

**Program Policy
Issues Clarification Paper:**

Recurrences

August 31, 2010

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1. PURPOSE

This paper is intended to help the Recurrences Stakeholder Program Policy Working Group (RSPWG) understand the current environment related to the policy topic of Recurrences. The feedback received by the Workers' Compensation Board (WCB) from the RSPWG, as part of Stage 1 Program Policy Consultation in response to this paper, will assist us 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 regarding recurrences in order to develop appropriate and effective policy.

Considering the feedback from the RSPWG, the WCB will develop and distribute a draft program policy and background paper to key stakeholders and post the documents on the WCB website During Stage 2 Program Policy Consultation.

2. BACKGROUND

Policy Development

At the May 14, 2010 Board of Directors' meeting, the WCB Board of Directors approved "recurrences" as the next high priority policy issue for inclusion on the revolving program policy agenda. Policy development in this area complements the general entitlement policy framework established in 2009/10 including the recently approved program policies: *General Entitlement – Arising out of and in the Course of Employment* (September 2009); and *General Entitlement – Occupational Disease Recognition* (February 2010).

The topic of recurrences was originally identified as a high priority policy topic through the 2009 Program Policy Agenda Setting Process. Both stakeholders and the WCB raised issues that were linked, in part, to a lack of clarity about when an event/circumstance is a recurrence or a new injury¹ (which may be compensable or non-compensable). The *Act* and current policies address what the impact of a recurrence is on injured workers' benefits and employers' claim costs (See Appendix B for a summary of these policies). However, there is currently no general WCB program policy describing what a recurrence is, and how the WCB determines whether an event/circumstance is a recurrence or a new injury.

A policy outlining the factors to consider in determining whether an injury should be adjudicated as a recurrence, rather than a new injury, would round out the general entitlement policy development framework. The purpose of policy development on this topic would not be to change, expand or limit injured workers' entitlement to benefits or employers' costs. Rather it would provide decision-makers with principles to guide claim adjudication, and improve transparency and accountability of the WCB's decision making process.

¹ A new injury includes, for example, traumatic events, injuries that develop over a period of time and an aggravation, activation or acceleration of a disease or disability existing prior to the injury (which may be work or non-work related) arising out of and in the course of employment.

Description of Recurrence

In recent years significant progress has been made in reducing the number of workers injured on the job in Nova Scotia. In 2009, the number of serious workplace injuries fell below 8,000 for the first time in over a decade. When a worker does suffer a workplace injury, the WCB works with the worker, employer, unions, and service providers in championing a safe and timely return to work. Unfortunately, sometimes an injured worker may have a return of their compensable injury (in the form of increased disability or symptoms) after a period of recovery/stabilization and/or return to work. This may result in a need for further treatment and/or earnings replacement benefits². In these circumstances, the WCB generally considers the worker to be experiencing a “recurrence”.

The Workers’ Compensation Act and WCB Program Policy

Benefits and the adjudication of recurrences

Section 75 of the *Workers’ Compensation Act* (“the *Act*”) refers to a “recurrence of an injury” in the context of computing Temporary Earnings Replacement Benefits (TERB). The *Act* states:

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(1) Subject to subsection (2), where a temporary earnings-replacement benefit is payable, it shall be computed in accordance with Section 37.

(2) Where a temporary earnings-replacement benefit is payable as the result of a recurrence of an injury, compensation shall be computed and be payable from the day on which the loss of earnings resulting from the recurrence commences unless one year has elapsed since the workers temporary earnings-replacement benefit for the injury ended, in which case, subsection (1) applies.

