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

General Entitlement:
Arising out of and in the Course of Employment

Final Program Policy Decision and Supporting Rationale

Date: September 21, 2009

I - Introduction:

In setting the Program Policy Agenda, the Workers' Compensation Board (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 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 partners (Workers' Advisers Program [WAP], Workers' Compensation Appeals Tribunal [WCAT] and Occupational Health and Safety Division of the Department of Labour and Workforce Development [OHS]), WCB operations, and the WCB strategic and annual plans.

General Entitlement – Arising out of and in the course of employment was considered a "major" policy issue of the WCB Board of Directors and placed on the 2009 Program Policy Agenda. The WCB began policy development in October 2008 with the release of the Stage 1 consultation paper entitled *"Issues Clarification Paper: General Entitlement – Arising out of and in the Course of Employment".* The WCB considered the feedback provided during the November 26th 2008 Program Policy Summit and carried out research and analysis throughout December 2008 – May 2009 on this program policy topic.

At the May 21st 2009 Board of Directors' meeting, the Board agreed to initiate Stage 2 consultation with stakeholders on the proposed new draft program policy. On June 8th, the document entitled "*Program Policy Background Paper: General Entitlement – Arising out of and in the Course of Employment*" and a draft program policy were mailed to individuals on the key stakeholder mailing list and posted to the WCB website for a period of 34 days. The deadline for submissions was July 13th, 2009. The WCB granted an extension of 7 days to one stakeholder and accepted four late submissions (July 14th, July 20th, and July 22nd). The WCB received 11 submissions in total from stakeholders offering input on the proposed draft new program policy.

The Issues Clarification Paper, and Policy Background Paper can be found on the WCB website at www.wcb.ns.ca.

On September 17, 2009 the WCB Board of Directors approved a new program policy *"General Entitlement – Arising out of and in the Course of Employment"*. Please see Appendix D for the new program policy.

The remainder of this report provides:

- key issues raised by stakeholders during Stage 2 consultation on the proposed new program policy;
- the rationale for why the WCB *did* or *did not* revise the draft new program policy *"General Entitlement: Arising out of and in the Course of Employment",* in

- a summary of feedback received during Stage 2 consultation (see Appendix A); and
- the WCB's final policy decision as reflected in the final version of the program policy in Appendix D.

II - Suggested Policy Changes/Issues Raised During Stage 2 Consultation and WCB Response

This section of the report summarizes the key issues raised by stakeholders and provides the rationale for why the WCB did or did not revise the proposed new general entitlement program policy to reflect this input. For a detailed overview of input received from stakeholders, see Appendix A *General Entitlement: Arising out of and in the Course of Employment - Stage Two Consultation Summary*.

Injured Workers' Association and Labour:

Change or Issue Raised:

#1. *General Entitlement – Arising out of and in the course of employment is not an appropriate topic for a program policy. Codifying general entitlement principles and guidelines is only appropriate in situations where there are clear, specific and well-defined principles and guidelines identified through practice and by interpretations from tribunal and court decisions. Other tools, such as a fact sheet similar to the one used for chronic pain, are more appropriate given the case by case nature of general entitlement decision making.*

Analysis:

In keeping with the approach taken by all other Canadian jurisdictions, the WCB believes general entitlement is an appropriate topic for a program policy because there are well defined general principles and guidelines that can be applied in all general entitlement decisions.

As required by Section 10(1) of the *Workers' Compensation Act* (the "*Act*"), to be eligible to receive compensation benefits and services a worker must be caused a personal injury by accident arising out of and in the course of employment. However, the *Act* does not expand, or provide any direction, on what is meant by "arising out of an in the course of employment. The WCB has historically used program policy to clarify a legislated requirement, provide direction and clarification to support consistent decision-making, or define discretionary authority granted under the legislation and/or regulations. Given the lack of direction in the *Act* related to the meaning of "arising out of and in the course of employment" the WCB believes it is appropriate to use program policy as a tool for clarifying this legislated requirement and to support consistent decision-making.

The WCB believes the subject of General Entitlement – Arising out of and in the Course of Employment is different from the topic of medical evidence of a causal connection between chronic pain and the original compensable injury. This is because there are no "rules" or principles that apply to all chronic pain claims. This is supported by the fact that no other WCB in Canada has program policy addressing this topic. Alternatively, all Canadian jurisdictions have general entitlement policies and in every claim for compensation it must be shown that the accident arose out of and in the course of employment before a worker is eligible to receive compensation benefits and services.

Change or Issue Raised:

#2 *The policy should state (as noted in the Policy Background Paper) the intent is to clarify how the WCB makes general entitlement decisions, and not to impose new limits on access to WCB benefits and services.*

Analysis:

While the WCB has several entitlement policies related to specific topics or diseases, there is currently no WCB documented program policy specifying how the WCB makes general entitlement decisions, and in particular how the WCB determines whether or not an injury arose out of and in the course of employment. Therefore, the WCB understands why injured workers/Labour, and employers, may be concerned that documenting the general entitlement decision making framework and guiding principles in a program policy may change (expand or limit) access to benefits. To ensure this does not happen, and consistent with feedback from stakeholders at the 2008 Policy Summit and Stage 2 consultation, the WCB has taken a high level approach to ensure the policy does not change access to WCB benefits or services or exclude new types of injuries/circumstance we have yet to consider in our compensation system.

Given the legal nature of program policy, the desire to ensure the policy is flexible enough to accommodate new circumstances, and the fact that no existing WCB entitlement related policies include a statement related to expanding or limiting access to benefits, the WCB does not believe it is appropriate to include the suggested statement in the policy. Additionally, no other Canadian jurisdiction includes a statement like this in their general entitlement policy. While the approach in the new program policy is currently applied at the WCB, the WCB will reinforce to WCB decision makers that the new general entitlement policy serves to clarify and communicate existing practice, and does not change access to benefits.

