' Compensation Appeals Tribunal (WCAT) and the Occupational Health and Safety Division (OHS), WCB operational departments, and the content of the WCB corporate business plan.

Stakeholder input is a critical step in the program policy issue identification process. Throughout late April - early July 2008, the WCB asked stakeholders (by mail and website), our partners in the WSIS and WCB staff to identify program policy topics that support the WCB's vision and strategic focus. After careful review and analysis of stakeholder input, the Board of Directors decided that 2009 will be a "foundation and follow-up" year for program policy review. By focusing on foundational issues, the WCB can begin to address what are believed to be the root causes of some stakeholder concerns. In particular, this approach will allow for the development of clear adjudicative principles at key points in the WCB decision-making process. The WCB believes clarification of the principles used to make key claim decisions will begin to resolve some of the issues raised by stakeholders during the program policy agenda setting process. As a result, the 2009 Program Policy Agenda includes the following three foundational, principle based, program policy topics:

- General Entitlement – Arising out of and in the Course of Employment;
- General Entitlement – Occupational Disease; and
- General Principles – Medical Aid.

The development of key principles will help create a common understanding among workers, employers, and the WSIS, of how entitlement decisions are made. The development of principles in these areas will: improve the transparency and accountability of WCB decision making processes; support the WSIS in getting to the right decision the first time; and simplify future program policy development by reducing the need, in some cases, for situation specific policies and/or establish the basis on which more complex entitlement policies can be built.

## **2. PURPOSE OF THIS PAPER**

The purpose of this discussion paper is to provide stakeholders with background information and an overview of the proposed new program policy "General Entitlement – Arising out of and in the Course of Employment" program policy. This program policy would clarify and communicate the WCB's approach to determining the work-relatedness of an accident or injury.

This paper kicks off Stage 2 consultation on this program policy topic. Stage 1 consultation on this program policy topic took place at the November 26<sup>th</sup> 2008 Program Policy Summit. The input received from stakeholders during Stage 1 consultation was considered by the WCB and informed the development of the proposed "General Entitlement – Arising out of and in the Course of Employment" program policy outlined in this paper. In support of the 2008 Program Policy Summit, a paper entitled "Issue Identification: General Entitlement – Arising out of and in the Course of Employment" was prepared. To view the paper, and other background information related to the 2008 Program Policy Summit, go to [www.wcb.ns.ca](http://www.wcb.ns.ca).

While occupational diseases are considered “accidents” under the *Workers’ Compensation Act of Nova Scotia* (the “Act”) and the principles included in the proposed “General Entitlement – Arising out of and in the Course of Employment” program policy can be applied to the determination of the work-relatedness of an occupational disease, the focus of this program policy is non-disease related accidents and injuries. The process for determining the work-relatedness of a disease is often more complex than that used for non-diseases. Therefore, as part of the 2009 Program Policy Agenda discussed above, the WCB will be consulting on a “General Entitlement – Occupational Disease” program policy later this year.

Prior to finalizing this new program policy, the WCB would like to hear stakeholders’ views on the proposed program policy. The Board of Directors will consider the input received from stakeholders and will determine whether revisions are required to the draft program policy before making a final decision.

The consultation period for this program policy issue concludes on **July 13<sup>th</sup>, 2009**. Please review the background paper and draft program policy, and provide your written feedback by **July 13<sup>th</sup>, 2009** to:

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This paper is also available at [www.wcb.ns.ca](http://www.wcb.ns.ca) under News and Policy.

**DEADLINE FOR COMMENTS: July 13<sup>th</sup>, 2009**

### **3. PROGRAM POLICY INTENT AND RATIONALE**

Based on the analysis of stakeholder input provided as part of the development of the 2009 Program Policy Agenda, it has been determined there are gaps in our existing program policy framework related to the theme of entitlement. Addressing these program policy gaps will better position the WCB to successfully respond, in the future, to more specific entitlement related program policy topics identified by stakeholders. One of the gaps identified was the lack of a “General Entitlement – Arising out of and in the Course of Employment” (General Entitlement) program policy. The development of a General Entitlement program policy is important because:

- It supports clarity and transparency of decision making. This is a frequent and pivotal decision in the WCB environment and currently there is no program policy that guides or communicates this decision-making process. In recent years, some stakeholders have specifically identified the need for the WCB to have clearer adjudicative guidelines that support the determination of the work-relatedness of an accident or injury.
- Nova Scotia is the only jurisdiction in Canada that does not have a general entitlement – arising out of and in the course of employment program policy. Program policy is the generally accepted approach in Canada to clarifying and communicating how general entitlement decisions are made.
- It will lay the foundation necessary to address some of the more specific entitlement issues identified by stakeholders during the 2008 Program Policy Agenda Setting Process (i.e. recurrences, hearing loss) and will improve accountability in decision-making.

- It supports the development of program policies on more complex issues in the future. The WCB can expect an increase in complex claims adjudication in the future due to increased awareness of workplace hazards (i.e. air quality), changes in the workplace environment (i.e. telecommuting vs. on-site work), the emergence of new diseases (i.e. pandemic flu) and new technologies (i.e. the use of nanotechnology in manufacturing).