Section 37 outlines how earnings loss benefits will be computed for workers who have a loss of earnings resulting from a workplace injury and is applied when a worker first experiences a compensable injury. Therefore, recurrences that take place more than one year after a worker stops receiving TERB are treated like a “new” injury for TERB calculation purposes. Specifically, S. 37 requires TERB be paid at a rate of 75% of net earnings loss for the first 26 weeks after the injury occurs, then increasing to 85% of net earnings loss. Section 37 also requires that eligible workers wait for two-fifths of a normal work week (often referred to as the “two-fifths waiting period”) before receiving TERB. For recurrences of less than one year from the last TERB end date, the two-fifths deductible is not applied and the previous TERB rate is applied for the purposes of the recurrence³. These requirements are reiterated in *Policy 3.2.2R1 – Waiting Period Without Compensation (Deductible)*.

² For example, a worker may require treatment for the recurrence of their compensable injury, but not suffer any earnings loss because they continued working at modified duties, or they were no longer working.

³ Other sections of the *Act* or program policy may be applicable, but are not limited to, injury recurrences. For example, S. 40(2) of *Act*, which specifies when the WCB may consider new earnings in calculating earnings loss benefits, is often applied where a

Entitlement to medical aid benefits for a recurrence is not specifically referenced in the *Act*. However, Section 102 (1) of the *Act* gives the WCB the authority to provide “to any worker entitled to compensation any medical aid the WCB considers necessary or expedient as a result of the injury”. This includes medical aid required as a result of the original compensable injury or as a result of a recurrence.

As well, the WCB has two policies that make specific mention of the adjudication of a recurrence. *Policy 1.1.3 – Claims Adjudication – Processing Continuing Claims* states that based on medical evidence, a flare – up of a condition for which the WCB has awarded a Permanent Medical Impairment (PMI) may be considered a recurrence and TERB paid to the worker. *Policy 1.1.1R - Back Injuries* states that, “Generally, recurrences of non-traumatic back injuries six months after the closing of a claim are considered a new injury”. The policy goes on to state “For disc cases, compensable recurrence after about one year is doubtful.”

Employer Costs and Re-employment Obligations

The *Act* does not specifically consider recurrences in relation to employers' claims cost/experience rating or re-employment obligations. However, the classification of an injury as a recurrence, or a new injury, may impact an employer's experience rating and their re-employment obligations.

Generally, the costs associated with a recurrence are assigned to the employer for whom the worker was working at the time of the original compensable injury. The WCB, under Section 121 of the *Act*, *Policy 9.3.1R - Classification, Rate Setting and Experience Rating Process* and *Policy 9.4.3R1- Data Used in Experience Rating*, bases employer assessments (in part) on injury experience. As part of experience rating, employers with better than average accident experience may receive merits (rate decreases), while employers with worse than average accident experience receive demerits (rate increases). The data used for determining a firm's experience rating includes the claims costs for a three-year period for all claims with accident dates during that period.

This generally means that, if a worker has a recurrence while working for a new employer within the three year period used for experience rating purposes, the costs will continue to impact the accident employer's experience rating. Alternatively, if it is found the worker has suffered a new compensable injury while working for the new employer, the new employer's experience rating may be impacted. This approach is also reflected in *Policy 9.6.3 - Apportionment of Claims Costs Under a Rehabilitation Program* which states that the costs of a recurrence that occurs while a worker is participating in a vocational rehabilitation program (e.g. On-the-Job Training, Employer Incentive Program) are to be the responsibility the original employer (the employer where the worker was working at the time of the original accident).

worker suffers a recurrence of their compensable injury. As well, S. 73A, stating that workers who are in receipt of an extended earnings replacement benefit may temporarily receive TERB, is often applicable to an injury recurrence.

Sections 89, 90 and 92 of the *Act* obligate some employers⁴ to re-employ an injured worker (who had been employed by the employer, at the date of the injury⁵, for at least twelve continuous months) for a period of two years after the date of the injury or until the worker turns 65 years old, whichever comes first. If an employer re-employs the worker in the last six months of the re-employment period, the obligation period (based on the original injury date) to re-employ the worker is extended 6 months from the date of the re-employment.