Change or Issue Raised:

#3 *The policy should be re-titled "General Entitlement – Non-disease related accidents and injuries".*

Analysis:

The WCB believes it is in keeping with the intent of the *Act* to apply the decision making framework and principles included in the new general entitlement policy to all types of accidents/injuries - including diseases. This is because Section 10(1) of the *Act* requires a worker be caused a personal injury by **accident** arising out of and in the course of employment to be eligible to receive compensation benefits and services. The definition of "accident" in the *Act* (which is included in the policy) includes both traumatic injuries and diseases. Therefore, the WCB believes the principles that clarify the meaning of "arising out of and in the course of employment" in the new policy should apply to diseases. The principles contained in the new policy are general and high level in nature and do not inhibit the application of other decision making frameworks or principles that may be particularly relevant to the adjudication of disease related claims.

Change or Issue Raised:

#4 *The policy should indicate that the definition of "accident" is taken directly from Section 2 of the Act. Additionally, the use of the word "accident" in the Act effectively eliminates any worker from compensation as a result of psychological harassment and intimidation in the workplace.*

Analysis:

The WCB agrees it may improve reader comprehension and the clarity of the policy to state that the definition is taken from the *Act*. The policy has been changed to reflect this. The definition of "accident" in the *Act* covers stress that is an acute reaction to a traumatic event. The WCB is legally bound to apply it as written, and has no ability to change the definition of accident through policy.

Change or Issue Raised:

#5 *The policy should reflect the exact wording of Act sections; in particular those sections referenced in Policy Statements 1. (real merits and justice – S. 186), 6. (presumption – S. 10(4)) and 7. (benefit of the doubt - S. 187). The manner in which the sections are referenced is misleading/inappropriate. Not quoting the Act directly increases the risk of being inconsistent with the Act. Additionally, Policy Statement 1. is confusing and should be reworded because the principles and questions included in the policy do not "provide the WCB with evidence". Policy Statements 1., 6., and 7. should be moved to the beginning of the policy.*

Analysis:

Referencing these sections of the *Act* in such a way as to specify how they are applied in general entitlement decision-making, rather than quoting verbatim from the *Act*, increases understanding of how the WCB makes this important decision. From a legal perspective, this approach does not limit the scope of these sections of the *Act* and their application to other types of decisions, orders or rulings. The WCB agrees that clarifying the wording of Policy Statements 1. and 6. would improve understanding and better reflect the intent of the Policy Statements. The WCB believes Policy Statement 7. is clear and appropriately written given the context of the policy.

The following changes (deletions represented by ~~strikeout~~, additions by underlining) to Policy Statements 1. and 6. have been made:

> **1. Real merits and justice of the case**
>
> Section 186 of the *Act* requires the WCB to ~~consider~~ base each ~~claim for~~ general entitlement decision ~~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.~~ a framework for gathering and considering evidence to guide general entitlement decision - making.
>
> **6. Presumption**
>
> As required in Section 10(4) of the *Act*, if ~~there is evidence to support~~ it is determined 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~~ it is determined 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.

The WCB believes the order of Policy Statements 1. 6. and 7. is appropriate and reflects the general entitlement decision - making framework in the *Act*. Policy Statement 1. was placed at the beginning of the policy to communicate the fact that the WCB is mindful of this requirement from the outset of claim adjudication. From a decision making perspective, the presumption and benefit of the doubt provisions are considered when a decision about whether an accident arose out of and in the course of employment is to be made. That is, they are considered after all the evidence has been gathered, other relevant sections of the *Act* (like Section 10(3) or (5)) have been considered and the WCB is ready to make a

decision. Upon reviewing the evidence, Section 10(4) is applied if one part of the test has been satisfied, but the other has not, and there is no evidence to the contrary. If there is evidence to the contrary, the WCB would then weigh the evidence both for and against the claim for compensation. As required by S. 187 of the *Act*, if the evidence shows 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.

Change or Issue Raised:

#**6.** *Policy statement 2. should reference the specific provisions of the Act relating to basic eligibility requirements.*

Analysis:

The WCB agrees it may improve reader comprehension and the overall clarity of the policy to state the relevant sections of the *Act*. In doing so, however, the WCB believes it is important to ensure employers and injured workers are aware there may be requirements other than those noted in this Policy Statement (ie. residency requirements in Section 20 of the *Act*) that may apply to the claim. Policy Statement 2. has been changed as follows:

2. Basic eligibility requirements

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

a) be a worker as defined by Section 2 (ae) of the *Act* ~~all the relevant provisions under the *Act*~~;
b) meet the requirements for filing a claim for compensation ~~provided for in the~~ in Section 83 of the *Act*;
c) ~~have been~~ be caused a personal injury by accident arising out of and in the course of employment as required by Section 10 of the *Act*; and
d) depending on the facts of the claim, meet any other applicable Sections of the *Act*.

Change or Issue Raised:

#**7.** *Policy statement 3 (a) describing what is meant by "arising out of" employment may add another "layer" of requirements that injured workers will need to meet before receiving WCB benefits and services.*

Analysis:

The WCB does not believe describing what is meant by "arising out of" employment adds any new requirements that injured workers must meet before receiving WCB benefits and services. Workers are already required, to be eligible

to receive WCB benefits and services, to show that the accident/injury they have suffered arose out of and in the course of employment. Policy Statement 3. (a) clarifies the concept of "arising out of" employment. To ensure the policy does not change access to benefits and services, and in keeping with the feedback received at the November 26th 2008 Program Policy Summit, the WCB chose to take a high level approach in developing this program policy.

The descriptions of the meaning of "arising out of' and "in the course of" employment, as well as the questions and principles included in Policy Statement 3. are a combination of those commonly and consistently found in the policies of other jurisdictions, the writings of learned text writers, 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.

