



## **Recurrence of Compensable Injury:**

### **Final Program Policy Decision and Supporting Rationale**

**Date: March 19, 2012**

## **I - Introduction:**

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<sup>1</sup>. Policy development in this area completes work on the high-level general entitlement policy framework initiated in 2009/10 including the recently approved program policies: *General Entitlement – Arising out of and in the Course of Employment* (September 2009); *General Entitlement – Occupational Disease Recognition* (February 2010); and *Medical Aid – General Principles* (February 2011).

Stage 1 consultation on this program policy topic took place on January 27<sup>th</sup>, 2011. In accordance with the WCB's program policy consultation process, Stage 1 consultation occurred by way of a small stakeholder working group. At the September 21<sup>st</sup>, 2011 Board of Directors' meeting, members agreed to initiate Stage 2 consultation with stakeholders on the proposed new draft program policy. On September 29<sup>th</sup>, 2011, the document entitled "*Program Policy Background Paper: Recurrence of Compensable Injury*" 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 31 days. The deadline for submissions was October 31<sup>st</sup>, 2011. The WCB received 4 submissions in total from stakeholders offering input on the proposed draft new program policy. Submissions were received from injured worker and labour stakeholders as well as the Office of the Worker Counsellor.

The Issues Clarification Paper and Policy Background Paper can be found on the WCB website at [www.wcb.ns.ca](http://www.wcb.ns.ca).

On March 15<sup>th</sup>, 2012 the WCB Board of Directors approved a new program policy "*Recurrence of Compensable Injury*" after considering input received from stakeholders and making revisions to the policy to improve clarity and transparency. Please see Appendix C 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 "*Recurrence of Compensable Injury*", in response to stakeholder submissions received as a result of Stage 2 consultation;
- a summary of feedback received during Stage 2 consultation (see Appendix A);
- the changes made to the program policy in response to stakeholder feedback (see Appendix B); and

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<sup>1</sup> In setting the program policy agenda, the Workers' Compensation Board of Nova Scotia (the "WCB") undertakes a program policy issue identification process. This process involves the identification of program policy issues where the development of new and/or the revision of existing program policy statements will improve consistency in decision making and/or assist the WCB in achieving its corporate/system goals. Program policy issues are identified through a number of sources including stakeholder input, our Workplace Safety and Insurance System (WSIS) partners: the Workers' Advisers Program (WAP), the Workers' Compensation Appeals Tribunal (WCAT) and the Occupational Health and Safety Division (OHS), WCB departments, and the content of the WCB corporate business plan.

- the WCB's final policy decision as reflected in the final version of the program policy in Appendix C.

## **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 recurrences program policy to reflect this input. The key issues identified (and the WCB's response) have been grouped according to the draft program policy section to which they pertain, with the addition of a section entitled "General" that contains feedback that is general in nature. The WCB received 4 submissions in total from stakeholders offering input on the proposed draft new program policy. For a detailed overview of input received from stakeholders, please see Appendix A - Recurrence of Compensable Injury: Stage Two Consultation Summary.

### **◀General**

*#1. There is nothing wrong with the way the WCB currently adjudicates recurrences. Injured worker circumstances will not improve with a new policy. It will result in confusion for case workers, changes the criteria for the medical profession, and causes stress and delays in the receipt of WCB benefits for injured workers that negatively impacts their families.*

#### **Analysis:**

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 during consultations undertaken as part of the policy issue identification process that were linked, in part, to a lack of clarity about when an event/circumstance is a recurrence or a new injury (which may be compensable or non-compensable). The WCB believes the new recurrences program policy will contribute to improved transparency, accountability, and consistency in the decision-making process. The criteria/factors to guide claim adjudication that are included in the draft policy are currently applied by WCB decision makers and are reflective of those commonly considered by the WCAT.

Health care professionals (including physicians) play a key role in WCB efforts to facilitate a safe and timely return to work for those injured on the job. WCB decision makers seek medical opinions and information to support claim adjudication and make the right decision. However, medical professionals do not apply WCB policy and law. Rather, they provide their professional opinion regarding whether a worker's current symptoms may be caused by the compensable injury. The WCB decision maker will then consider the medical opinion (and all other relevant information), apply the policy, and make a decision.

## ◀Preamble

*#2. The Preamble should clearly state as indicated in the Background Paper that the purpose of the policy is not to change, expand or limit the existing criteria for determining if a worker has had a recurrence of their original compensable injury, but to clarify the criteria/factors to guide adjudication and to improve transparency and accountability.*

### **Analysis:**

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 policy includes 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 recurrences policy.

## ◀Definitions

*#3. Insert the following statement in the definition of “recurrence of compensable injury”:*

*A recurrence of an injury can occur while the worker is at work, not at work, participating in a Board sponsored return to work or while undergoing active medical treatment.*

### **Analysis:**

The definition of recurrence in the policy states:

"recurrence of compensable injury" is the return of, or increase in, clinically demonstrated disability or symptoms that are<sup>2</sup> caused by the compensable injury ~~the~~ after the<sup>3</sup> worker has reached maximum medical recovery; the worker has returned to work; and/or the worker suffers a further injury, condition, or disablement caused by, and considered part of, the compensable injury.