The determination of whether a worker has suffered a recurrence has an impact on an employer's re-employment obligation. If a worker is re-employed with the accident employer and subsequently suffers a recurrence, the obligation to re-employ (as reiterated in *Policy 5.2.2 Employer's Obligations Within the Re-Employment Period*⁶) and the length of the re-employment obligation is not impacted⁷. If, however, the worker suffers a new compensable injury with the same employer, a new re-employment obligation period is established for the new injury based upon the date of the new injury.

See Appendix A for relevant sections of the *Act*.

3. THE ISSUES

The following are the key points, problems, or opportunities identified to date that the WCB believes should be considered during the development of a recurrence policy:

1. The WCB is regularly required to decide if a worker has suffered a recurrence or a new injury. Adjudication of some recurrences can be complex and require consideration of a number of factors (e.g. intervening incidents, multiple previous claims).

Determining whether a worker has suffered a recurrence, a new compensable injury, or a non-work related injury can be challenging. For example, sometimes a new intervening incident has occurred affecting the same body part as the compensable injury. The adjudication of these circumstances can be particularly challenging because the WCB must decide if the worker has suffered a recurrence, a new compensable injury, or a new non-compensable injury. This includes considering if the incident was enough, on its own, to have resulted in an injury.

A number of workers have had multiple separate compensable injuries (sometimes with various employers) over the years. Where a recurrence is suspected, it can be challenging to determine which injury is the source of the recurrence. This is further complicated when a new

⁴ Re-employment obligations do not apply to employers who regularly employ fewer than twenty workers, those that are exempted by regulation by reason of the nature of the industry, or the construction industry (S. 89 of the *Act*).

⁵ For the purposes of the re-employment provisions only, the WCB considers the date of injury to be the date the time loss commences (*Policy 5.2.1 - Determination of Date of Injury for Purposes of Re-Employment*)

⁶ Policy 5.2.2 – Employer's Obligations Within the Re-Employment Period clarifies an employer's re-employment obligations by specifying that where a worker, who continues to be employed by the accident employer, suffers a recurrence within the re-employment period, the accident employer is bound by the re-employment provisions.

⁷ The length of the re-employment period is not extended where a worker suffers a recurrence after being re-employed within the last 6 months because the extension of the re-employment period is based upon the injury date and the date the worker is re-employed, not the date of any subsequent recurrence of the compensable injury.

intervening incident has occurred introducing the possibility that the worker has suffered a new injury.

A policy that defines a recurrence and outlines the key considerations for distinguishing it from a new injury will support WCB staff in making the right decision the first time.

2. Stakeholders have identified concerns and issues linked to the need for clear and transparent adjudicative principles for determining when a recurrence has taken place.

Some injured worker and employer stakeholders have stated there is a lack of clarity and consistency in WCB decisions about the impact of a recurrence (or a new injury) on an employer's re-employment obligations. Some injured worker stakeholders have identified a need for more clarity and transparency about how the WCB determines if a worker has suffered a new injury or a recurrence.

Policy development on the topic of recurrences will contribute to discussion, clarity, consistency, and transparency related to how the WCB determines whether a worker has suffered a recurrence. Further, it should also clarify the impact of recurrences on an employer's re-employment obligations.

3. Getting to the right decision the first time is important because recurrences and new injuries have different impacts on employer costs and injured worker entitlement to, and level of, benefits and services.

It is important to employers that recurrences and new injuries be correctly classified so that an employer's experience rating is appropriately impacted and costs are assigned to the right employer. For example, if a worker returns to work with the same employer and has a recurrence and the original accident date is outside the three-year period used to calculate injury experience, the recurrence will not have an impact on the employer's cost experience for the purposes of experience rating. However, if it is found (for the same event/circumstance) the worker suffered a new injury with the same employer, a new injury date is established and the costs associated with the injury will impact the employer's cost experience for three years.

