

**Issues Clarification Paper:**

**General Entitlement – Arising out of and in the course of  
employment**

October 24, 2008

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## 1. PURPOSE

This paper is intended to help readers understand the current environment related to the topic of “General Entitlement – Arising out of and in the course of employment”. Responses to this paper will assist the Workers’ Compensation Board (WCB) to clarify areas of concern, understand the scope of the issue, and ensure all issues are considered. The WCB requires a comprehensive understanding of both employer and worker concerns around “General Entitlement – Arising out of and in the course of employment” in order to determine the best approach to addressing this topic.

## 2. BACKGROUND

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 2007, over 28,000 injured workers registered approximately 32,000 new claims for compensation. This resulted in almost 8,000 injured workers (8,200 claims) missing more than two days from work. This means the WCB made thousands of general entitlement decisions about the work-relatedness of a worker’s injury or disease. This is the first, and one of the most important, decisions the WCB makes in the claims adjudication process because it determines whether or not a worker is eligible to receive the benefits or services provided for in the *Workers’ Compensation Act* (the “Act”).

The *Act* sets out the conditions for workers’ general entitlement to WCB benefits and services. Workers who are employed in industries or occupations covered by the *Act* are entitled to medical aid and earnings loss benefits or services if they suffer a personal injury by accident arising out of and in the course of their employment.<sup>1</sup> Where the accident arose out of a worker’s employment, it is presumed that the accident occurred in the course of their employment, and vice versa<sup>2</sup>. Workers are also entitled to compensation if they suffer from an occupational disease that is due to the nature of their work, and the occupational disease has resulted in a loss of earnings or permanent impairment, or the worker’s death.<sup>3</sup> This means an injury or occupational disease must be “work-related” for a worker to be eligible for WCB services and benefits.

Currently, the WCB does not have a program policy or publically available guideline that communicates to injured workers, employers and other stakeholders how the WCB determines if an injury or disease is work-related. The WCB does have some policies that outline the criteria for determining the work-relatedness of specific types of injuries (i.e. back injuries) and diseases (i.e. lung cancer in foundry workers).

**The subject of this paper is general entitlement where a worker has suffered an injury.**<sup>4</sup> While related, the topic of general entitlement where a worker is suffering from

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<sup>1</sup> The *Act*, S. 10 (1).

<sup>2</sup> The *Act*, S. 10 (4).

<sup>3</sup> The *Act*, S. 12 (1).

<sup>4</sup> Disabilities most commonly considered injuries are those that involve a specific incident (e.g. a fall) or occur over a period of time (e.g. ergonomic related injuries).

a disease<sup>5</sup> is more complex (and there are separate sections of the *Act* addressing diseases) and the WCB believes this topic is better addressed in a separate policy. Please see the Issue Identification Paper “General Entitlement – Occupational Disease” for a discussion of the issues related to addressing this topic.

### 3. THE ISSUES

The following are the key points, problems, or opportunities identified to date that the WCB believes should be considered when determining the best approach to addressing the topic of “General Entitlement – Arising out of and in the course of employment”:

**1. The general entitlement decision is the first, and most important, decision made by the WCB in the adjudication of a claim for compensation. The WCB believes that clearly communicating how this decision is made will improve the transparency of the decision making process for injured workers, employers, and stakeholders generally.**

The first step in the adjudication of a claim for compensation benefits and services is making a general entitlement decision: essentially, answering the question “was the injury work-related?” The consequences of this decision have important implications for the worker, employer, and the WCB. For instance, if it is determined the injury was work - related, the worker will be eligible to receive benefits and services from the WCB and their employer’s experience rating will be impacted. While the WCB believes its decision making is sound, clarifying and communicating the WCB’s approach to determining general entitlement will increase the transparency of the decision making process and contribute to a common understanding, by all stakeholders, of how this pivotal decision is made. This would make the claims adjudication process easier to understand and make it easier for workers and employers to participate in the system.