The WCB agrees that the physical location of a worker, when they experience the return of, or increase in, disability or symptoms, does not determine whether or not they have experienced a recurrence of their compensable injury. This is addressed by the requirement that disability or symptoms be caused by the compensable injury. Ultimately, evidence of medical compatibility (potentially supported by continuity) will determine whether or not a worker has experienced a recurrence. As part of the adjudication of a recurrence claim, the WCB would consider any relevant information related to the circumstance of the recurrence. This may include, for example, the location of the worker and/or their actions activities at the time of the recurrence. The WCB does not believe it is necessary to include a reference to the location of the worker when they experience a recurrence in the definition.

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<sup>2</sup> The words “that are” have been added for clarity.

<sup>3</sup> The word “the” was misplaced in the definition and has been corrected.

**#4.** *The definition of “maximum medical recovery” should include not just the opinion of the WCB but also the opinion of the worker’s own doctor.*

**Analysis:**

As set out in the *Act*, the WCB has the responsibility for making all claim related decisions. Therefore, it would not be appropriate to indicate in policy that a person/s other than the WCB has decision making capacity. To inform the decision making process, the WCB gathers evidence that may include medical/health care reports from a variety of health professionals including general practitioners, physiotherapists, medical specialists, WCB medical advisors, and others. Ultimately, the WCB weighs all the evidence on file and determines if a worker has reached maximum medical recovery.

**#5.** *In the definition of “recurrence of compensable injury”, we are concerned about the use of the terms “clinically demonstrated” and “caused by the compensable injury”. We think they might limit the possibility of the determination of a recurrence.*

**Analysis:**

The definition of “recurrence of compensable injury” states it is:

“the return of, or increase in, clinically demonstrated disability or symptoms that are caused by the compensable injury after the worker has reached maximum medical recovery; the worker has returned to work; and/or the worker suffers a further injury, condition, or disablement caused by, and considered part of, the compensable injury.

The WCB currently requires an injured worker to provide medical evidence to support (clinically demonstrate) the existence of the symptoms/disability the worker is experiencing and believe is caused by the compensable injury. Further, as raised in stakeholder issue #6 and noted in the WCAT decisions referenced, when adjudicating a recurrence the WCB must decide if the symptoms/disability the worker is experiencing is caused by the compensable injury. Including these concepts in the definition does not change or limit what is, or is not, considered a recurrence. Rather, the WCB believes it improves transparency, accountability, and consistency in the decision-making process.

## ◀Section 1. Overview

**#6.** *This section should explicitly refer to the WCAT “but for”, common sense approach to infer causation. The worker does not have to prove causation with absolute, scientific certainty. This might especially be used when it is difficult to make a determination based on medical compatibility or continuity.*

*The texts noted in the background paper and the factors/criteria noted have been considered by WCAT many times. However, the members of the WCAT have repeatedly determined they are not a substitute for the decision making of the Board*

*staff. The policy should encourage continued appropriate decision making by Board staff, guided by the decisions of the WCAT, and the courts<sup>4</sup>.*

### **Analysis:**

The WCB agrees that the basic test for causation is the “but for” test<sup>5</sup>, and the recurrences policy in no way changes this test. The “but for” test for causation is central in determining causation – both at the initial entitlement stage and when determining whether a worker has experienced a recurrence. In determining causation, it must be established that it is as likely as not that “but for” the compensable injury, the worker would not be experiencing the current return of, or increase in, symptoms/disability. The factors listed in the policy help guide the WCB decision maker in considering the evidence and determining if the causation test has been met. The causation test and the factors in the policy are not interchangeable. Rather, the factors in the policy provide a framework for deciding whether or not the causation test has been met.

A review of the decisions cited in the stakeholder submission support this approach. WCAT repeatedly notes that the test for causation is “but for” (or “material contribution” where “but for” is unworkable). However, the decisions typically go on to state that factors related to continuity and medical compatibility are “relevant when assessing whether a prior injury has recurred”.

### **# 7. Insert the following statement in Section 1. Overview:**

*The Board shall adjudicate each claim on an individual basis and make determinations based upon the real merits of each claim. The adjudicative factors identified in this policy are not an exhaustive list and must be considered only as a guideline in determining whether the current disability is a new injury or a recurrence.*

### **Analysis:**

The WCB agrees that decision makers are required by the *Act* to make decisions based upon the real merits and justice of the case. That is, they must apply law and policy to the facts of an individual claim. The new recurrences policy does not limit a decision maker’s ability to consider information/evidence/factors other than those referenced in the policy where the facts of an individual claim indicate it is necessary. Rather, the policy provides a framework (based on generally accepted practice and WCAT decisions) for recurrence decision making. To clarify this, the following changes have been made to the policy:

### **Preamble**

The purpose of this program policy is to outline the factors ~~that will be~~ considered by the WCB when determining if the evidence supports a finding that a worker

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<sup>4</sup> The stakeholder submission references a series of decisions by WCAT (2005-77-AD, 2010-632-A, 2010-458-AD-R, 2009-844-AD, 2009-769-AD, 2009-844-AD).