Like employers, decisions related to recurrences have financial impacts on injured workers. For example, injured workers who suffer a recurrence within one-year of returning to work are not subject to the requirements S. 37 of the *Act* (e.g. the two-fifths waiting period). However, if it is determined they suffered a new compensable injury, the S. 37 requirements would be applied. Another example is where the worker was at home at the time of the event/circumstances. A finding that the worker suffered a recurrence means they are eligible for WCB medical aid and potentially TERB. However, if it found they suffered a new non-compensable injury at home they would generally not be eligible for WCB benefits or services in relation to that injury.

4. JURISDICTIONAL INFORMATION

Legislation

The legislative frameworks across Canada consider “recurrences” in a variety of ways. Like NS, four jurisdictions (NB, NF, SK, and YK) speak to a “recurrence of an injury” in their legislation. The legislation of AB, BC, and NT/NU refers to a recurrence of disability due to the same injury or accident. In MB, ON, and PEI the term “recurrence” is not specifically used in the legislation. Instead, the legislation provides direction where a worker experiences a further earnings loss (or loss of earning capacity). In QC the reference is to as “an aggravation consequent upon a worker's accident”.

In all of the jurisdictions, the primary focus in the legislation (including NS) is establishing the amount of (or entitlement to) earnings loss benefits a worker will receive if they have a recurrence and/or subsequent loss of earnings due to a previous injury/accident.

Policy

Most jurisdictions rely on program policy to define and provide guidance⁸ in the adjudication of recurrences. All jurisdictions with an explicit definition of “recurrence” generally describe it as a return (in some manner) of the original compensable injury. The definitions of “recurrence” vary from very general (NB) to very specific (SK). However, those jurisdictions that provide guidance in policy on the adjudication of injury recurrence use similar factors/considerations when determining if a worker has suffered a recurrence.

The following are key points in the policy definitions across jurisdictions:

- MB, SK, and NF specify that the worker must suffer increasing disability, be disabled again, or suffer disabling symptoms, respectively. In BC a recurrence is when the injury occurs again.
- AB⁹, MB, and PEI specify in their definitions that there must be clinical/medical compatibility between the original compensable injury and the recurrence.
- In BC and NB’s definitions, a recurrence is when there is “no intervening” incident or it is “not a new injury”.
- Several jurisdictions specify the strength of the relationship between the recurrence and the original compensable injury. In AB, MB, NB, NF, and YK the recurrence must be directly related to the original injury. In PEI it must be reasonably related.
- Some jurisdictions require the worker to have recovered/stabilized or returned to work at the time symptoms reappear or disability increases for an event/circumstance to be considered a recurrence:

⁸ AB,BC,MB,NF,ON,PEI define and provide adjudication criteria for recurrences in policy. SK and YK define the term, but do not provide adjudicative guidance or criteria in policy.

⁹ AB also specifies that the resulting disability is temporary in nature.

- AB and BC specify the return of disabling symptoms/increasing disability must occur after the original injury had resolved or stabilized.
- YK requires the worker to have reached Maximum Medical Recovery (MMR).
- SK requires the worker to have returned to full employment.
- In NF a return of disabling symptoms must result in a loss of earnings capacity.

It is important to note that simply because a worker's circumstance does not meet the definition of "recurrence" in a specific jurisdiction does not mean they are not eligible for WCB benefits or services. Rather it generally means their circumstance would not be treated as a recurrence for the purpose of calculating earnings loss benefits.

There is consistency in the policy approach taken by those jurisdictions that have included the factors/considerations to be applied when adjudicating a recurrence. The following factors/considerations are generally used to determine if a worker has suffered a recurrence:

- Presence of a new incident/accident that was capable of causing an injury on its own. If this is the case, most jurisdictions would classify it as a new injury.
- Medical compatibility between the current difficulties/symptoms and the original compensable injury. For example, is the same body part or function affected? Has there been a significant change in function since the original injury?
- Continuity of symptoms. Has there been continuing medical care since the original injury? Was the worker's job modified to accommodate them? Did they have work restrictions? Were there demonstrated on-going symptoms?
- Passage of time. Has a significant period of time passed where the worker's condition had stabilized? If so, other causes for the current condition are often considered. This includes pre-existing conditions, natural ageing, or aggravating lifestyle factors.