This General Entitlement program policy will establish the principles that guide decision-making regarding the work-relatedness of an injury. The purpose of this program policy is not to change, expand or limit the existing criteria for determining work-relatedness, but rather to improve transparency and accountability regarding the WCB's decision-making process. It will also lay the foundation necessary for potentially developing more complex adjudicative policies in the future identified by stakeholders.

## **4. BACKGROUND**

### **a) General Entitlement – a pivotal decision**

The determination of whether an injury is work-related is one of the first and most important decisions the WCB makes in the claims adjudication process. This decision determines whether a worker is eligible to receive the benefits or services provided for under the *Act*. In recent years, the number of workers injured on the job in Nova Scotia has decreased. However, too many men and women are still injured on the job. In 2008, over 27,900 injured workers registered approximately 31,750 new claims for compensation. This means the WCB made thousands of general entitlement decisions about the work-relatedness of a worker's injury or disease.

### **b) Legislative framework**

#### *Purpose of the Workers' Compensation Law*

Generally, workers' compensation law (including the Nova Scotia *Act*) provides a "no fault" insurance system where workplace injuries are compensated without consideration of the fault of any workplace party, or the cause of the accident, outside of the need to establish work-relatedness. In particular, the WCB does not investigate or consider the cause of a workplace accident when determining a worker's entitlement to compensation. While the WCB plays an important role in promoting the prevention of workplace injuries, the Internal Responsibility System (the "IRS"), as set out in the *Occupational Health and Safety Act*, places shared responsibility for workplace safety in the hands of the workplace parties (ie. managers, workers, owners, suppliers) who actually work in the workplace. The Occupational Health and Safety Division of the Nova Scotia Department of Labour and Workforce Development play a supportive role by establishing and clarifying the roles and responsibilities for workplace parties, and enforcing standards when the responsibilities aren't met.

There are other publicly administered programs in the country that compensate individuals for the effects of injuries or disabilities. For example, Canada Pension Plan (CPP) Disability provides financial assistance to CPP contributors who are unable to work because of a severe and prolonged disability. These programs are distinct from the workers compensation system and are governed by different laws and eligibility criteria. People who qualify for disability benefits from these types of programs may not qualify for workers compensation benefits.

## *Basic Requirements*

All program policy developed by the WCB must be consistent with the requirements in the *Act*. The following is an overview of the key entitlement requirements in the *Act* that the draft General Entitlement program policy is based upon. Please see Appendix 1 for the key sections of the *Act*.

The *Act* sets out the general conditions that must be satisfied for a worker to be entitled to WCB benefits and services. Generally, to be entitled to WCB benefits and services, a worker must:

- be a worker pursuant to the *Act*;
- meet the claim filing requirements; and
- suffer an accident that arose out of and in the course of employment.

A number of requirements are considered when determining if a worker is a “worker” pursuant to the “*Act*”. This includes, for example, determining whether the worker’s employer has compensation coverage. The WCB considers, among other factors, whether an employer is in an industry where coverage is mandatory, the number of workers employed<sup>1</sup>, and the relationship between employers.<sup>2</sup>

The *Act* does not limit initial entitlement to benefits based on a worker’s age. Any worker, regardless of age, who suffers an injury and satisfies the basic requirements, may be eligible for compensation benefits. Where entitlement has been determined, earnings replacement benefits are paid until a worker reaches the age of 65. However, if a worker is 63 years of age or older when they first suffer a workplace injury, they may receive earnings replacements benefits for 2 years from the date of the accident. Other benefits, such as medical aid or permanent impairment benefits may be paid for the life of the worker.

In the WCB context, an accident or injury includes those that result from a single incident, a number of incidents, or a gradual process, as well as disablements, including occupational diseases. The definition does not include stress other than an acute reaction to a traumatic event.

Employers also have responsibilities and duties under the *Act* related to general entitlement. For example, employers are required by Section 86 of the *Act* and Policy 10. 1. 1R “Accident Reporting - Duties of Employers”, to notify the WCB within five business days of becoming aware of an accident that may entitle a worker to compensation. Additionally, an employer (according to Sections 87 and 88 of the *Act*) is unable to: 1) require, or permit, a worker to protect the employer against any liability imposed by the *Act*; 2) take any payment or consideration (ie. use of benefits) from a worker and use it to cover assessment or compensation claim costs; or 3) discipline or discriminate against a worker for reporting an accident or making a compensation claim.

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<sup>1</sup> Appendix A of the *Workers' Compensation General Regulations* (the “*Regulations*”) lists the industries where coverage is mandatory. Employers in those industries with three or more workers are required to have compensation coverage.