<sup>5</sup> In special circumstances, there are exceptions to the basic “but for” test where it is impossible for the worker to prove that the original compensable injury caused the chronic pain using the “but for” test. The impossibility must be due to factors that are outside the worker’s control. In these limited circumstances, the “material contributing” factor test is to be applied.

has suffered a recurrence of their compensable injury. Where it is determined a worker has suffered a recurrence of their compensable injury, they may be eligible to receive benefits and services as provided for in the Workers' Compensation Act ("the Act").

### **Medical compatibility**

~~In particular, the WCB considers:~~ In particular, in gathering and weighing evidence of medical compatibility to determine if a worker has suffered a recurrence of their compensable injury, the WCB considers a series of questions that may include, but is not limited to, the following:

## **◀Section 2. Intervening event**

*#8. It is not clear why it might be determined that disability or symptoms caused by an intervening event would have to be automatically considered to be a new compensation claim and not a recurrence.*

### **Analysis:**

The WCB agrees that the current phrasing may not capture the original intent of the section. Where there is evidence a worker has experienced an intervening event or exposure (e.g. a trip and fall) the WCB considers whether or not the symptoms are a result of the compensable injury or the intervening event or exposure. Where the evidence suggests the intervening event is substantial enough to have caused an injury on its own, the WCB will apply Policy 1.3.7 General *Entitlement - Arising out of and in the Course of Employment* and determine whether the worker has suffered a new injury caused by an accident arising out of and in the course of employment. If this is the case, a new claim will be registered.

The consideration of whether a worker has experienced an intervening event or exposure is part of the determination of medical compatibility and the WCB believes it is better positioned as one of the considerations in Section 3. Therefore, it has been added to the list of considerations for medical compatibility, removed from Section 1. Overview, and Section 2. Intervening event has been deleted. As well, the WCB has further clarified, that the WCB may collect, where appropriate, information about the circumstances of the return of, or increase in, disability or symptoms. The changes are as follows:

### **1. Overview**

Generally, in determining whether a worker has suffered a recurrence of the compensable injury, the WCB considers whether:

- ~~a) there has been an intervening event that may have, by itself, caused a new injury;~~
- ~~b) there is medical compatibility between the compensable injury and the current return of, or increase in,~~<sup>6</sup> disability or symptoms.

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<sup>6</sup> To improve clarity and readability, the phrase "return of, or increase in" has been added before the phrase "disability or symptoms" throughout the policy as reflected in the definition of recurrence.

## **2. Intervening event**

~~Where disability or symptoms are caused by an intervening event(s), activity or exposure which, by itself, may have caused a new injury, the WCB will adjudicate the claim as a new accident. The WCB will apply *Policy 1.3.7 General Entitlement - Arising out of and in the Course of Employment* and a decision will be made concerning whether any injury(s) resulting from the new accident are work-related. If the injury is work-related, a new compensation claim will be registered.~~

## **3. Medical Compatibility**

To establish medical compatibility, the current return of, or increase in, disability or symptoms must result from, ~~and be consistent with,~~ the compensable injury. In determining medical compatibility, the WCB ~~will compares~~ the worker's current medical diagnosis to the diagnosis of the compensable injury (using, but not limited to, medical opinions, the worker's medical history, information collected about the circumstances of the recurrence claim and medical/scientific literature). ~~In particular, the WCB considers:~~ In particular, in gathering and weighing evidence of medical compatibility to determine if a worker has suffered a recurrence of their compensable injury, the WCB considers a series of questions that may include, but is not limited to, the following:

- a) has the worker experienced an intervening event or exposure that may have caused the current disability or symptoms?
- b) are whether the parts of the body affected now are the same as, or related to, those affected initially?
- c) are whether the body functions affected now the same as, or related to, those affected initially?
- d) is the degree to which body functions are affected now ~~is~~ similar when compared to the affect of the compensable injury?
- e) what was the nature of, and medical prognosis for, the compensable injury?

**#9.** *Insert the underlined phrase in Section 1 Overview and Section 2. Intervening event.*

*Where disability or symptoms are caused by an intervening event(s), activity or exposure which, by itself, may have caused a new injury or aggravation on its own, the WCB will adjudicate the claim as a new accident.*

### **Analysis:**

As noted earlier, the WCB recognizes that the intervening event statement may not have captured the original intent of the section. As a result, the statement has been revised and relocated in the policy. Overall, the WCB interprets the intent of the recommended change above to be to ensure that it is clear that an aggravation of a pre-existing condition can be a compensable injury. The WCB believes this is sufficiently addressed in *Section 4 of Policy 1.3.7 - General Entitlement - Arising out of and in the Course of Employment*<sup>7</sup>. The WCB does not believe it is appropriate or necessary to repeat the section in the recurrences policy.