5. CURRENT PRACTICE

Over the years the WCB (supported by best practice in other Canadian WCBs, writers in the field of workers compensation such as Terrance Ison, and WCAT decisions) has developed a working definition of a recurrence, methods for identifying potential injury recurrences, and criteria/consideration for determining if a worker has suffered a recurrence of a compensable injury or a new injury.

Description of injury recurrence

As noted, the WCB generally considers a compensable recurrence to be the return of a worker's compensable injury (in the form of increased disability or symptoms) after a period of recovery/stabilization and/or return to work. This may result in a need for further treatment and/or earnings replacement benefits¹⁰. Additionally, a recurrence may occur during employment, or outside the employment circumstances (e.g. at home). It is the potential

¹⁰ For example, a worker may require treatment for the recurrence of their compensable injury, but not suffer any earnings loss because they continued working at modified duties, or they were no longer working.

recurrence's connection to the original compensable injury, not the employment¹¹, which is crucial in determining if an injury recurrence has occurred.

The WCB's working definition of injury recurrence is generally consistent with the approach taken by the Nova Scotia Workers' Compensation Appeals Tribunal (WCAT) in recurrence related decisions, and experts in the field of workers' compensation. In fact, WCAT has consistently referenced¹² Terrence G. Ison, in *Workers' Compensation in Canada*, when tasked with deciding if a worker has suffered an injury recurrence. Ison describes a recurrence as follows:

...the word "recurrence" usually refers to the situation where a worker returns to work following a compensable injury or disease and subsequently suffers a temporary or permanent disablement as a result of the same injury or disease... A recurrence may be an event within or outside the course of employment...A recurrence of a compensable disability usually entitles the worker to a revival of wage loss benefits, medical aid, and rehabilitation assistance if required. It is irrelevant whether the worker was employed or unemployed at the time of the recurrence.

Identifying a potential recurrence

Typically, the WCB becomes aware that a claim may be a recurrence in one of three ways: 1) an Accident Report is submitted; 2) the WCB is contacted by the worker or employer and informed a recurrence has occurred; or 3) the worker's healthcare professional (e.g. family physician or physiotherapist) contacts the WCB to report new findings on behalf of the worker. The following describes these three situations:

- 1) Accident report. Sometimes a new Accident Report is submitted by the employer noting the worker has "had a recurrence" at the workplace. The WCB would seek details of the circumstances (e.g. was there an incident?) as well as review the medical information to confirm if in fact a recurrence has occurred. In other cases, an Accident Report for a "new injury" is submitted. However, upon review of the worker's information on WCB systems it may be discovered they have had an injury to the same body part (and sometimes a PMI for that body part). This is a "trigger" for the WCB to consider if the incident was a new injury or a recurrence.
- 2) Conversations with the worker or employer. In many instances the WCB will be contacted by the worker or employer who will inform the WCB that they are experiencing an increase in symptoms or disability. As is the case with notification through an injury report, the WCB will seek details on the circumstances and usually obtain new medical information to determine whether a recurrence has occurred.

¹¹ The original compensable injury would have previously satisfied the requirement to have arisen out of and in the course of employment as required by S. 10(1) of the Act. It is not necessary for an injury recurrence to meet the 10(1) requirement again.

¹² Ison's definition of recurrence is referenced in many WCAT decision. These include: 97-497-AD, 96-252-TAD, 99-595-AD, 2000-70-AD, 2002-326-AD, 2003-223-AD, 2006-718-AD, 2006-561-AD, 2008-638-AD, 2008-450-AD, 2009-173-AD, 2008-729-AD, 2007-279-AD, 2009-370-AD.

- 3) The worker's healthcare professional. Upon review of test results or during an examination, a worker's healthcare professional may identify symptoms, functional changes, or a condition they believe could be a recurrence. The healthcare professional will often then contact the WCB and report these findings on behalf of the worker. The WCB will review the information and seek further information if required and then make a determination.