<sup>2</sup> Policy 9.1.3 “Coverage for contractors and subcontractors which employ less than three workers” states that if a principal contractor with greater than three workers hires a contractor with less than three workers, and both the principal and the contractor operate in an industry designated under the *Regulations* as subject to mandatory coverage, the workers and the contractor will be considered workers of the principal for coverage purposes. However, if the contractor operates in an industry excluded from mandatory coverage under the *Regulations*, the contractor and the workers of the contractors will **not** be considered workers of the principal contractor.

## *Decision Making*

When deciding whether an accident arose out of an in the course of employment, the WCB must base decisions upon the real merits and justice of the case, the requirements of the *Act*, and program policies of the WCB. The *Act* also includes two key provisions, a “presumption” and a “benefit of the doubt” requirement, that can assist a worker in establishing a claim for compensation. The WCB must apply these requirements in the situations described below.

In some instances the evidence necessary to establish that an accident both “arose out of” and “in the course of” employment is not available. When this occurs, the “presumption” provision in Section 10(4) of the *Act* can help a worker establish his/her accident was work-related. Under Section 10(4), if the accident arose out of employment, unless the contrary is shown, it will be presumed by the WCB that it occurred in the course of employment. If, on the other hand, the accident occurred in the course of employment, unless the contrary is shown, it will be presumed that it arose out of the employment.

When making a decision about the work-relatedness of an accident, the WCB collects, considers, and weighs evidence. Sometimes, the evidence supporting the work-relatedness of an accident is equal to the evidence not in support of the claim. In these instances, Section 187 of the *Act* requires the WCB to give the benefit of the doubt to the worker and decide the claim in the worker’s favour.

## *Deviations*

There are situations that occur, or actions that may be taken by a worker (deviations), that may result in a worker not being eligible to receive compensation benefits or services. This is because the action/s may have the effect of removing them from employment or being serious or willful in nature. If an injury results from a worker’s own serious and willful misconduct, compensation will not be paid unless the injury causes death to the worker or results in serious and permanent impairment.

For example, sometimes accidents occur that are the result of actions that are solely personal in nature, and in no way connected to employment. In these instances, the worker is considered to have removed him or herself from employment. Therefore, the accident and resulting injury would not be covered by the *Act*.

## **c) General compensation principles**

Over the years, a series of questions and principles have developed and evolved in Canada to guide the adjudication of entitlement to compensation. In Canada, Terence G. Ison is a recognized expert in workers compensation law, and his text “*Workers’ Compensation in Canada*” is often cited as a leading workers’ compensation reference in Canada. In fact, the general entitlement policies of many Canadian jurisdictions quote directly from this source.

While each jurisdiction has its own legislative framework that must be followed when determining the work-relatedness of an accident, many of the same principles that guide the determination of whether an accident arose out of and in the course of employment are similar across the country. These principles, most of which are discussed in Ison’s text, include:

- Compensation is generally payable where:
  - the worker making the claim has workers’ compensation coverage;

- the worker sustains an injury or disablement; and
  - the injury or disablement is from the employment.
- The “fault” of an employer or “innocence” of the worker is not relevant to the determination of whether an accident arose out of and in the course of employment. These issues are considered in drafting the legislation and are not, generally, considered again on claim-by-claim basis.
- A range of types of injuries are potentially compensable, including trauma induced injuries (ie. a broken arm), disablements (ie. injuries from repetitive motions) and diseases (ie. some cancers).
- No single criterion or factor is conclusive in classifying an injury as arising out of and in the course of employment, but various indicators are used to guide the collection of evidence, including:
  - Whether the injury occurred:
    - on the premises of the employer;
    - in the process of doing something for the benefit of the employer;
    - in the course of an action in response to instructions from the employer;
    - in the course of using materials or equipment supplied by the employer;
    - in the course of receiving payment or other consideration from the employer; and
    - during a time period for which the employee was being paid.
  - Whether the risk to which the employee was exposed was the same as the risk to which he is exposed as a member of the general public; and
  - Whether the injury was caused by some activity of the employer or a fellow employee.
- Injuries that are directly, indirectly, or, incidentally related to work are potentially compensable.
- Where a worker suffers from a pre-existing disability and the employment situation “worsens” the disability or injury, the increased injuries maybe compensable.
- A claim for compensation is not automatically disallowed because there are non-work related factors at play. If an employment event had causal significance (ie. contributed to the injury) the injury is likely compensable. The question usually asked is “would the worker be suffering from the disability but for the employment event, exposure, or circumstance?”
- There are actions or situations which may have the effect of either removing a worker from employment and/or limiting their eligibility for compensation benefits. These include:
  - Deviating from employment: In this situation, the worker completely removes oneself from the employment situation. For example, the worker leaves the employer’s premises at lunch time and is injured while undertaking a solely personal errand (ie. going to the dentist) with no employment connection. In this case, the injury would not normally be compensable under workers’ compensation law.
  - Serious and willful misconduct: Most Canadian jurisdictions limit benefits where the injury is due solely or primarily to the serious and willful misconduct of the worker.