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<sup>7</sup> Section 4. of Policy 1.3.7 - General Entitlement - Arising out of and in the Course of Employment states:



### ◀Section 3. Medical compatibility

**#10.** *The description of this factor was confusing and open to possible misinterpretations. For example, why should the current disability and symptoms have to result from and also, be consistent with, the original compensable injury?*

#### **Analysis:**

The WCB agrees it is redundant to require current symptoms or disability to both result from, and be consistent with, the compensable injury. If the current symptoms or disability result from the compensable injury, it follows that they are also consistent with the compensable injury. Therefore, the WCB has removed the requirement for the symptoms or disability to be consistent with the compensable injury. This is implicit in a finding that the current symptoms or disability resulted from the compensable injury. Specifically, the following changes have been made to the policy:

To establish medical compatibility, the current return of, or increase in, disability or symptoms must result from, ~~and be consistent with,~~ the compensable injury.

To improve readability and maintain consistency with other entitlement, principle based policies, the WCB has changed the phrasing of the items considered in Section 3. Medical compatibility from statements to questions. The substance of the items has not changed.

**#11.** *What does “non work-related factors” mean? What effect on a decision will these factors have?*

#### **Analysis:**

Non-work related factors are non-compensable conditions, events, or activities experienced by/undertaken by a worker (e.g. personal recreational activities). When adjudicating claims for compensation (both for initial entitlement and recurrences), where appropriate, the WCB considers the role/impact of non-work related factors on the worker's current disability or symptoms. For example, if evidence indicates the worker is experiencing natural physical deterioration in the body part (e.g. shoulder) originally injured, the WCB will consider whether the symptoms the worker is currently experiencing are due to the effects of ageing (non-work related) or the compensable injury (compensable recurrence). In all claim decision making, the WCB considers the individual merits and justice of the case and, where the evidence both for and against a worker having suffered a recurrence of their compensable injury is evenly balanced, the WCB will find in favor of the worker.

**#12.** *If a person has a compensable injury to their right knee but over time and as a result of the knee injury develops problems with their left hip or knee as a result of overuse or*

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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.

*unbalanced gait, is this to be considered a recurrence or new injury? To us, it is a recurrence or more accurately a 'related injury' as a result of the initial injury.*

**#13.** *The first sentence of the last paragraph seems to negate all that is outlined previously and begs the question as to whether medical compatibility can be determined.*

### **Analysis:**

Comments 12. and 13. Outlined above are closely related and are addressed in one response.

The WCB agrees, as described in comment #12 above, that a further injury, condition, or disablement caused by, and considered part of, the compensable injury is a recurrence of the compensable injury. The definition of recurrence includes this type of recurrence:

"recurrence of compensable injury" is the return of, or increase in, clinically demonstrated disability or symptoms that are caused by the compensable injury after the worker has reached maximum medical recovery; the worker has returned to work; and/or the worker suffers a **further injury, condition, or disablement caused by, and considered part of, the compensable injury.**

Some of the questions listed in the medical compatibility section focus primarily on identifying whether the same body part and/or function is being affected as was affected by the compensable injury. While this is often the case, some recurrences, particularly those that are a further injury, condition, or disablement, do not affect the same body part or function as the compensable injury. Therefore, the WCB believes it is appropriate to acknowledge in the policy that a worker may experience a recurrence that does not affect the same body part or function as the compensable injury.

The WCB understands, based on stakeholder feedback that the intent of the statement referenced in comment #13. may not be clear and that it may give the impression that medical compatibility is not required and/or cannot be determined for a recurrence that is a further injury, condition, or disablement. Medical compatibility with the compensable injury is required for all recurrences. However, as noted above, the considerations/questions that are relevant when adjudicating this type of recurrence may vary from those considered when a recurrence manifests itself as symptoms/disability that affects the same body part/function as the compensable injury. To clarify this point, the WCB has deleted the following statement from Section 3. of the policy:

~~It is recognized that the considerations listed above may not always be appropriate/applicable to situations where the WCB is determining whether a worker has suffered a recurrence of the compensable injury that may be a further injury, condition, or disablement caused by, and considered part of, the compensable injury. In these instances, the WCB considers whether the original compensable injury is of significance in the development of the current disability or symptoms.~~

and inserted the following statement:

Where a worker's current return of, or increase in, disability or symptoms arise from a further injury, condition, or disablement, the questions above may not always be appropriate in guiding the determination of medical compatibility. In

these instances the WCB may, where circumstances warrant, consider questions other than (or in addition to) those noted above in establishing a causal relationship between the current increase in, or return of, disability or symptoms and the compensable injury.

*#14. The policy should require the WCB to strive to obtain the opinion of the treating physician who diagnosed the original compensable condition to assist in making the determination of whether the current disability is a new injury or a recurrence.*

### **Analysis:**

To support and inform decision making, WCB decision makers may seek a variety of evidence including medical opinions and other relevant information. For a number of reasons, it may not be possible to have the original treating physician provide a further diagnosis. However, any medical opinion sought will be from healthcare providers qualified to provide such an opinion. The WCB believes this is a policy application/practice issue and should not be addressed in program policy.