Distinguishing between a recurrence and a new injury

Generally, the factors the WCB considers in determining whether a worker has suffered a recurrence are the same as those used by WCAT (and many other Canadian jurisdictions) and are taken from text by Douglas G. Gilbert, John Mastoras, L.A. Liversidge, *A guide to Workers' Compensation in Ontario*¹³. The factors that generally support a conclusion that a recurrence has occurred are:

- The worker experienced ongoing problems after returning to employment and communicated these problems to supervisors and/or co-workers.
- The worker sought continuing medical attention.
- The worker could not return to regular employment and was given modified duties.
- The diagnosis established at the time of the recurrence(s) is medically compatible with the original diagnosis.

It is not necessary for a particular circumstance to meet all of the factors listed to be considered a recurrence. In some instances a particular factor (or combination of factors) may take precedence. Where the WCB has ruled out the possibility that a recurrence has taken place, Policy 1.3.7 *General Entitlement – Arising out of and in the Course of Employment* and the relevant sections of the *Act* are considered. As is always the case, each claim is considered on its own merits and a decision made after considering and weighing the evidence to determine whether a new injury has occurred.

¹³ p.198. These factors are referenced in a number of WCAT decision including those referenced in relation to Ison's definition of recurrence. Others include: 99-321-AD, 2000-284-AD, 2005-87-AD, 2005-270-AD, 2006-529-AD, 2007-389-AD, 2008-638-AD, 2008-450-AD, 2009-173-AD, 2009-75-AD, 2008-729-AD, 2007-279-AD, 2009-370-AD.

PROVIDING YOUR COMMENTS

We look forward to discussing the information presented in this paper with the RPSWG. **In particular, we encourage you to consider whether there are any additional issues you would like to see addressed as the WCB considers the policy issue of Recurrences.**

If you have any questions prior to the RPSWG meeting (date and location to be determined) please feel free to contact me.

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Appendix - A

Relevant/Related Sections of the *Nova Scotia Workers' Compensation Act*

Earnings-replacement benefit

37 (1) Where a loss of earnings results from an injury, an earnings-replacement benefit is payable to the worker in accordance with this Section.

.....

(3) The amount of any earnings-replacement benefit payable to a worker after the worker has received compensation pursuant to subsection (2) for a total of twenty-six weeks is the difference between

(a) an amount equal to eighty-five per cent of the worker's loss of earnings; and
(b) the amount of any permanent-impairment benefit payable to the worker pursuant to Section 34.

(4) Notwithstanding subsection (1), the Board shall not pay compensation pursuant to subsection (1) until the worker who is injured is unable to continue to work with the employer for whom the worker was working when the injury occurred for a period of time during which the worker would have received remuneration from that employer equivalent to two fifths of the worker's net average weekly compensation.

(5) The Board shall not pay compensation to a worker in respect of the period of time referred to in subsection (4) except as provided for in subsection (6).

(6) Where a loss of earnings results from an injury for more than five weeks, the Board shall pay to the worker the amount deducted pursuant to subsection (4).

.....

(11) The loss of earnings referred to in subsection (1) shall be calculated in accordance with Section 38.

Relevant times

40 (1) Subject to subsections (2) and (3), a workers net average earnings and maximum earnings are the workers net average earnings and maximum earnings as of the date of injury.

(2) Where a workers loss of earnings resulting from an injury has ended, and the worker subsequently suffers a loss of earnings

(a) resulting from the same injury; and
(b) the subsequent loss of earnings occurs more than twelve months after the initial loss of earnings has ended,

the workers net average earnings and maximum earnings are

(c) the workers net average earnings and maximum earnings before the initial loss of earnings;
or

(d) the workers net average earnings and maximum earnings at the time of the subsequent loss of earnings,

whichever appears to the Board to best represent the actual loss of earnings suffered by the worker by reason of the injury.

.....