Change or Issue Raised:

#**8.** *The following changes should be made to Policy statement 3 (b):*

- *state, as noted in the Puddicombe Court of Appeal decision, that the "circumstances" (in addition to time and place) under which the accident took place be considered when determining if an accident arose in the course of employment;*
- *remove "directly" related to employment. This is not necessary if the term "incidental" is used; and*
- *state that if an accident occurred off the employer's premises, or after work hours, it may still be work-related.*

Analysis:

The WCB agrees that the verbatim wording of the Puddicombe decision uses the term "circumstances". A review of the general entitlement policies in other jurisdictions shows that, in addition to "time" and "place", many of their policies require the consideration of the activity the worker was doing at the time of the injury or the circumstances surrounding the injury as part of determining if the accident occurred "in the course of employment". The WCB believes it is reasonable and legally sound to interpret the term "circumstances" as encompassing all three of the concepts: time, place, and activity. To make the linkage to the Puddicome decision clearer, the WCB has changed the wording in Policy Statement 3.(c) to include the term "circumstances". Please see Employers and Other's issue # 2 (where further recommended changes to Policy Statement 3. are discussed) to see the specific change made.

The WCB believes it is important to clarify and communicate the range of risks (or activities) in Policy Statements 3.(a) and (b) that may be considered work-related by including both the terms "directly" and "incidental" in the policy. However, the

WCB does believe, in light of stakeholder feedback, Policy Statement 3. can be further clarified. Please see Employers and Other's issue # 2 (where further recommended changes to Policy Statement 3. are discussed) to view the specific changes that have been made to Policy Statement 3.

The WCB believes that the concluding statement in Policy Statement 3. (b) addresses the comment made in the third bullet above: "*state that if an accident occurred off the employer's premises, or after work hours, it may still be work-related"*. The statement reads:

> 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.

Change or Issue Raised:

#9. *The following questions should be added to the list of questions in Policy Statement 3 (c) that considered when making general entitlement decisions:*

- *Did the injury/illness occur while the worker was exposed to some contaminant in the course of their employment?*
- *Was participation in the activity directed, requested, or endorsed by the employer?*

Analysis:

The WCB believes a question addressing exposure to contaminants would be a valuable addition to the listing in Policy Statement 3. (c) and has added the question:

> "Was the injury caused by an exposure in the workplace, or as part of the employment activities?

The WCB believes questions i), ii) and iii) in Policy Statement 3.(c) are equivalent to the recommended question in bullet # 2: "*Was participation in the activity directed, requested, or endorsed by the employer?"* and facilitate the gathering of the same information.

Change or Issue Raised:

#10. *Reference to Section 10(5) of the Act in Policy Statement 4. may lead to WCB decision makers to pay inappropriate attention to "fault" finding and apportioning of benefits that is out of place in a no-fault insurance system.*

Analysis:

As stated in the *Act*, the aggravation, activation, or acceleration of pre-existing disease or disability that arises out of and in the course of employment is a compensable injury. However, the WCB believes this is not well understood by some stakeholders. This section communicates to both employers and injured workers that these types of injuries are potentially compensable and that the WCB will pay benefits for that portion of the injury that is attributable to the workplace accident or injury. The WCB does not believe the inclusion of Policy Statement 4. will impact when or how the WCB apportions benefits.

WCB program policy 3*.9.11R - Apportionment of Benefits* directs when and what types of benefits the WCB may apportion. The WCB does not seek to find fault when apportioning benefits. Rather, it seeks to determine the portion of loss of earnings and/or permanent impairment that is due to compensable/non-compensable factors, and then apportion benefits accordingly.

The WCB does believe it is appropriate to amend Policy Statement 4. to include a reference to Policy 3.9.11R. The WCB has added the following sentence to the Policy Statement:

> Where Section 10(5) of the *Act* is applicable, the WCB apportions benefits in accordance with *Policy 3.9.11R - Apportionment of Benefits*.

Change or Issue Raised:

#11. *The inclusion of Policy Statement 5. (serious and willful misconduct) could inappropriately increase the application of Section 10(3) of the Act.*

Analysis:

This section of the policy was included to clarify that an injured worker may still be eligible for compensation under certain circumstances as specified in Section 10(3) of the *Act*. The WCB believes, through communications with stakeholders during day to day claim adjudication, there is confusion or misunderstanding by some workers about the meaning of Section 10(3) and the fact that they may still be eligible for compensation even though they believe the accident to have been the result of their own “willful misconduct”. The WCB does not believe the inclusion of this Policy Statement will impact the number of instances where Section 10(3) of the *Act* is applicable. Additionally, several Canadian jurisdictions include a reference to serious and willful misconduct in their entitlement policies as part of the decision – making framework.

Change or Issue Raised:

#12. *If the policy is a re-statement of existing principles and practice, why is an effective date required in Policy Statement 8.?*

Analysis:

The WCB is legally required to include an effective date for all policies. This does not impact existing practice, limit, or expand, benefits in any way.

Employers and Other:

Change or Issue Raised:

#1. *Policy Statement 1. is confusing and should be reworded because the principles and questions included in the policy do not "provide the WCB with evidence".*

Analysis:

The WCB agrees Policy Statement 1. should be clarified. Please see Injured Workers' Association and Labour, issue # 5, to view the changes to Policy Statement 1.

Change or Issue Raised:

#2. *The use of the word "incidental" in Policy Statement 3. (a) and (b) could inadvertently expand the meaning/understanding of what is considered a work-related injury. The phrase "directly related" in 3. (a) provides clarity, but the term "incidental" is not used in the Act and should be removed from both 3. (a) and (b).*

WCB Response:

The intent of the inclusion of the sentence "The risk may be directly related to the employment, or incidental…. in Policy Statement 3. (a) is to clarify and communicate the range of risks (or activities as noted in Policy Statement 3.(b)) that may be considered work-related. Court decisions from across Canada and the UK dating from the1930s have established that injuries or accidents that arise from risks (or occur under circumstances) ***directly related*** (ie. a butcher cutting his hand while slicing meat) to employment and those that are "***natural incident[s]*** (ie. the butcher trips on the carpet while picking up his pay check) connected with the employee's work"[1] may be compensable.