## **◀Section 4. Continuity**

*#15. The factors listed in this section are troubling and may be misleading:*

- a) ongoing treatment for the compensable injury. Often a recurrence will happen long after the treatment has ended. This may be the result of a poor accommodation or assignment to work that is incompatible with the original injury. (Once injured the body never repairs itself as well as before the original injury.)*
- b) modified work duties or restrictions on some work activities. Many injured workers return to work without requiring modified duties but will re-injure the same or related body parts sometime later.*
- c) demonstrated ongoing symptoms since the compensable injury. Similar to comments for a), a worker may be symptom-free until they do something that reinjures or aggravates the affected body part.*
- d) complained to supervisors and co-workers on an ongoing basis. This ought not to be a factor. Most workers, especially injured ones, do not want to be seen as 'complainers' in their workplace. They would be more inclined to report (or complain) of pain or discomfort to their medical practitioners and it is the report of those medical professionals that should be considered with considerable weight.*

### **Analysis:**

Evidence of continuity is not required for a finding that a worker has experienced a recurrence. The WCB agrees that evidence of the continuation of symptoms/disability is not always present in recurrence claims. That is why continuity is not required in order for the WCB to make a finding that a worker has experienced a recurrence. The presence or lack of continuity, on its own, is not determinative of whether a worker has experienced a recurrence. Medical compatibility is the key factor in determining whether or not a worker has had a recurrence. Continuity is not required, but where it exists, it can support a finding that a recurrence has occurred where medical compatibility is unreliable. To clarify this, Section 1. Overview and Section 4. Continuity have been changed as follows:

## 1. Overview

Where medical compatibility, by itself, is not a reliable indicator of the causal relationship between the compensable injury and the current return of, or increase in, disability or symptoms, the WCB ~~will~~ may consider a combination of medical compatibility and continuity. If medical compatibility has been established, it is not required that continuity be considered. ~~is not required.~~

## 4. Continuity

The continuation of disability or symptoms after the achievement of maximum medical recovery and/or return to work may be an indicator of a causal relationship between the compensable injury and the increase in, disability or symptoms. Evidence of continuity may be used to support a finding that worker has suffered a recurrence of their compensable injury where medical compatibility, by itself, is not a reliable indicator of the causal relationship between the compensable injury and the current disability or symptoms. If medical compatibility has been established, it is not required that continuity be considered.

The changes to these sections emphasize that the WCB has the ability to consider continuity where medical compatibility is not reliable, but continuity is not required.

To be consistent with the drafting approach in Section 3. Medical Compatibility, and improve readability and understanding, the manner in which the considerations are presented has been changed from statements to questions in Section 4. Continuity. The substance of the considerations has not changed.

## ◀Section 5. Application

**#16.** *This new policy should apply to the adjudication of claims made on or after a certain date before which relevant staff will be fully trained.*

### Analysis:

The WCB agrees that decision makers should understand the content of a policy before they are required to apply the policy. However, given the legal nature of program policy, it is not appropriate to include operational requirements. As discussed previously, the general content of the policy is current practice at the WCB for the adjudication of recurrences. As is the case with any adjudication topic, where a knowledge gap is identified, the WCB will take steps to ensure decision makers have the knowledge they need to apply the provisions of the *Act* and policy.

To view the changes made to *Policy 1.3.8 - Recurrence of Compensable Injury*, please see Appendix B. To view the final WCB Board of Directors approved program policy, please see Appendix C.

## **Appendix A:**

**Recurrence of Compensable Injury:**

**Stage Two Consultation Summary**

## **Introduction**

At the September 21<sup>st</sup>, 2011 Board of Directors' meeting, members agreed to initiate Stage 2 consultation with stakeholders on the proposed new draft program policy. On September 30<sup>th</sup>, 2011 the document entitled "*Program Policy Background Paper: Recurrence of Compensable Injury*" 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 30 days. The deadline for submissions was October 31, 2011. The WCB received 4 submissions in total from stakeholders offering input on the proposed draft new program policy. Submissions were received from injured worker and labour stakeholders as well as the Office of the Worker Counsellor.

## **Overview of Stakeholder Submissions**

Below is a summary of the comments submitted by the Injured Workers' Associations and Labour organizations on the topic of recurrences in response to the "*Program Policy Background Paper: Recurrence of Compensable Injury*" and the draft program policy:

- We think the policy regarding recurrence of compensable injury should adopt the clear decisions<sup>8</sup> of the Workers' Compensation Appeals Tribunal (WCAT) which use the "but for" test. It is a common sense approach to infer causation. But for the initial injury, would the worker have suffered a subsequent earnings loss. These texts and formulations [*referenced in the background paper*] have been considered by members of the Workers' Compensation Appeal Tribunal many times. The members of the WCAT have repeatedly determined they are not a substitute for the decision making of the Board staff.
- The determination as to whether an injury has recurred must always be guided by the benefit of the doubt in favour of the worker as required by Section 187 of the *Act* which provides as follows
- We also think the Preamble should clearly state as indicated in the Background Paper that the purpose of the policy is not to change, expand or limit the existing criteria for determining if a worker has had a recurrence of their compensable injury, but to clarify the criteria/factors to guide adjudication and to improve transparency and accountability.
- The definition of "maximum medical recovery" should include not just the opinion of the WCB but also the opinion of the worker's own doctor.
- Definitions.
  - In the definition of "recurrence of compensable injury", we are concerned about the use of the terms "clinically demonstrated" and "caused by the compensable injury". We think they might limit the possibility of the determination of a recurrence.
  - Insert the following statement in the definition of "recurrence of compensable injury": "A recurrence of an injury can occur while the worker is at work, not at work, participating in a Board sponsored return to work or while undergoing active medical treatment."
- Overview.
  - This section should explicitly refer to the WCAT "but for", common sense approach to infer causation. The worker does not have to prove causation with