Effect of certain losses of earnings

73A (1) Notwithstanding Section 73, where a worker who is receiving an extended earnings-replacement benefit suffers a loss of earnings that

- (a) is temporary;
 - (b) results from the injury for which the extended earnings-replacement benefit is being paid;
 - and
 - (c) was not taken into account in the most recent setting or review of the extended earnings-replacement benefit,
- the Board may pay to the worker a temporary earnings-loss supplement.
- (2) A temporary earnings-loss supplement shall be calculated in accordance with Sections 37 to 49.

Computation and payment of benefit

75 (1) Subject to subsection (2), where a temporary earnings-replacement benefit is payable, it shall be computed in accordance with Section 37.

(2) Where a temporary earnings-replacement benefit is payable as the result of a recurrence of an injury, compensation shall be computed and be payable from the day on which the loss of earnings resulting from the recurrence commences unless one year has elapsed since the workers temporary earnings-replacement benefit for the injury ended, in which case, subsection (1) applies.

.....

RE-EMPLOYMENT

Application and interpretation of Sections 90 to 101

89 (1) Sections 90 to 101 do not apply to

- (a) any employer that, in the opinion of the Board, regularly employs fewer than twenty workers or such other number of workers less than twenty as the Board may prescribe by regulation;
- (b) any class or ~~sub-class~~ [subclass] of employers or workers exempted by the Board by regulation by reason of the nature of the industry; or
- (c) the construction industry, unless included by the Board by regulation.

(2) Sections 90 to 101 apply only to injuries occurring on or after the coming into force of Sections 90 to 101.

(3) For the purpose of Sections 90 to 101,

- (a) "alternative employment" means employment that is comparable to the workers pre-injury work in nature, earnings, qualifications, opportunities and other aspects;
- (b) "suitable work" means work which the worker has the necessary skills to perform, is medically able to perform and which does not pose a health or safety hazard to the worker or any co-workers.

Duty to re-employ

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

- (a) has been unable to work as a result of the injury; and
- (b) had been employed by the employer, at the date of the injury, for at least twelve continuous months.

Duration of duty

92 (1) Subject to subsection (2), an employer is obligated pursuant to Sections 89 to 101 until the earlier of the day that

(a) is two years after the date of the injury to the worker; or

(b) the worker attains the age of sixty-five years.

(2) Where an employer re-employs a worker pursuant to Sections 89 to 101 less than six months before the time described in clause (1)(a), the employer is obligated, pursuant to Sections 89 to 101, for six months after the date of re-employment.

Medical aid

102 (1) The Board may provide for any worker entitled to compensation pursuant to this Part, or any worker who would have been entitled to compensation had the worker suffered a loss of earnings equivalent to the amount determined pursuant to subsection 37(4), any medical aid the Board considers necessary or expedient as a result of the injury.

.....

121 (1) The Board may establish rates of assessment among any class or subclass and where, in the opinion of the Board, the record, risk, cost or experience in any class or subclass over a period of time determined by the Board differs from the average in other classes or subclasses, the Board may

(a) confer or impose a special rate, differential or assessment to correspond with the relative hazard of the class or subclass; and

(b) adopt a system of rating to take into account the relative costs of claims of the class or subclass.

(2) Where, in the opinion of the Board, the record, risk, cost or experience of injuries among the workers of an employer is better than the average among the workers of other employers in the same class or subclass over a period of time determined by the Board, the Board may

(a) reduce the amount of any assessment made upon that employer; or

(b) refund a portion of any assessment paid by that employer.

(3) Where, in the opinion of the Board, the record, risk, cost or experience of injuries among the workers of an employer is worse than the average among the workers of other employers in the same class or subclass over a period of time determined by the Board, the Board may

(a) increase the amount of any assessment made upon that employer; or

(b) make a special additional assessment upon that employer.

(4) In determining the record, risk, cost and experience of an employer, the Board may deem the cost of any compensation payable as the result of a worker's death to be the average cost of fatal injury claims in the previous year.