[1] Blee v. London & North Eastern Railway Co., [1937] 4 All E.R. 270 (H.L.)

In Nova Scotia, the 2005 Puddicombe[2] decision clarified the meaning of the phrase "arising out of and in the course of employment". In that decision, the court discusses at length what is meant by the phrase, and references several other key decisions. It is emphasized that the phrase must be interpreted in the context of a no-fault insurance system intended to provide for speedy resolution of claims for compensation and that in exchange workers gave up their right to sue their employer for damages. Through legal precedent it has been established that injuries that arise from risks (or occur during activities) that are ***incidental to employment*** may be compensable under workers compensation legislation. The WCB believes the policy would be inconsistent with the *Act* and the overall intent of the workers compensation system to state that only accidents/injuries resulting from risks (or activities) ***directly related*** to employment are compensable. It has been established over many years that the *Act* covers a wide range of work-related injuries and accidents. Appendix C contains a series of references from key court decisions illustrating the approach.

While the no-fault nature of the workers' compensation system has necessarily resulted in a broader interpretation of "arising out of and in the course of employment" than in the civil law system, this does not mean "injuries are covered regardless of cause"[3]. The injury must ultimately be caused by work to be compensable. Therefore, the WCB has re-structured parts of Policy Statement 3. (a) and (b) to ensure it is clearly communicated that an injury must be work related to be eligible for compensation. Specifically, the WCB has made the following changes:

> **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. For an accident, and resulting injury, to be considered to have arisen out of employment there must be ~~some~~ a causal connection between the worker's employment and the injury they received.
>
> Generally, ~~for an accident to arise out of the employment,~~ this means the accident and resulting injury must be caused by some risk related to the employment. The risk may be directly, or incidentally, related to the employment ~~or incidental~~; and the injury may be the result of a single

[2] Nova Scotia (Department of Transportation and Public Works) v. Nova Scotia (Workers' Compensation Appeals Tribunal) 10(Puddicombe) (2005), 231 N.S.R. (2d) 390 (C.A.)
[3] Kovach v. British Columbia (Workers' Compensation Board), [1999] 1 W.W.R. 498; [1998] B.C.J. No. 1245 (Q.L.)(C.A.); [2000] 1 S.C.R.

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

Generally, an accident, and resulting injury, is considered to have arisen in the course of employment when it occurs under the following circumstances: ~~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, or incidentally, 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 believes these amendments to Policy Statement 3. emphasize the fact that, ultimately, there must be a causal connection between the worker's employment and the workplace accident they suffered for it to be determined that it arose out of and in the course of employment.

Change or Issue Raised:

#3. *Two of the questions in the list considered by the WCB when making general entitlement decisions (contained in Policy Statement 3. (c)) are inappropriate/confusing and should be removed. The questions are:*

- *3. (c) (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?" The nature of work and where workers perform activities has changed. The consideration here should be whether the employer has control over the activity – not the premises.*
- *3. (c) (ix) "Did the workers' employment expose them to a greater risk of injury than a member of the general public?" It is not clear why a worker's activity is being compared to the general public.*
- *It is also suggested the following question be added: "Does the worker engage in work or activities outside of his employment that may have contributed to the injury?"*

Analysis:

The WCB agrees that whether or not an employer has care or control of the workplace may, depending on the facts of the claim, have little impact on whether an accident is determined to be work-related. The WCB believes it is appropriate to remove the reference and has made the change in the policy. This will not prevent the WCB from considering the issue if it is relevant to a particular claim. The question now reads as follows:

> (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?

The WCB believes question (ix) can be amended to improve clarity. Question (ix) is intended to assist the gathering of evidence related to the risk faced by a worker in their employment relative to the risk that worker would face as a member of the public. For example, risk relative to the general public is relevant where there is an outbreak of an infectious disease (ie. pandemic flu). In many instances, a person may be as likely to contract a communicable infectious disease in a social or recreational situation, as they are at work. Therefore, the WCB would be required to consider whether the worker's employment put them at a greater risk for contracting the flu than the general public. To ensure understanding of the question, the WCB has made the following change:

> (ix) Did the workers' employment expose them to a greater risk of injury <u>than they would have been exposed to as a member of</u> the general public?

In bullet # 3 above it is suggested the question: *"Does the worker engage in work or activities outside of his employment that may have contributed to the injury?"* be added to the list in Policy Statement 3. (c). The WCB does not believe it is appropriate to include an explicit question on a workers non-work activities in this general entitlement policy because it is covered by several other parts/questions in the policy. The WCB agrees it may be appropriate to seek information related to the workers non-work related activities if there is reason to believe a cause other than a workplace risk or activity may be of significance. The WCB believes the information collected in response to questions i) through iv) in Policy Statement 3.(c) are sufficient to highlight any inconsistencies.

Change or Issue Raised:

#4. *Policy Statement 4. should explain what types of benefits are apportioned and how apportionment is carried out.*

Analysis:

The WCB believes *Policy 3.9.11R - Apportionment of Benefits* adequately addresses the apportionment of WCB benefits and it is unnecessary to repeat the

content in the general entitlement program policy. The WCB does believe, however, it would improve reader comprehension to reference the apportionment policy in Policy Statement 4. Please see Injured Worker Association and Labour issue # 10, where this topic is also discussed, to view the changes to Policy Statement 4.

Change or Issue Raised:

#5. *Policy Statement 5. should explain what is considered serious and willful misconduct. Clear articulation of what constitutes "serious and willful misconduct" is required in order for employers to provide proper documentation during claim adjudication.*

Analysis:

The new general entitlement policy is intended to clarify and communicate the decision making framework, and the principles and questions considered (focusing on the "arising out of and in the course of employment" requirement), when making general entitlement decisions. The WCB believes it would be more appropriate and transparent to consider a substantive change such as defining or explaining what is meant by the topic of serious and willful misconduct as part of the development of future policy agendas by the Board of Directors. At that time stakeholders would have the opportunity to identify the topic for policy development and consider its priority in relation to other topics. Therefore, the WCB has not made any changes to Policy Statement 5.