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<sup>8</sup> A series of court and WCAT decisions where the "but for" test for causation is elaborated upon as well as WCAT decisions where the common considerations/factors for the adjudication of recurrences (continuity and medical compatibility) are referenced.

absolute, scientific certainty. This might especially be used when it is difficult to make a determination based on medical compatibility or continuity.

- Insert the following statement: “The Board shall adjudicate each claim on an individual basis and make determinations based upon the real merits of each claim. The adjudicative factors identified in this policy are not an exhaustive list and must be considered only as a guideline in determining whether the current disability is a new injury or a recurrence.”
- Intervening event.
  - We are not clear why it might be determined that a disability or symptoms caused by an intervening event would have to be automatically considered to be a new compensation claim and not a recurrence.
  - Insert the underlined phrase:
    - Where disability or symptoms are caused by an intervening event(s), activity or exposure which, by itself, may have caused a new injury or aggravation on its own, the WCB will adjudicate the claim as a new accident.
- Medical compatibility - We found the description of this factor was confusing and open to possible misinterpretations. For example, why should the current disability and symptoms have to result from and also, be consistent with, the original compensable injury?
  - What does “non work-related factors” mean? What effect on a decision will these factors have?
  - If a person has a compensable injury to their right knee but over time and as a result of the knee injury develops problems with their left hip or knee as a result of overuse or unbalanced gait, is this to be considered a recurrence or new injury? To us, it is a recurrence or more accurately a ‘related injury’ as a result of the initial injury.
  - The first sentence of the last paragraph seems to negate all that is outlined previously and begs the question as to whether medical compatibility can be determined.
  - The opinion of the doctor who diagnosed the original compensable injury should be contacted if available.
  - Insert the following statement: “In all cases, the WCB shall strive to obtain the opinion of the treating physician who diagnosed the original compensable condition to assist in making the determination of whether the current disability is a new injury or a recurrence.”
- Continuity
  - Ongoing treatment for the compensable injury. Often a recurrence will happen long after the treatment has ended. This may be the result of a poor accommodation or assignment to work that is incompatible with the original injury. (Once injured the body never repairs itself as well as before the original injury.)
  - Modified work duties or restrictions on some work activities. Many injured workers return to work without requiring modified duties but will re-injure the same or related body parts sometime later.
  - Demonstrated ongoing symptoms since the compensable injury. Similar to comments for a), a worker may be symptom-free until they do something that reinjures or aggravates the affected body part.
  - Complained to supervisors and co-workers on an ongoing basis. This ought not to be a factor. Most workers, especially injured ones, do not want to be seen as ‘complainers’ in their workplace. They would be more

inclined to report (or complain) of pain or discomfort to their medical practitioners and it is the report of those medical professionals that should be considered with considerable weight.

- Application. This new policy should apply to the adjudication of claims made on or after a certain date before which relevant staff will be fully trained.
- We see the value of the Board having a program policy about the recurrence of compensable injury, but we also see a lack of clarity in every section of the draft policy. The decisions of the WCAT should form the basis of the policy.
- I find that the purpose of a new policy would change, and limit the existing criteria for determining if a worker has had a recurrence, of their original compensable injury. Right now the word "recurrence refers to the situation where an injured worker returns to work following A compensable injury or disease and suffers A temporary or permanent disability as a result of the same injury or disease, and it should entitle the injured worker to a revival, of WCB benefits, medical aid, rehabilitation assistance if required, and it is irrelevant whether the injured worker is employed or not at the time of his or her recurrence.
- I see nothing wrong with the way WCB handles these cases right now, and I cannot see how anything can improve for the injured worker if the policy is changed. Case managers know how to handle recurrences and it's simple. If A recurrence occurs and the medical is there to prove it then the injured worker should be compensated. Changing the policy only confuses case workers changes the criteria for the medical profession and causes stress and delays for possible WCB benefits for the injured worker which cause family problems such as bills not being paid hunger for their families and as much as houses being lost and marital breakups. The WCB prides itself on expedient WCB claims and this will only stall the expedient claim process even more this will cause nothing but hardship on the injured worker and increase more costly litigation on the WCB board and the injured worker.

Below is a summary of the comments submitted by the Office of the Worker Counsellor.