**2. Stakeholders have identified concerns and issues linked to the need for clear and transparent adjudicative principles for determining general entitlement.**

In recent years, a number of stakeholders have identified issues related to the topic of “general entitlement” as an area requiring consideration. Specifically, during 2006/07 consultations on the apportionment policy, stakeholders identified the need for clearer adjudicative guidelines that support the determination of whether an injury “arose out of and in the course of employment”. For example, some employers have stated that they are unclear about the approach, and the evidence, the WCB uses to determine whether an injury occurred at the workplace. Additionally, Injured workers should be able to easily access information on the key factors the WCB considers when determining if an injury is work-related, and therefore compensable.

After carrying out research and analysis on some of the issues/concerns raised by stakeholders during the 2009 Program Policy Agenda Setting Process (i.e. determining

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<sup>5</sup> Examples of disabilities commonly considered diseases are exposures or inhalation of chemicals, infections, noise induced hearing loss, and contagious diseases.

the compensability of hearing loss, determining whether an incident is a recurrence or a new injury, and WCB accountability for decision making), the WCB believes the root cause of these concerns can be traced back, at least in part, to a lack of a common understanding and agreement on how the WCB makes general entitlement decisions, as well as the transparency of WCB decision making.

The WCB believes that clarifying the basic principles related to the topic of “General Entitlement – Arising out of and in the course of employment” will contribute to a common understanding among workers and employers of the fundamental adjudicative principles used by the WCB, make the claim process easier for workers and employers to understand, facilitate participation in the system, and improve the transparency of WCB decision making.

### **3. The workers’ compensation environment is evolving and becoming more complex.**

Clear adjudicative criteria for determining whether or not an injury is work-related supports effective complex claims adjudication. This is important because the WCB can expect an increase in complex claims adjudication in the future due to, for example, increased awareness of some workplace hazards (i.e. air quality), changes in the workplace environment (i.e. telecommuting vs. on-site work), and new technologies (i.e. the use of nanotechnology in manufacturing). Clarifying and communicating the “basic principles” the WCB uses when adjudicating a claim for compensation will assure both employers and workers that the WCB has a basic framework for making general entitlement decisions in a consistent manner, regardless of the complexity of a claim.

### **4. Clarifying and communicating the WCB’s approach to determining whether or not an injury is work-related would act as a foundation for future work on more complex topics.**

Clarifying and communicating the WCB’s approach to determining whether or not an injury is work-related will lay the foundation necessary to address some of the more specific entitlement issues (ie. recurrences) identified by stakeholders during the 2009 Program Policy Agenda setting process and will improve accountability in decision-making. In some cases it may eliminate the need for, or simplify, the analysis of these issues by ensuring stakeholders have a common understanding of the basic principles underlying all WCB entitlement decisions.

Workers and employers should have confidence that the WCB will be able to successfully face future adjudication challenges. Clarifying basic principles, such as those related to general entitlement, will enable the WCB to respond effectively to changes in our environment such as new injuries resulting from scientific advancements like nanotechnology. It will also, along with work on the topic of “General Entitlement – Occupational Disease” ensure the WCB is ready to adjudicate claims if Nova Scotia were to face a flu pandemic.

## 4. CURRENT PRACTICE

In determining general entitlement to compensation benefits and services, the WCB applies commonly accepted workers' compensation principles. These principles are reflected in the *Act*, and are very similar to the approaches used in other Canadian jurisdictions. While the WCB uses general principles to guide decision making, each claim for compensation is considered on its own merits and entitlement decisions are based on the facts of each case. The following are the basic issues that must be considered by the WCB (which are very similar to those considered by other provincial WCBs) when determining general entitlement to compensation benefits and services for injuries:

1. Eligibility (does the worker making the claim have coverage under the *Act*?);
2. Evidence of an injury caused by an accident (has the worker suffered an injury?); and
3. Determining if the accident 'arose out of and in the course of employment' (is the injury work-related?).

In considering issue 3, the WCB reflects on various indicators or questions to assist in determining if the injury arose out of and in the course of employment. Some basic indicators/questions that would be considered by the WCB include, but are not limited to, the following:

- Did the injury occur at the workplace?
- Did the injury occur while doing something at the request, or for the benefit of, the employer?
- Did the injury occur while using equipment or material supplied by the employer?
- Did the injury occur while the worker was being paid?
- Was the injury caused by some activity of the employer or another employee?