Change or Issue Raised:

#6. *Policy Statement 7. should more clearly state that "equal evidence" is needed before the Section 187 benefit of the doubt provision of the Act can be applied during decision making. Also, wording should be added to strengthen the evidence requirements for both the employer and the employee.*

Analysis:

The WCB believes the current wording of Policy Statement 7. is appropriate in light of the Nova Scotia Court of Appeal decision *Workers' Compensation Board of Nova Scotia v. Johnstone (1999), 181 N.S.R. (2d) 247 (C.A.)* where it was clarified that a worker must establish that it is as likely as not that an injury arose out of and in the course of employment. Additionally, the WCB believes the Policy Statement specifies that the "benefit of the doubt" will be applied only where it has been shown that it is as likely as not that the accident arose out of and in the course of employment.

The WCB does not believe it is appropriate to include evidence requirements in this general entitlement policy. This is because the WCB has two existing policies

that specify how the WCB weighs conflicting medical evidence and determines what is considered “new” evidence. These policies are:

- 1.4.3 Weighing Conflicting Medical Evidence. This policy, among other provisions, specifies the criterion WCB decision makers will consider when weighing conflicting medical evidence.
- 8.1.7. R1 Reconsiderations Pursuant to s. 185(2) Where a Final Decision of the Board Addressing an Issue Has Been Rendered. In this policy, the criterion for “new evidence” is specified. New evidence is required if an employer or worker wishes to have a final decision of the WCB reconsidered pursuant to Section 185(2) of the *Act*.

Appendix A:

General Entitlement – Arising out of and in the Course of Employment:

Stage Two Consultation Summary

Introduction

At the May 2009 Board of Directors' meeting, the Board agreed to initiate consultation with stakeholders on a proposed draft new program policy: General Entitlement – Arising out of and in the course of employment. On June 8th 2009 the document *"Policy Background Paper: General Entitlement – Arising out of and in the Course of Employment"* and a draft new program policy were mailed to individuals on the key stakeholder mailing list and posted to the WCB website. The deadline for submissions was July 13th, 2009. The WCB granted an extension of 7 days to one stakeholder and accepted four late submissions (July 14th, July 20th, and July 22nd). The WCB received 11 submissions in total from stakeholders offering input on the proposed draft new program policy.

Feedback Summary

The Injured Workers' Association that provided comment does not believe a program policy is required to provide clarity, consistency and transparency related to general entitlement decision-making (as explained in the Policy Background Paper) by the WCB. They believe policy is only appropriate where there are clear, specific, and well-defined principles and guidelines that have developed through practice and court/tribunal decisions. General entitlement, they believe, is not an appropriate topic for a policy due to the case by case nature of decisions making. Instead, they recommend this be done through a guideline or a fact sheet similar to the one prepared for the adjudication of chronic pain claims.

The Labour submission expressed appreciation for the goals of the policy, but at the same time communicated a concern that this could be a step toward "auto-adjudication". They also stated that care should be taken to ensure the policy remains consistent with the *Act* and does not impose any new limits on compensation. It was also recommended that a statement of "basic principles" such as "The Stanhope Manifesto on Workers Compensation" be developed and circulated. The remainder of Labour's submission focused on specific recommendations for changes to the policy. The changes requested include those related to formatting, clarity of language, additions to the questions used to guide WCB decision makers, the removal of some sections, and modifications to the language used to reflect the principles in the policy.

Employers generally believed the policy provides improved transparency and clarity of decision making and is a "good start" on the way to improving employers' understanding of how the WCB makes general entitlement decisions. Like Labour, employers also believe the policy should not change (in particular, not expand) the concept of what is considered a work-related injury. They also believe WCB decision makers must be fully trained and that the policy be applied consistently. The remainder of the submissions concentrated on recommended changes, or the expression of concern related, to a specific section or wording in the policy. Of particular concern was the use of the word "incidental" to describe the strength of the relationship/linkage between a risk or activity and a worker's employment. Employers believe the use of this word has the potential to expand the understanding of what is considered a work-related accident or injury and

should be removed. Also, employers believed 2 questions in Policy Statement 3 (c) (questions vii and ix) should be changed or removed. Some employers communicated concerns about the challenges of an ageing population poses for determining what portion of an injury is work-related as opposed to a condition resulting from the natural ageing process. Employers also expressed a need for clarification of the term "serious and willful misconduct". Lastly, several employers recommended the WCB emphasize the need for "equal" evidence before the benefit of the doubt provision in Section 187 of the *Act* is applied.

Overview of Stakeholder Submissions

Outlined below is a summary of general comments submitted by various stakeholders.

Injured Workers' Association and Labour:

- Our association does not support the creation of a general entitlement policy. It is our view the goals of improving transparency and accountability of the WCB decision making process, supporting the WSIS in getting to the right decision the first time, and simplifying future program policy development can be accomplished by creating a fact sheet rather than a new policy.
- A policy on general entitlement will add even more litigiousness to an already overly litigious system. All decisions must be made in accordance with the Workers' Compensation *Act*, Regulations and Board Policies. The Workers' Compensation Appeals Tribunal is bound by WCB policies that are consistent with the *Act*. Creating a new policy on entitlement will add another layer of litigiousness.
- Codifying general entitlement principles and guidelines is only appropriate in situations where there are clear, specific and well-defined principles and guidelines identified through practice and by interpretations from tribunal and court decisions. A codification is not suitable in situations such as the current matter where entitlement decisions are made based upon the individual circumstances of each case.
- The WCB, in determining whether an accident arose out of and in the course of employment, is not limited to the general principles and practices included in the proposed policy and must consider the unique circumstances of each claim on an individual basis. Why develop a policy on matters that involve principles and guidelines that are not concrete or that cannot all be included in the policy?
- Other than the additional notes contained in Policy Statement 3a and b and the "Questions considered" at 3c, the draft policy is basically identical to the legislation. It does not define discretionary authority or clarify a legislated or regulatory requirement. The proposed policy does not appear to serve any purpose other than listing the factors the WCB considers in determining entitlement.
- A new policy was not required to outline the key steps in the "causal connection" decision-making process. The Chronic Pain Fact Sheet was sufficient to provide clarification on this issue. A new policy was not required to clarify and explain