- It seems a matter of common sense that the first person one would ask the question of- is this a recurrence of the injury you diagnosed back then- is the person who diagnosed the initial injury which the Board then treated as compensable. The other factors such as medical compatibility and continuity would be factors that person would consider in arriving at the conclusion. If that person is not available for some reason, then someone else would make that determination using these guidelines.
- It is important to have a policy on recurrences because I believe it is a difficult area for your staff to adjudicate and they need some guidelines to help them do it. Directing them to go first to the diagnosing physician is, I think, necessary because although it is common sense it make the policy clear and complete.
- You have dealt with the issue of non-work related factors directly under the heading "medical compatibility" which is equally common sense - adjudicators should always look at all of the factors in arriving at a decision.



## Appendix B

### Changes to September 23, 2011 version of Program Policy: Recurrence of Compensable Injury based on Stage 2 Stakeholder Feedback

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

## DRAFT PROGRAM POLICY

NUMBER: 1.3.8

Effective Date:	Topic:	Recurrence of compensable injury
Date Issued:	Section:	Entitlement
Date Approved by Board of Directors:	Subsection:	General

#### Preamble

The purpose of this program policy is to outline the factors ~~that will be~~ considered by the WCB when determining if the evidence supports a finding that a worker has suffered a recurrence of their compensable injury. Where it is determined a worker has suffered a recurrence of their compensable injury, they may be eligible to receive benefits and services as provided for in the Workers' Compensation Act ("the Act").

#### Definitions

"maximum medical recovery" means the point at which further medical treatment or intervention will not, in the opinion of the WCB, result in a significant improvement in the worker's medical condition.

"recurrence of compensable injury" is the return of, or increase in, clinically demonstrated disability or symptoms that are caused by the compensable injury ~~the~~ after the worker has reached maximum medical recovery; the worker has returned to work; and/or the worker suffers a further injury, condition, or disablement caused by, and considered part of, the compensable injury.

#### Policy Statement

##### 1.

#### Overview

Generally, in determining whether a worker has suffered a recurrence of the compensable injury, the WCB considers whether:

- a) ~~there has been an intervening event that may have, by itself, caused a new injury;~~

b) there is medical compatibility between the compensable injury and the current return of, or increase in, disability or symptoms.

Where medical compatibility, by itself, is not a reliable indicator of the causal relationship between the compensable injury and the current return of, or increase in, disability or symptoms, the WCB ~~will~~ may consider a combination of medical compatibility and continuity. If medical compatibility has been established, it is not required that continuity be considered. ~~is not required.~~

~~2.~~

## **Intervening event**

~~Where disability or symptoms are caused by an intervening event(s), activity or exposure which, by itself, may have caused a new injury, the WCB will adjudicate the claim as a new accident. The WCB will apply Policy 1.3.7 General Entitlement Arising out of and in the Course of Employment and a decision will be made concerning whether any injury(s) resulting from the new accident are work related. If the injury is work related, a new compensation claim will be registered.~~

3.

## **Medical compatibility**

To establish medical compatibility, the current return of, or increase in, disability or symptoms must result from, ~~and be consistent with,~~ the compensable injury. In determining medical compatibility, the WCB ~~will~~ compares the worker's current medical diagnosis to the diagnosis of the compensable injury (using, but not limited to, medical opinions, the worker's medical history, information collected about the circumstances of the recurrence claim, and medical/scientific literature). ~~In particular, the WCB considers:~~ In particular, in gathering and weighing evidence of medical compatibility to determine if a worker has suffered a recurrence of their compensable injury, the WCB considers a series of questions that may include, but is not limited to, the following:

- a) has the worker experienced an intervening event or exposure that may have caused the current disability or symptoms?
- b) ~~are whether~~ are the parts of the body affected now the same as, or related to, those affected initially?
- c) ~~are whether~~ are the body functions affected now the same as, or related to, those affected initially?
- d) is the degree to which body functions are affected now ~~is~~ similar when compared to the affect of the compensable injury?
- e) what was the nature of, and medical prognosis for, the compensable injury?

Where a worker's current return of, or increase in, disability or symptoms arise from a further injury, condition, or disablement, the questions above may not always be appropriate in guiding the determination of medical compatibility. In these instances the WCB may, where circumstances warrant, consider questions other than (or in addition to) those noted above in establishing a causal relationship between the current increase in, or return of, disability or symptoms and the compensable injury.

~~It is recognized that the considerations listed above may not always be appropriate/applicable to~~

~~situations where the WCB is determining whether a worker has suffered a recurrence of the compensable injury that may be a further injury, condition, or disablement caused by, and considered part of, the compensable injury. In these instances, the WCB considers whether the original compensable injury is of significance in the development of the current disability or symptoms.~~

When determining medical compatibility between the worker's current return of, or increase in, disability or symptoms and the compensable injury the WCB may, where appropriate, consider the relevance and/or impact of non work-related factors.

4.

### **Continuity**

The continuation of disability or symptoms after the achievement of maximum medical recovery and/or return to work may be an indicator of a causal relationship between the compensable injury and the current increase in disability or symptoms. Evidence of continuity may be used to support a finding that a worker has suffered a recurrence of their compensable injury where medical compatibility, by itself, is not a reliable indicator of the causal relationship between the compensable injury and the current disability or symptoms. If medical compatibility has been established, it is not required that continuity be considered.