Depending on the nature and circumstances of an injury, the number and type of indicators/questions considered by WCB decision makers may vary.

## 5. JURISDICTIONAL INFORMATION

Most jurisdictions in Canada have a legislative framework similar to Nova Scotia's. For example, in all jurisdictions (except Quebec<sup>6</sup>) 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.

All jurisdictions except Nova Scotia have used program policy to clarify and communicate how they determine if an injury is work-related or not. The policies address, usually at a high level, the principles related to:

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<sup>6</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".

- Eligibility for compensation (ie., is the accident employer covered by the legislation?);
- Evidence of an injury caused by an accident (ie., is there evidence to establish there was an accident?); and
- Determining if the accident ‘arose out of and in the course of employment’ (ie, was it work-related?).

The policies in other jurisdictions primarily focus on the question “did the accident arise out of and in the course of employment”? To do this, a three part test of time, place, and activity (generally the same as the indicators/questions used in Nova Scotia) is usually applied. In some jurisdictions, special attention is paid to determining the work-relatedness of injuries that occur in specific types of workplaces (ie. remote camps), locations (ie. parking lots, lunch rooms), and occupations (ie. travelling salespeople).

## 6. PROVIDING YOUR COMMENTS

We are interested to hear your comments on the information presented in this paper. In particular, we encourage you to consider whether there **are any additional issues you would like to see addressed as the WCB considers the best approach to addressing the topic of General Entitlement – Arising out of and in the course of employment.**

Comments may be provided to the WCB in two ways:

### 1. Stakeholder presentation at the WCB Policy Summit on November 26<sup>th</sup>, 2008

On November 26<sup>th</sup>, 2008 the WCB will be hosting a Policy Summit at the Westin Hotel from 1:00 – 4:00 pm. As part of the summit, stakeholders and interested parties will have an opportunity to make 5-10 minute presentations that identify and clarify their issues related to the three policy topics on the upcoming year’s Program Policy Agenda including, “General Entitlement - Arising out of and in the course of employment”. If you are interested in making a presentation at the WCB Policy Summit please contact Marcy Dalton at (902) 491-8904 or e-mail at [marcy.dalton@wcb.gov.ns.ca](mailto:marcy.dalton@wcb.gov.ns.ca) by **November 12, 2008**. For more information on the WCB policy summit please go to the WCB website at [www.wcb.ns.ca](http://www.wcb.ns.ca).

### 2. In writing by mail or e-mail

Alternatively, we encourage all stakeholders to share their issues and/or concerns related to the three policy topics on the upcoming year’s Program Policy Agenda with the WCB in writing by **December 8, 2008**. This will ensure a full and accurate understanding of your issues by the WCB. Please provide written submissions to:

Marcy Dalton  
Manager Policy, Procedure & Research

Workers' Compensation Board of Nova Scotia  
PO Box 1150  
Halifax NS B3J 2Y2  
Phone: (902) 491-8904  
E-mail: [marcy.dalton@wcb.gov.ns.ca](mailto:marcy.dalton@wcb.gov.ns.ca)



## **APPENDIX A**

### **Relevant Sections of the *Workers' Compensation Act***

#### **Interpretation**

2. In this Act,

(a) "accident" includes

- (i) a willful 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;

(v) "occupational disease" means a disease arising out of and in the course of employment and resulting from causes or conditions

- (i) peculiar to or characteristic of a particular trade or occupation, or
- (ii) peculiar to the particular employment,

and includes silicosis and pneumoconiosis.

#### **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.

**(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.

#### **Compensation for occupational disease**

**12 (1)** Where an occupational disease is due to the nature of any employment to which this Part applies in which a worker was engaged, whether under one or more employments, and

(a) the occupational disease results in loss of earnings or permanent impairment; or

(b) the worker's death is caused by the occupational disease,

the worker is entitled to compensation as if the occupational disease was a personal injury by accident.