- For this “foundation and follow-up” year, we believe that the starting-point should be a statement of basic principles. Such a statement entitled “The Stanhope Manifesto on Workers Compensation” was developed in 2002.
- We are very concerned about the potential adverse impact that this draft general entitlement policy may have for the current adjudication process of interpreting the *Act* and for future possible changes in that process such as moves to auto-adjudication as is the case in British Columbia and Ontario…..If, as stated on page 10, this program policy is intended to clarify “…how the WCB makes general entitlement decisions while remaining consistent with the *Act* and not imposing new limits on access to compensation benefits or services”, this should be clearly stated in the policy statement such as in the preamble.
- That Nova Scotia is the only Province without such a policy is not a reason, on its own, to develop a policy…..Having greater clarify and transparency, laying the foundation for more specific entitlement issues, and supporting the development of program policies on more complex issues in the future are all admirable goals but could be compromised if the fundamental questions and concerns we raise about the need for and content of this policy are not addressed.
- We think this proposed draft policy document …should be re-titled: “General Entitlement – Non-Disease related accidents and Injuries”.
- Definitions - The provision should indicate that the definition of “accident” is taken directly from Section 2 of the WCA. We are concerned that the use of the word "accident" in the *Act* and its limitations/connotations with respect to illness and the limits on its definition which prohibits gradual onset stress or chronic stress from being included. This effectively eliminates any worker from compensation as a result of psychological harassment and intimidation in the workplace.
- Provision 1
    - “real merits and justice of the case”. Section 186 of the WCA does not require the WCB to consider each “individual” merits and justice of the case….The reference should be as stated in the WCA, in full.
    - We suggest that the provisions of Section 187 of the WCB be quoted in full as Provision 1 of the Policy Statement. The Policy Statement refers to Section 187 of the WCB in Provision 7 and limits it to the question of “out of and in the course of employment”. Section 187 does not limit the “benefit of the doubt” to that question.
    - The rest of current Provision 1 is confusing. The “general principles and questions” do not “provide the WCB with EVIDENCE” to consider when making a decision. The “EVIDENCE” comes from the claim. The “general principles and questions” provide a “structure for the exercise of decision making” with respect to an individual claim. We suggest the language be changed in this manner.
- Provision 2 – basic eligibility requirements
    - The reference in (a) should identify the particular provisions of the WCA that define a “worker”. The most obvious required reference is to Section

- Provision 3 – “determining if an accident arose out of and in the course of employment”
    - should quote in full the provisions of Section 10(4) of the WCA.
    - state that consideration should be made to 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” as set out by the Nova Scotia Court of Appeal in NS in Puddicombe, 2005, 231 N.S.R. (2d) 390 (C.A.)
    - Provision 3(a) Description of “arising out of” employment. We are concerned that the introduction of the phrase “some risk related to the employment” will become yet another “hoop” for an injured worker, rather than answering the question as to whether the injury “arose” out of employment. Introducing the “causal” connection in the “arising out of” section is also confusing.
    - Provision 3(b) Description of “in the course of” employment. The reference to “time” and “place” were specifically approved by the Nova Scotia Court of Appeal (Puddicombe, supra), but an investigation into the “circumstances” is also suggested. The reference in (iii) should not say “directly related” to employment, if the option of being “incidental” employment is permitted. As long as the activity is “related” to employment, it is sufficient. It is also appropriate to indicate that if the personal injury happened off the employer’s premises and/or outside usual working hours, it may be work-related, if evidence shows that a worker’s injury arose out of the employment in any event.
    - Provision 3 (c) – Questions Considered – “arising out of and in the course of employment”. We support the use of questions or ‘triggers’ and agree that this would help an injured worker understand the decision making process of the WCB better. The fundamental question to be answered is “but for” employment, would the worker have been injured. We suggest a few additional types of questions:
        - “Did the injury/illness occur while the worker was exposed to some contaminant in the course of their employment”
        - Was participation in the activity directed, requested, or endorsed by the employer?
- Provision 4 – “aggravation, acceleration of pre-existing disease or disability and injuries due to other causes”. We agree that it is appropriate to refer to the provisions of Section 10(5) of the WCA . However, we are concerned that an inappropriate focus on “proportionality” regarding pre-existing disease, disability or injuries will cause WCB adjudicators to engage in detailed determinations of “fault” that are based on a tort system completely opposed to the no-fault insurance system explained at page 5 of the Background Paper.
- Provision 5 – “serious and willful misconduct”. We recognize that this is a statutory exemption provided for in Section10(3) of the WCA. However, … the exemption is very infrequently used. We are opposed to increasing the

- Provision 8 – Application. If the policy is a restatement of existing practices, what effect will a "start" date have on the claims adjudication process? Why not just have a date of reference that would also refer to the *Act*?