~~To establish continuity the WCB considers factors, including but not limited to, whether the worker:~~ In gathering and weighing evidence of continuity, the WCB considers a series of questions that may include, but is not limited to, the following:

- a) has the worker had on-going treatment for the compensable injury?
- b) has the worker required modified work duties and/or restrictions on some work activities?
- c) has the worker demonstrated ongoing symptoms since the compensable injury?
- d) has the worker complained to supervisors and co-workers on an on-going basis since the compensable injury?

The above list is not exhaustive, and a worker is not required to have carried out/experienced each of the items listed above for continuity to be established.

5.

### **Application**

This program policy applies to recurrence decisions made on or after (date to be determined).

6.

### **References**

*Workers' Compensation Act* (Chapter 10, Acts of 1994-95), Sections 2 (a), 2 (p), 2(ae), 40, 75, 183, 186, and 187.

## Appendix C

### Final Board of Directors Approved Program Policy: Recurrence of Compensable Injury

# DRAFT PROGRAM POLICY

NUMBER: 1.3.8

Effective Date: March 15, 2012	Topic:	Recurrence of compensable injury
Date Issued: March 21, 2012	Section:	Entitlement
Date Approved by Board of Directors: March 15, 2012	Subsection:	General

#### Preamble

The purpose of this program policy is to outline the factors considered by the WCB when determining if the evidence supports a finding that a worker has suffered a recurrence of their compensable injury. Where it is determined a worker has suffered a recurrence of their compensable injury, they may be eligible to receive benefits and services as provided for in the Workers' Compensation Act ("the *Act*").

#### Definitions

"maximum medical recovery" means the point at which further medical treatment or intervention will not, in the opinion of the WCB, result in a significant improvement in the worker's medical condition.

"recurrence of compensable injury" is the return of, or increase in, clinically demonstrated disability or symptoms that are caused by the compensable injury after the worker has reached maximum medical recovery; the worker has returned to work; and/or the worker suffers a further injury, condition, or disablement caused by, and considered part of, the compensable injury.

#### Policy Statement

##### 1.

#### Overview

Generally, in determining whether a worker has suffered a recurrence of the compensable injury, the WCB considers whether there is medical compatibility between the compensable injury and the current return of, or increase in, disability or symptoms.

Where medical compatibility, by itself, is not a reliable indicator of the causal relationship between the compensable injury and the current return of, or increase in, disability or symptoms, the WCB may consider a combination of medical compatibility and continuity. If medical compatibility has been established, it is not required that continuity be considered.

**2.**

**Medical compatibility**

To establish medical compatibility, the current return of, or increase in, disability or symptoms must result from the compensable injury. In determining medical compatibility, the WCB compares the worker's current medical diagnosis to the diagnosis of the compensable injury (using, but not limited to, medical opinions, the worker's medical history, information collected about the circumstances of the recurrence claim, and medical/scientific literature). In particular, in gathering and weighing evidence of medical compatibility to determine if a worker has suffered a recurrence of their compensable injury, the WCB considers a series of questions that may include, but is not limited to, the following:

- a) has the worker experienced an intervening event or exposure that may have caused the current disability or symptoms?
- b) are the parts of the body affected now the same as, or related to, those affected initially?
- c) are the body functions affected now the same as, or related to, those affected initially?
- d) is the degree to which body functions are affected now similar when compared to the affect of the compensable injury?
- e) what was the nature of, and medical prognosis for, the compensable injury?

Where a worker's current return of, or increase in, disability or symptoms arise from a further injury, condition, or disablement, the questions above may not always be appropriate in guiding the determination of medical compatibility. In these instances the WCB may, where circumstances warrant, consider questions other than (or in addition to) those noted above in establishing a causal relationship between the current increase in, or return of, disability or symptoms and the compensable injury.

When determining medical compatibility between the worker's current return of, or increase in, disability or symptoms and the compensable injury the WCB may, where appropriate, consider the relevance and/or impact of non work-related factors.

**3.**

**Continuity**

The continuation of disability or symptoms after the achievement of maximum medical recovery and/or return to work may be an indicator of a causal relationship between the compensable injury and the current increase in disability or symptoms. Evidence of continuity may be used to support a finding that a worker has suffered a recurrence of their compensable injury where medical compatibility, by itself, is not a reliable indicator of the causal relationship between the compensable injury and the current disability or symptoms. If medical compatibility has been established, it is not required that continuity be considered.

In gathering and weighing evidence of continuity, the WCB considers a series of questions that may include, but is not limited to, the following:

- a) has the worker had on-going treatment for the compensable injury?
- b) has the worker required modified work duties and/or restrictions on some work activities?
- c) has the worker demonstrated ongoing symptoms since the compensable injury?
- d) has the worker complained to supervisors and co-workers on an on-going basis since the compensable injury?

The above list is not exhaustive, and a worker is not required to have carried out/experienced each of the items listed above for continuity to be established.

**4. Application**

This program policy applies to recurrence decisions made on or after March 15, 2012.

**5. References**

*Workers' Compensation Act* (Chapter 10, Acts of 1994-95), Sections 2 (a), 2 (p), 2(ae), 40, 75, 183, 186, and 187.