(5) Where, in the opinion of the Board, sufficient precautions have been taken for the prevention of injuries to an employer's workers, the Board may reduce the amount of any assessment for which the employer is liable.

(6) Where, in the opinion of the Board, sufficient precautions have not been taken for the prevention of injuries to an employer's workers, the Board may increase the amount of any assessment for which the employer is liable.

(7) The Board shall, on or before January 1, 1996, establish and implement an experience rating program for the purpose of subsections (1) to (4) that relates an employers assessment to the factors described in those subsections.

Appendix – B

Summary of Recurrence Related Policies

Policy 1.1.1R - Back Injuries

This policy provides guidance on the adjudication of back injuries as well as recurrence of back injuries. Specific references to recurrences are:

- Where there is a history of traumatic back injury, subsequent recurrences due to the accident/injury are compensable.
- Generally, recurrences of non-traumatic back injuries beyond six months after the closing of a claim are considered a new injury.
- For disc cases, compensable recurrence after about one year is doubtful.
- In the event of a permanent impairment case, further difficulty, particularly if disc surgery is involved, may warrant a reopening of the claim and further temporary earnings replacement considered on the basis of medical evidence.

Policy 1.1.3 - Claims Adjudication – Processing Continuing Claims

This policy states that claims that have been closed based on current information and medical reports may be reopened if there are subsequent reports of disability. It also states that based on medical evidence, a flare – up of a condition for which the WCB has awarded a permanent medical Impairment (PMI) may be considered a recurrence and TERB paid to the worker.

Policy 3.1.1R2 - Calculation of Gross Earnings

Section 16 of this policy reiterates S, 40(2) of the *Act* and states, where there is a recurrence of a loss of earnings from an injury more than 12 months after the end of the original earnings loss of earnings from that injury, the worker's average earnings for purposes of the recurrence shall be based on the worker's average earnings before the original loss of earnings, or the worker's average earnings before the recurrence of the loss of earnings, whichever appears to the Board to best represent the worker's actual loss of earnings from the injury.

Policy 3.2.2R1 - Waiting Period Without Compensation (Deductible)

This policy reiterates S. 75 of the *Act* and states that, in the case of a recurrence of an injury, a waiting period will not apply if the recurrence occurs within one year of the worker last receiving a TERB.

Policy 5.2.2 - Employer's Obligations Within the Re-Employment Period

This policy clarifies an employer's re-employment obligations by specifying that, where a worker who continues to be employed by the accident employer suffers a recurrence within the re-employment period, the accident employer is bound by the re-employment provisions.

Policy 9.3.1R - Classification, Rate Setting and Experience Rating Process

This policy describes the process for classifying employers and setting assessment rates, including the experience rating process. Experience Rating is a program, designed to be revenue neutral, which adjusts employer rates on the basis of the comparison of their accident experience (cost to payroll ratio) to the average accident experience of the rate group over a period of three years. Employers with better than average accident experience may receive merits (rate decreases), while employers with worse than average accident experience receive demerits (rate increases).

Policy 9.4.3R1 – Data Used in Experience Rating

This policy provides that the data used for determining a firm's experience rating includes the claims costs over a period of three consecutive calendar years for all claims with accident dates during that period.

Policy 9.6.3 - Apportionment of Claims Costs Under a Rehabilitation Program

The WCB, as part of efforts to return a worker to the workforce, sometimes places workers in Vocational Rehabilitation (VR) programs (e.g. On-the-Job Training, Employer Incentive Program). This policy specifies how claims costs will be apportioned where a worker has a recurrence while participating in a VR program. Specifically, the policy states:

- A recurrence is a situation where a worker who has previously suffered a loss of earnings and returns to work suffers a subsequent loss of earnings from the same injury.
- The costs of a recurrence that occurs while a worker is participating in a VR program are to be the responsibility of the original employer.
- The original employer is the employer where the worker was working at the time of the original accident.