Employers and Others:

- Overwhelmingly, employers view "General Entitlement" as perhaps the most critical point in a claim as it results in adjudication of claim entitlement. A document that can provide improved transparency, clarity and understanding is fully supported.
- Employers felt that the general entitlement policy does provide more transparency as intended by the WCB and will be helpful in making initial WCB submissions …and is a good start to provide employers with greater clarity and a better understanding of the criteria used by WCB to make decisions.
- Employers stated repeatedly that the wording contained within the policy must be ensured to not change or expand what is work related or in any way expand the definition of work related. Therefore while employers support the creation of a policy document they stress that great care and concern must be exercised to ensure that the wording in a policy must not create a change or expansion of the definition of work-relatedness.
- We agree with the stated rationale and general approach of the policy.
- Employers emphasized the need for Case Managers to be fully trained and understand how to use any policy and that this training is focused to ensure consistent application of the policy.
- #1: Real Merits and Justice of the Case – this section states that the *"general principles and questions considered by the WCB as outlined in this program policy . . .rather they provide the WCB with evidence to consider when making a decision"….*this section does not contain evidence to consider but rather details guidelines that can be considered in review of a claim and making a decision.… the wording in this section needs to be revised to reflect that these are guidelines.
- #3(a) (b) Description of "arising out of" employment – The use of the word "Incidental" was viewed by employers as providing the potential to be misinterpreted and most concerning was that it would expand the understanding of what is work related. Employers viewed the section to be clear when the word "incidental" was removed and did not believe it altered or diminished the current understanding or legislation. However the word "incidental" was of significant concern to employers in its use in this section. Employers would like this word removed. A causal connection has to be demonstrated and this policy must not expand the definition of work relatedness. Incidental is used twice in this section – in (a) and in (b). Employers recommend it is removed in both uses.
- ["incidental"]This terminology is not used in the *Act.* If used in the policy employers would like to see the criteria used by case workers in the application of this term before it is included in the policy. We would recommend the removal of the word

- We recognize that under the jurisprudence, an accident can possibly be compensable under causal conditions which have more than insignificant causal elements. However the use of the term “incidental” will likely cause confusion at the case management level. This could allow for any and all claims to be compensable which have little or no relation to the workplace.
- #3 (c) vii and ix – Questions considered. Employers were very confused/concerned over the section re: premises being under the “care and control of the employer” Employers, particularly those in health care (home care), expressed concern that they perform many activities under the control of an employer but not on premises under the control of an employer. Work has changed and the nature of work and where workers perform activities has changed. The consideration here should be whether the employer has control over the activity – NOT that the employer has care of the premises. Likewise, in question ix employers frequently expressed concern over the relevance of an activity being compared to the general public? There was significant concern that Case Managers would not be able to consistently and knowledgeably apply incorrect comparisons.
- We would wish to see under section 3(c) additional questions to help determine whether the injury arises in and out of employment. Suggested question – does the worker engage in work or activities outside of this employment that may have contributed to the injury?
- We…are concerned that existing conditions such as stroke or heart attacks could be considered as work related. These are conditions that deteriorate with age and life styles. With an aging work force more people will suffer from these previously existing conditions while at work. How will a case be evaluated to determine if or how it may have been aggravated by work related activities? …With the current balance of doubt we are setting up a scenario where every heart attack or stroke occurring at work will immediately become compensable. This is moving well beyond covering injuries that occur at work.
- The definition of “workplace” should parallel the definition outlined in the *Health and Safety Act*.
- Employers require greater clarity about the current application of “causal connection”. What are the criteria used to establish causal connection?
- Policy Statement 4 – Clarify ‘Temporary and/or Permanent’… the Policy should clarify whether compensation is payable for the proportion of the temporary and/or permanent loss of earnings. Our interpretation is that both types of earnings are apportionable.
- Pre-existing disease or disability and injuries due to other causes. Concerned as to how a reasonable portion would be assigned to an injury. The policy should clarify this.
- #5. Serious and Wilful Misconduct- Employers described a “reluctance” by Case Managers to apply this section in a meaningful way. Perhaps what is required is

- Policy Statement 5 – Legislative entitlement should not be broadened through policy… The policy should provide guidelines as to what situations can be considered “serious and willful misconduct.” For example, incompetence may be compensable with regards to a serious injury, however a deliberate or wanton disregard for safety, intentional violence, or sabotage, should NEVER be compensable.
- Clear articulation of what constitutes “serious and willful misconduct” is required in order for employers to provide proper documentation. Employers would like to have further education/dialogue on this issue. At the end of the sentences for a) and b) the words, “of the worker” should be added for further clarification. A willful act could result in the injury/death of someone other than the worker themselves.
- #5 Serious and willful misconduct: is the intent that employees who ignore policy, safety warnings, specific instruction and training etc. may not be eligible for WCB benefits if the employer can provide evidence that the employee sustained an injury having chosen not to follow safe practices?
- #7. Benefit of the Doubt – Employers reported that in claim adjudication and appeals they believe benefits are being awarded without true equal evidence being reviewed and that often times the decision maker simply concludes “benefit of the doubt”. Employers request that this policy narrative should make the statement that “equal evidence” has to be presented in order to use Benefit of the Doubt. It must be evenly balanced of clear evidence. The policy should reflect the importance of that prerequisite being met before the benefit of the doubt is applied.
- Wording should be added to strengthen the evidence requirements for both the employer and the employee.

Appendix B

Quotes From key Court Decisions Regarding the Compensability of Injuries Arising from Risks or Activities Incidental to Employment

- "Those cases that have considered the nature and purpose of workers' compensation schemes in Canada have consistently emphasized the protection of employees against the risks of their employment, ***including risks incidental to the usual duties of employees***. They have therefore given the phrase "arising out of and in the course of employment" a liberal interpretation not limited to the employer's actual work premises nor to the employee's actual work hours."[4]
- "In truth the phrase 'arising out of and in the course of employment' means no more and no less than 'caused by the work which the man was employed to do and was doing'. ***In this context, employment must be regarded as covering and including the things necessarily and incidental to the employment.*** The injury by accident must be work-caused."[5]
- "Since the accident did not arise in the course of the actual work as a waitress, nor of entering upon nor departing from it, ***to be within the statute her act must be found to be what has been called an incident of the work***."[6]
- "In considering whether there was evidence to support the arbitrator's conclusion that the worker's injury arose out of and in the course of employment, Lord Atkin [Blee v. London & North Eastern Railway Co., [1937] 4 All E.R. 270 (H.L.)] looked to the employment duties of the worker and the activity in which he was engaged at the time of the injury in order to determine whether, at the time of the injury, he was actually performing his contract of service…The learned Law Lord, however, recognized that ***the inquiry was not limited to the employee's contractual duty.*** He referred to statements that the activity at the time of the accident must be within the discharge of the employee's duty, directly or indirectly, ***or something which is a natural incident connected with the employee's work***". [7]