#### **d) WCB practice**

While the *Act* provides a broad framework for determining whether an accident arose out of and in the course of employment, it does not provide any direction on how to apply these legal concepts in the claim adjudication process. Currently, the WCB does not have a program policy that guides the general determination of whether an accident arose out of and in the course of



employment. As a result, the WCB reflects on the various principles, or questions as noted above in section c) General Compensation Principles, and a series of decisions by the Nova Scotia Court of Appeal, the Supreme Court of Nova Scotia, and the Supreme Court of Canada in making general entitlement decisions.

The WCB does have a number of existing entitlement policies intended to guide the adjudication of claims for specific types of injuries. These policies, for the most part, focus on occupational diseases. A listing of these policies can be found in Appendix 2.

#### **e) Inter-jurisdictional information**

Most jurisdictions in Canada have a legislative framework similar to Nova Scotia's and compensation is payable if a worker is injured, or dies, as a result of an accident that arose out of and in the course of employment.<sup>3</sup>

All Canadian jurisdictions, except Nova Scotia, have used program policy to clarify and communicate how they determine if an injury is work-related. Generally, the policies address the principles and/or requirements related to:

- Eligibility for compensation (ie., is the accident employer covered by the legislation? is the worker covered?);
- Claim filing (ie. has a claim been filed in the prescribed time frames?);
- Determining if the accident 'arose out of and in the course of employment' (ie, was it work-related?);
- When a worker may not be eligible for compensation (ie. they have removed themselves from employment, or the accident was the result of serious and willful misconduct); and
- General decision making (ie. reference to legislated presumptions, application of the benefit of the doubt provision, and the requirement to consider each claim on a case by case basis).

The approach and principles applied across the country in determining if an accident or injury arose out of and in the course of employment are generally consistent. In reference to "arising out of employment", all jurisdictions (except Ontario<sup>4</sup>) specify that for an accident to have arisen from the employment it must have been caused by the employment in some way. Some jurisdictions (Alberta, Manitoba, Newfoundland, and Saskatchewan) explicitly state that it must be caused or linked to a "hazard" or "risk" in the workplace.

All Canadian jurisdictions' policies include an explicit reference to consider the time and place of the injury as part of determining if it occurred "in the course of" employment. In six jurisdictions' (Manitoba, New Brunswick, Newfoundland, Ontario, Saskatchewan, and the Yukon) policies there is an explicit requirement to consider the activity the worker was doing at the time of the injury or the circumstances surrounding the injury as part of determining if it occurred "in the course of employment".

In Nova Scotia, the 2005 Nova Scotia Court of Appeal decision *Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers' Compensation Appeals Tribunal)*

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<sup>3</sup> The requirement in the Quebec *Act* (in particular in the definition of "employment injury" and S. 20) is slightly different in that compensation is payable if a worker suffers an injury "arising out of or in the course of employment".

<sup>4</sup> Ontario does not specifically explain "arising out of" employment in their policies. WSIB representatives indicate they intend to start policy development on a "arising out of" employment policy in the near future.

(*Puddicombe*) (2005), 231 N.S.R. (2d) 390 (C.A.) clarified the meaning of the phrase “arising out of and in the course of employment”. In that decision, the Court concluded:

“...WCAT correctly stated the governing legal principles in relation to the “arising out of and in the course of employment” requirement: it considered the time, place and circumstances under which the accident took place and the link between the injury and the risk created by or related to the employment.”<sup>5</sup>

Another Nova Scotia Court of Appeal decision, *Michelin North America (Canada) Inc. v. Workers’ Compensation Board (N.S.)* (2003), 211 N.S.R. (2d) 273 (C.A.) provided further clarification by explaining that “An injury, however, is not necessarily compensable simply because it happened; or symptoms occurred, at the workplace.” This means that the injury or condition must be caused or aggravated by the requirements of the employment in some way. A typical example is that of a heart attack occurring at the workplace. Heart disease is a common ailment suffered by many Canadians and it is not unusual for a person to have a heart attack at work. However, for a heart attack occurring at the workplace under these circumstances to be compensable it must be established that an employment related action or activity caused or aggravated the worker’s heart condition such that it resulted in a heart attack.

These Nova Scotia court decisions are consistent with the approach taken in other Canadian jurisdictions.

#### **f) Stakeholder feedback**

On November 26<sup>th</sup>, 2008 the WCB held a Program Policy Summit to gather feedback from stakeholders on the program policy topics approved by the WCB Board of Directors for 2009. Prior to the Program Policy Summit, WCB key stakeholders were mailed issue identification papers on each of the three topics (including a paper on the program policy topic “General Entitlement – Arising out of & in the Course of Employment”) and the papers were posted to the WCB website. At a high level, the WCB received the following feedback from stakeholders:

- Some stakeholders expressed the view that a program policy on general entitlement is not necessary because the requirements are in Section 10(1) and the definition of “accident” in the *Act*. They also expressed concern that such a program policy could limit access to compensation benefits and services and that the “presumption” in Section 10(4) of the *Act* is not appropriately applied.
- Some stakeholders expressed the view that any general entitlement program policy must be consistent with the *Act* and regulations. In keeping with this view, both urged the WCB to take a principled approach rather than prescribe or direct specific requirements that must be met before a claim may be accepted. If a prescriptive approach were taken, they explained, the WCB could limit workers’ access to compensation due to circumstances or injuries the WCB has not yet faced.

The WCB has been mindful of this feedback in the development of the draft program policy and believes the program policy clarifies how the WCB makes general entitlement decision, while remaining consistent with the *Act* and not imposing new limits on access to compensation benefits or services.

## **5. PROPOSED PROGRAM POLICY APPROACH**

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<sup>5</sup> Paragraph 46, *Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers’ Compensation Appeals Tribunal)* (*Puddicombe*) (2005), 231 N.S.R. (2d) 390 (C.A.).

The WCB proposes a new program policy “General Entitlement – Arising out of and in the Course of Employment” be implemented that will identify and communicate the principles and questions the WCB considers in determining whether an accident or injury was work-related. Please see Appendix 3 for a copy of the proposed program policy. The intent of the program policy is not to change, expand, or limit the existing criteria used to determine the work-relatedness of an accident or injury, but rather to improve transparency and accountability regarding the WCB’s decision-making process. The principles and questions outlined in this program policy are not new and are currently considered by WCB decision makers when making general entitlement decisions. The following is a high-level overview of the proposed new program policy.

### *Preamble and definitions*

The Preamble section of the program policy establishes the purpose of the policy and provides context for the policy statements that follow. The WCB has chosen to include in the definition of “accident” in the draft policy because it is an important part of understanding the basic eligibility requirements that must be met to receive workers compensation benefits and services.

### *Real merits and justice of the case*

Section 1. “Real merits and justice of the case” was included in the program policy to reinforce the requirement that each claim for compensation must be considered on an individual basis, based on the facts of the case. While there are general principles and questions that may be considered in determining if an accident arose out of and in the course of employment, the WCB is not limited to those included in the program policy, and must ultimately consider the unique circumstances of each claim on an individual basis.

### *Basic eligibility requirements*

Section 2. “Basic eligibility requirements” communicates the basic requirements that must be met before a worker is eligible to receive compensation under the *Act*. These requirements are in the *Act* and are not new. This section simply consolidates the requirements so workers and employers are able to easily access this basic information, and most jurisdictions in Canada make reference to them in either entitlement or coverage related policies. This section also clarifies the basic “administrative” requirements, in addition to the requirement that an accident arise out of and in the course of employment, a worker must meet before they are eligible for compensation.

### *Determining if an accident arose out of and in the course of employment*

Section 3. “Determining if an accident arose out of and in the course of employment” is intended to clarify the concept of “arising out of and in the course of employment”. Given that the *Act* does not provide any guidance on what principles or questions may be considered in making this crucial decision, the WCB believes it is important to communicate through program policy how the WCB makes this decision. This, in turn, will contribute to improved stakeholder understanding of how the WCB determines whether an accident arose out of and in the course of employment.

The WCB has chosen to take a high level approach in developing this program policy, and not address specific accident topics (ie. injuries while traveling, or in parking lots). This is because,

while there are general principles and questions that may be considered in making a general entitlement decisions, it is ultimately a “fact based” decision. The WCB believes including various accident scenarios (and how entitlement decisions are made in these instances) in this type of program policy could unintentionally limit or expand coverage, or make the policy inconsistent with the *Act*.

This high level, principle based approach is consistent with feedback at the November 26<sup>th</sup> 2008 Program Policy Summit where stakeholders highlighted the need to ensure the program policy did not limit coverage, or exclude new types of injuries or circumstance we have yet to consider in our compensation system.

The descriptions of the meaning of “arising out of” and “in the course of” employment, as well as the questions and principles included in this section of the draft program policy are a combination of those commonly and consistently found in the policies of other jurisdictions, the writings of learned text writers<sup>6</sup>, and decisions of the Workers’ Compensation Appeal Tribunal (WCAT), the Nova Scotia Court of Appeal, the Supreme Court of Nova Scotia, and the Supreme Court of Canada. These principles and questions are not new to the WCB and are typically considered now by the WCB in making general entitlement decisions.

*Aggravation, activation, acceleration of pre-existing disease or disability and injuries due to other causes*

Section 4. “Aggravation, activation, acceleration of pre-existing disease or disability and injuries due to other causes” was included in the program policy to clarify that the *Act* confirms these types of injuries may be compensable. In particular, where an injury has been found to have arisen out of and in the course of employment, resulted in loss of earnings or permanent impairment, and:

- it was due in part to the employment-related injury and partly to a non-employment cause; or
- it is an aggravation, activation, or acceleration of pre-existing disease or disability;

the WCB will pay compensation for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury.

Communicating the compensability of these types of injuries is typical in the policies of other Canadian jurisdictions. The WCB believes, through communications with stakeholders during day to day claim adjudication, there is some confusion or misunderstanding about the potential compensability of these injuries and this section is intended to provide clarity.