[4] Kovach v. British Columbia (Workers' Compensation Board), [1999] 1 W.W.R. 498; [1998] B.C.J. No. 1245 (Q.L.)(C.A.); [2000]
[5] 1966 Report of the Commission of Inquiry into the Workers Compensation Act of British Columbia p. 178
[6] Supreme Court of Canada - Workmen's Compensation Board v. C.P.R., [1952] 2 S.C.R. 359
[7] *Department of Transportation and Public Works v. Nova Scotia Workers' Compensation Appeals Tribunal) Puddicombe) (2005), 231 N.S.R. (2d) 390 (C.A.), p. 12, [38].*

Appendix C

Changes to June 8th version of Program Policy: General Entitlement – Arising out of and in the Course of Employment based on Stage 2 Stakeholder Feedback

(Additions are underlined, deletions are ~~struck out~~)

POLICY	NUMBER: 1.3.7

Effective Date: September 17, 2009	**Topic:**	**General Entitlement – Arising out of and in the Course of Employment**
Date Issued: September 24, 2009	Section:	Entitlement
Date Approved by Board of Directors: September 17, 2009	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", as defined in Section 2(ae) of the *Act*, 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~~ base each ~~claim for~~ general entitlement decision ~~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.~~ a framework for gathering and considering evidence to guide general entitlement decision - making.

2. Basic eligibility requirements

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

a) be a worker as defined by Section 2 (ae) of the *Act* ~~all the relevant provisions under the *Act*;~~
b) meet the requirements for filing a claim for compensation ~~provided for in the~~ in Section 83 of the *Act*;
c) ~~have been~~ be caused a personal injury by accident arising out of and in the course of employment as required by Section 10 of the *Act*; and
d) depending on the facts of the claim, meet any other applicable Sections 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. For an accident, and resulting injury, to be considered to have arisen out of employment there must be ~~some~~ a causal connection between the worker's employment and the injury they received.

Generally, ~~for an accident to arise out of the employment,~~ this means the accident and resulting injury must be caused by some risk related to the employment. The risk may be directly, or incidentally, 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

Generally, an accident, and resulting injury, is considered to have arisen in the course of employment when it occurs under the following circumstances: ~~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, or incidentally, 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.

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 they would have been exposed to as a member of the general public?
x. Was the injury caused by an exposure in the workplace, or as part of the employment activities?

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.

Where Section 10(5) of the *Act* is applicable, the WCB apportions benefits in accordance with *Policy 3.9.11R - Apportionment of Benefits*.

5. Serious and wilful misconduct

Section 10(3) of the *Act* provides that where a personal injury is attributable wholly or primarily to the serious and wilful 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~~ it is determined 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~~ it is determined 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 September 17, 2009.

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.

Appendix D

Final Board of Directors Approved Program Policy: General Entitlement – Arising out of and in the Course of Employment

POLICY	NUMBER: 1.3.7

Effective Date: September 17, 20009	**Topic:**	**General Entitlement – Arising out of and in the Course of Employment**
Date Issued: September 24, 2009	Section:	Entitlement
Date Approved by Board of Directors: September 17, 2009	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", as defined in Section 2 (ae) of the *Act*, 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 base each general entitlement decision 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 a framework for gathering and considering evidence to guide general entitlement decision - making.

2. Basic eligibility requirements

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

a) be a worker as defined by Section 2 (ae) of the *Act*;
b) meet the requirements for filing a claim for compensation in Section 83 of the *Act*;
c) be caused a personal injury by accident arising out of and in the course of employment as required by Section 10 of the *Act*; and
d) depending on the facts of the claim, meet any other applicable Sections 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. For an accident, and resulting injury, to be considered to have arisen out of employment there must be a causal connection between the worker's employment and the injury they received.

Generally, this means the accident and resulting injury must be caused by some risk related to the employment. The risk may be directly, or incidentally, related to the employment; 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.

b) Description of "in the course of" employment

Generally, an accident, and resulting injury, is considered to have arisen in the course of employment when it occurs under the following circumstances:

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, or incidentally, related 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.

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:

xi. Was the activity part of the job, or a job requirement?
xii. Did the accident occur when the worker was in the process of doing something for the benefit of the employer?
xiii. Did the injury occur while the worker was doing something at the instruction of the employer?
xiv. Did the injury occur while the worker was using equipment or materials supplied by the employer?
xv. Was the injury caused by some activity of the employer or another worker?

xvi. Was the worker being paid or receiving some consideration for the activity from the employer at the time of the accident?
xvii. Was the worker on the employer's premises at the time of the accident?
xviii. Was the worker traveling for employment purposes at the time of the accident?
xix. Did the workers' employment expose them to a greater risk of injury than they would have been exposed to as a member of the general public?
xx. Was the injury caused by an exposure in the workplace, or as part of the employment activities?

The WCB then:

iv. considers the evidence gathered throughout the claim adjudication process;
v. weighs the evidence;
vi. 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:

c) in part to the injury and in part to causes other than the injury; or
d) 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.

Where Section 10(5) of the *Act* is applicable, the WCB apportions benefits in accordance with *Policy 3.9.11R - Apportionment of Benefits*.

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:

c) results in death or serious and permanent impairment; or
d) 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 it is determined 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 it is determined 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 September 17, 2009.

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.