*Serious and willful misconduct*

Section 5. “Serious and willful misconduct” is taken directly from the *Act* and was included to communicate the fact that a claim for compensation benefits for an accident that was the result of “serious and willful” misconduct by the worker may not be accepted unless it resulted in death or serious and permanent impairment. While this requirement is used infrequently, the WCB may be required to consider it in the decision making process where the circumstances of the accident potentially included serious and willful misconduct on the part of the worker. Most

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<sup>6</sup> Terence G. Ison is typically cited as the leading workers’ compensation scholar in Canada. The policies of many Canadian jurisdictions quote directly from his text “Workers’ Compensation in Canada” on the subject of determining if an injury/accident arose out of and in the course of employment.

jurisdictions in Canada include a reference to serious and willful misconduct in their entitlement policies.

#### *Presumption and benefit of the doubt*

In reference to general entitlement, the *Act* contains a “presumption” clause and a “benefit of the doubt” provision that play an important role in the WCB’s decision making process. They are applied when the WCB is considering the evidence both in support of, and against, a claim for compensation, and may ultimately be the basis for the acceptance or disallowance of a claim. Therefore, the WCB believes it is appropriate to include a reference to them in the proposed program policy.

Section 6. “Presumption” was included in the program policy to communicate how the WCB makes a determination of the work-relatedness of an accident where there is evidence available to support only one part of the “arising out of and in the course of employment” requirement. Most jurisdictions include an explanation or reference to the legislated presumption in their entitlement policies.

Section 7. “Benefit of the doubt” was included in the program policy because it plays an important role in any decision that WCB makes related to a claim for compensation. In reference to the WCB’s determination of whether an accident arose out of and in the course of employment, this provision of the *Act* is applied by the WCB when the evidence for and against the work-relatedness of an accident is equally balanced. This section of the program policy clarifies that it must only be shown that it is as likely as not that an injury arose out of and in the course of employment, rather than meet the civil standard of proof which is that it is more likely than not that the accident arose out of and in the course of employment. Most jurisdictions that have a benefit of the doubt provision in their legislation include a section, or reference to it, in their general entitlement policies.

#### *Application and references*

These are standard sections in WCB program policies and determine when and to what the program policy will apply, as well as the sections of the *Act* that give the WCB the authority for the content of the policy.

Section 8. “Application” directs that the program policy will apply to all new claims for compensation after a date to be determined by the WCB Board of Directors, who have the final authority to approve program policy.

Section 9. “Reference” states the sections of the *Act* from which the WCB gains its authority to make program policy and as well as the sections specific to the content of the policy.

## **6. PROVIDING YOUR COMMENTS**

We are interested to hear your comments on this proposed program policy and the information presented in this paper. In particular, we encourage you to consider whether there **are any recommended changes or additional topics you would like to see addressed in the proposed “General Entitlement - Arising out of and in the Course of Employment”**

**program policy.** Comments received will assist the WCB in ensuring all the issues are considered in the development of this program policy.

You can provide comments in 2 ways:

1. By e-mail: Send comments to Nancy Stacey at [nancy.stacey@wcb.gov.ns.ca](mailto:nancy.stacey@wcb.gov.ns.ca); or
2. In writing to:

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Policy Analyst  
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PO Box 1150  
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The deadline for comments is **July 13<sup>th</sup>, 2009.**

## **Appendix 1 - Key Sections of the Workers' Compensation Act of Nova Scotia**

### **Interpretation**

**2** In this Act,

(a) "accident" includes

- (i) a wilful and intentional act, not being the act of the worker claiming compensation,
- (ii) a chance event occasioned by a physical or natural cause, or
- (iii) disablement, including occupational disease, arising out of and in the course of employment,

but does not include stress other than an acute reaction to a traumatic event;

### **Payment of compensation**

10 (1) Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part.

(2) The compensation payable pursuant to subsection (1) shall be paid out of the Accident Fund.

(3) Where a personal injury is attributable wholly or primarily to the serious and wilful misconduct of the worker, the Board shall not pay compensation to the worker unless the personal injury

- (a) results in death or serious and permanent impairment; or
- (b) is likely, in the opinion of the Board, to result in serious and permanent impairment.

(4) Where the accident arose out of employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment, and where the accident occurred in the course of employment, unless the contrary is shown, it shall be presumed that it arose out of the employment.

(5) Where a personal injury by accident referred to in subsection (1) results in loss of earnings or permanent impairment

- (a) due in part to the injury and in part to causes other than the injury; or
- (b) due to an aggravation, activation or acceleration of a disease or disability existing prior to the injury,

compensation is payable for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury.

(6) The Board may, by regulation, exclude any type or class of personal injury or occupational disease from the operation of this Part.

(7) The Board may, by regulation, include any type or class of personal injury or occupational disease on terms or conditions, including rates, types and durations of compensation other than those specified in this Part, that the Board may prescribe. 1994-95, c. 10, s. 10.

### **Filing of claim**

82 Where a worker is eligible to apply for compensation pursuant to this Part, the worker shall forthwith file with the Board

- (a) a claim for compensation;
- (b) the attending physician's report; and
- (c) any further evidence of the claim as may be required from time to time by the Board.

1994-95, c. 10, s. 82.

### **Notice of accident or injury**

83 (1) In the case of an injury that is not an occupational disease, the Board shall not pay compensation except where

- (a) the worker has given the employer notice of the accident as soon as practicable after the happening of the accident and before the worker has voluntarily left the employment where the worker was injured; and
- (b) the worker's claim for compensation is made within twelve months of the happening of the accident.

(2) In the case of an occupational disease, the Board shall not pay compensation except where

- (a) the worker has given the employer notice of the injury as soon as practicable after the worker learns that the worker suffers from an occupational disease; and
- (b) the worker's claim for compensation is made within twelve months after the worker learns that the worker suffers from the occupational disease for which the worker is claiming compensation.

(3) The notice required pursuant to clause (1)(a) shall

- (a) give the name and address of the worker; and
- (b) state the cause of the accident and the place the accident happened.

(4) The notice required pursuant to clause (2)(a) shall contain the particulars set out in subsection (3) and is to be given to the employer who last employed the worker in the employment causing the disease.

(5) Failure to give notice pursuant to this Section bars the right to compensation unless, upon the application of the worker, the Board determines that

- (a) any right of the worker's employer pursuant to this Part; and
- (b) the subrogated interest of the Board,

has not been prejudiced by the failure, in which case the Board may extend the time for filing a claim.

(6) Subsection (5) does not apply where five years or more have elapsed from

- (a) the happening of the accident; or
- (b) the date when the worker learns that the worker suffers from an occupational disease,

as the case may be. 1994-95, c. 10, s. 83.

### **Basis for decisions of Board**

186 The decisions, orders and rulings of the Board shall always be based upon the real merits and justice of the case and in accordance with this Act, the regulations and the policies of the Board. 1994-95, c. 10, s. 186.

### **Applicant entitled to benefit of doubt**

187 Notwithstanding anything contained in this Act, on any application for compensation an applicant is entitled to the benefit of the doubt which means that, where there is doubt on an issue respecting the application and the disputed possibilities are evenly balanced, the issue shall be resolved in the workers favour. 1994-95, c. 10, s. 187.



## **Appendix 2 - Current Entitlement Program Policies**

The following is a listing of the existing entitlement program policies of the WCB:

- 1. 1R - Back Injuries
- 1. 1. 2 - Coverage Police/Firefighters Employed in Off-Duty Hours
- 1. 2. 1R - Guidelines for Automatic Assumption - Injuries prior to January 1, 2000
- 1. 2. 1A - Guidelines for Automatic Assumption - Injuries on or after January 1, 2000
- 1. 2. 4R - Carpal Tunnel Syndrome
- 1. 2. 5R1 - Occupational Hearing Loss - Injuries prior to January 1, 2000
- 1. 2. 5AR - Occupational Hearing Loss - Injuries on or after January 1, 2000.
- 1. 2. 6R - Workplace Noise Levels
- 1. 2. 7R - Lead Poisoning
- 1. 2. 8 - Lung Cancer - Foundry Workers
- 1. 2. 9 - Lung Cancer - Coke Oven Workers
- 1. 2. 10 - Medical Conditions from Coke Oven Workers Other Than Lung Cancer
- 1. 2. 11 - Lung Cancer in Asbestos Workers
- 1. 2. 12 - Mesothelioma in Asbestos Workers
- 1. 2. 13 - Laryngeal Cancer - Asbestos and Nickel Workers
- 1. 3. 4 - Volunteer Fire Fighters
- 1. 3. 5 - Criteria for psychiatric conditions: occupational stress
- 1.3.6 - Compensability of Stress as an Injury Arising out of and In the Course of Employment – *Government Employees Compensation Act (GECA)*

## Appendix 3 - Draft “General Entitlement – Arising out of and in the Course of Employment” program policy



# DRAFT PROGRAM POLICY

NUMBER: 1.3.7

Effective Date:	Topic:	<b>General Entitlement – Arising out of and in the Course of Employment</b>
Date Issued:	Section:	Entitlement
Date Approved by Board of Directors:	Subsection:	General

### Preamble

The purpose of this program policy is to: 1) identify the basic requirements that must be met to be eligible to receive compensation benefits and services; and 2) describe the typical questions, general principles and sections of the *Workers' Compensation Act* (the “Act”) the *Workers' Compensation Board* (the “WCB”) considers in determining if a personal injury by accident “arose out of and in the course of employment”.

### Definitions

"accident" includes

- (i) a wilful and intentional act, not being the act of the worker claiming compensation,
- (ii) a chance event occasioned by a physical or natural cause, or
- (iii) disablement, including occupational disease, arising out of and in the course of employment, but does not include stress other than an acute reaction to a traumatic event.

### Policy Statement

#### 1.

#### **Real merits and justice of the case**

Section 186 of the *Act* requires the WCB to consider each claim for compensation on the individual merits and justice of the case. The general principles and questions considered by the WCB, as outlined in this program policy, do not exclusively determine if an accident arose out of and in the course of employment. Rather, they provide the WCB with evidence to consider when making a decision.

#### 2.

#### **Basic eligibility requirements**

To be eligible to receive compensation benefits and services a worker must:

- a) be a worker as defined by all the relevant provisions under the *Act*;
- b) meet the requirements for filing a claim for compensation provided for in the *Act*; and
- c) have been caused a personal injury by accident arising out of and in the course of employment as required by Section 10 of the *Act*.

#### 3.

#### **Determining if an accident arose out of and in the course of employment**

The WCB generally considers the following principles and questions in determining if a personal

injury by accident arose out of and in the course of employment.

**a) Description of “arising out of” employment**

The words “arising out of employment” refer to the origin of the cause of the injury. Generally, for an accident to arise out of the employment, the accident and resulting injury must be caused by some risk related to the employment. The risk may be directly related to the employment, or incidental; and the injury may be the result of a single incident, or develop over a period of time.

An injury, however, is not necessarily compensable simply because it happened, or symptoms occurred, at the workplace. Rather, there must be some causal connection between the worker’s employment and the injury they received.

**b) Description of “in the course of” employment**

An accident, and resulting injury, is generally considered to have arisen in the course of employment when it occurs:

- i. at a time that is consistent with when the worker typically performs the employment, or at a time when the worker has been asked to perform activities for the employment;
- ii. at a place that is consistent with the employment or the employer’s premises; and
- iii. while performing an activity directly related, or incidental, to the employment.

The time and place of an accident, however, are not strictly limited to the normal hours of employment or the employer’s premises; the forgoing are intended to be general principles the WCB considers when determining if an accident arose in the course of employment.

**c) Questions considered - “arising out of and in the course of employment”**

In gathering evidence to determine if an accident, and resulting injury, arose out of and in the course of employment the WCB considers a series of questions that may include, but is not limited to, the following:

- i. Was the activity part of the job, or a job requirement?
- ii. Did the accident occur when the worker was in the process of doing something for the benefit of the employer?
- iii. Did the injury occur while the worker was doing something at the instruction of the employer?
- iv. Did the injury occur while the worker was using equipment or materials supplied by the employer?
- v. Was the injury caused by some activity of the employer or another worker?
- vi. Was the worker being paid or receiving some consideration for the activity from the employer at the time of the accident?
- vii. Was the worker on the employer’s premises, or premises under the care and control of the employer, at the time of the accident?
- viii. Was the worker traveling for employment purposes at the time of the accident?
- ix. Did the workers’ employment expose them to a greater risk of injury than a member of the general public?

The WCB then:

- i. considers the evidence gathered throughout the claim adjudication process;

- ii. weighs the evidence;
- iii. applies the statutory presumption in Section 10(4) and the benefit of the doubt provision in Section 187 of the *Act* where circumstances warrant; and

determines whether an accident arose out of and in the course of employment.

**4. Aggravation, activation, acceleration of pre-existing disease or disability and injuries due to other causes**

As stated in Section 10(5) of the *Act*, where the WCB has determined a personal injury by accident has arisen out of and in the course of employment and resulted in a loss of earnings or permanent impairment that was either due:

- a) in part to the injury and in part to causes other than the injury; or
- b) to an aggravation, activation, or acceleration of a disease or disability existing prior to the injury;

compensation is payable for the proportion of the loss of earnings or permanent impairment that may be reasonably attributable to the injury.

**5. Serious and willful misconduct**

Section 10(3) of the *Act* provides that where a personal injury is attributable wholly or primarily to the serious and willful misconduct of the worker, the WCB shall not pay compensation to the worker unless the personal injury:

- a) results in death or serious and permanent impairment; or
- b) is likely, in the opinion of the Board, to result in serious and permanent impairment.

**6. Presumption**

As required in Section 10(4) of the *Act*, if there is evidence to support that the accident arose out of employment, it is presumed the accident arose in the course of employment, unless there is evidence to the contrary. Alternatively, if there is evidence to support that the accident arose in the course of employment, it is presumed the accident arose out of the employment, unless there is evidence to the contrary.

**7. Benefit of the Doubt**

Section 187 of the *Act* establishes that a worker is not required to provide proof on a civil standard (on a balance of probabilities) in support of a claim for compensation. Rather, a worker must establish, through the provision of evidence, that it is as likely as not that a personal injury arose out of and in the course of employment. Where there is doubt on an issue respecting a worker's claim for compensation, and it is as likely as not that the accident arose out of and in the course of employment, the issue will be resolved in the worker's favour.

**8. Application**

This program policy applies to new claims for compensation made on or after (date to be determined).

9.

## References

Workers' Compensation *Act* (Chapter 10, Acts of 1994-95), Sections 2 (a), 2(n), 2(ae), 10, 82, 83, 183, 186, and 187.