

# **WORK SAFE. FOR LIFE.**

## **WORKERS' COMPENSATION BOARD OF NOVA SCOTIA**

### **Program Policy Background Paper: Recurrence of Compensable Injury**

**September 23, 2011**

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## 1. INTRODUCTION

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

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 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).

The topic of recurrences was originally identified as a high priority policy topic through the 2009 Policy Agenda Setting Process. Both stakeholders and the WCB identified the need to clarify the factors/criteria that are considered when determining if a worker has had a recurrence of their compensable injury as opposed to a new injury<sup>1</sup> (which may be compensable or non-compensable). Generally, in the workers' compensation systems (including NS), a recurrence is a return of a workers' compensable injury after the worker has returned to work and/or the injury has resolved<sup>2</sup> in some manner. This may result in a need for further treatment and/or earnings replacement benefits.

The *Workers' Compensation Act* (the "Act") and current WCB program policies address the impact of a recurrence on injured workers' benefits and employers' claim costs (See Appendix 1 for relevant sections of the *Act* and Appendix 2 for a summary of relevant program policies) summary of these policies). However, there is currently no general WCB program policy describing what a recurrence is, and how the WCB determines whether a worker has had a recurrence of their compensable injury or experienced a new injury requiring the registration of a new compensation claim.

The purpose of policy development on this topic 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 rather to provide decision-makers with criteria/factors to guide claim adjudication, and improve transparency and accountability of the decision-making process. The development and communication of key criteria/factors will help create a common understanding among workers, employers, and the WSIS, of how recurrence decisions are made. This, in turn, will: improve the

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<sup>1</sup> 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.

<sup>2</sup> Traditionally, in NS, this has meant the worker has reached maximum medical recovery (MMR). MMR is 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.

transparency and accountability of WCB decision making processes; support the WSIS in getting to the right decision the first time; and simplify future program policy development by reducing the need, in some cases, for situation specific policies and/or establish the basis on which more complex entitlement policies can be built.

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

The purpose of this discussion paper is to provide stakeholders with background information and an overview of the proposed new program policy “Recurrence of Compensable Injury”. This program policy would clarify and communicate the WCB’s approach to determining if a worker has suffered a recurrence of their original compensable injury.

This paper kicks off Stage 2 consultation on this program policy topic. 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. Key stakeholders in the workers’ compensation system who have historically participated in Stage 1 consultation were invited to take part in the working group. The working group was comprised of 7 members representing the following organizations: Pictou County Injured Workers’ Association, Cape Breton Injured Workers’ Association, the Office of the Worker Counselor, CUPE/NSGEU, Office of the Employer Advisor, Canadian Manufacturers and Exporters, and the Canadian Federation of Independent Business. The input received from stakeholders during Stage 1 consultation was considered by the WCB and informed the development of the proposed “Recurrence of Compensable Injury” program policy outlined in this paper.

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

The consultation period for this program policy issue concludes on **October 31, 2011**. Please review the background paper and draft program policy, and provide your written feedback by **October 31, 2011** to:

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

**DEADLINE FOR COMMENTS: October 31, 2011**

### 3. PROGRAM POLICY INTENT AND RATIONALE

In recent years, the WCB and stakeholders have identified gaps in the WCB's program policy framework as it relates to entitlement. One of the gaps identified was the lack of a "recurrences" program policy. The development of a "recurrences" program policy is important because:

- The WCB is regularly required to decide if a worker has suffered a recurrence or a new injury requiring the registration of a new claim. Adjudication of some recurrences can be complex and require consideration of a number of factors (e.g. intervening incidents, pre-existing conditions). A policy that defines a recurrence and outlines the key considerations for distinguishing it from a new injury requiring the registration of a new claim will support WCB staff in making the right decision the first time.
- 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.
- The determination of whether a worker has suffered a recurrence of their compensable injury has important implications for both workers (benefit entitlement and/or amount) and employers (claims costs and experience rating) and as a result is a pivotal decision for the WCB.

### 4. BACKGROUND

#### a) What is a recurrence?

As noted previously, the WCB of NS does not have a general definition of recurrence in program policy. However, as in most other Canadian WCB's, the WCB has traditionally considered a recurrence a return of a worker's compensable injury after the worker has returned to work and/or the injury has resolved in some manner. The WCB has generally considered "resolved" to mean the worker has reached maximum medical recovery<sup>3</sup>. This is consistent with the description of recurrence by Terence G. Ison in his text (and used by WCAT in recurrence decisions) "*Workers' Compensation in Canada*". Ison describes a recurrence at pages 109-10, which states in part:

...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. ... and 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 his recurrence.

During adjudication of recurrence claims, the factors listed in *A Guide to Workers' Compensation in Ontario*<sup>4</sup>, are commonly cited/referenced by WCB and WCAT in decisions. Evidence of the following factors tends to support the conclusion that a recurrence of a worker's compensable injury has occurred:

1. The diagnosis established at the time of the recurrence(s) is medically compatible with the original diagnosis.

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<sup>3</sup> MMR is 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.

<sup>4</sup> Douglas G. Gilbert, John Mastoras, L.A. Liversidge's, *A Guide To Workers' Compensation In Ontario*, 2nd ed., (Ontario: Canada Law Book Inc., 1995)

2. The worker experienced ongoing problems after returning to employment and communicated these problems to supervisors and/or co-workers.
3. The worker sought continuing medical attention.
4. The worker could not return to regular employment and was given modified duties.

#### b) Legislative and policy framework

Currently, there is no general definition of recurrence<sup>5</sup> of compensable injury or reference to the factors/criteria to be considered by the WCB when determining if a worker has suffered a recurrence of their compensable injury, in the *Act* or existing program policy. The primary focus of the *Act* and program policy relating to recurrences is in relation to the calculation of earnings loss benefits where a worker has had an injury recurrence, or the assignment of costs to an employer. The only reference to “recurrence” in the *Act* is in Section 75(2). Essentially, Section 75 (2) directs that where TERB is payable due to a recurrence of the injury more than one year after they last received TERB, the TERB will be calculated as if it were a new claim for compensation (S 37)<sup>6</sup>.

Other sections of the *Act* or program policy may be applicable once it has been determined a worker has experienced a recurrence of their compensable injury. However, as noted earlier, the purpose of this program policy is to communicate the framework for determining whether a worker has suffered a recurrence of their compensable injury. Therefore, this paper does not discuss in detail *Act* or program policy provisions that are applicable after a recurrence decision has been made. Included for readers’ convenience are relevant sections of the *Act* (Appendix 1) and a summary of recurrence related program policies (Appendix 2).

#### c) Inter-jurisdictional information

Nine of the twelve Canadian jurisdictions rely on program policy to define and/or provide guidance 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” range 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 from the policies across jurisdictions:

- AB, MB, NB, NF, ON, and PE state that if there was an intervening incident significant enough to have caused a new injury or aggravation on its own, the claim will be considered a new injury. BC references the need to consider if a new incident has occurred.
- AB, MB, NB, and PE specifically require that the current disability/symptoms for which an injury recurrence is being claimed, be clinically demonstrated and/or supported by objective medical evidence.

<sup>5</sup> For the purposes of assigning claims costs to employers where a worker is participating in a rehabilitation program, *Policy 9.6.3 - Apportionment of Claims Costs Under a Rehabilitation Program*, describes a recurrence as 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.

<sup>6</sup> 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 recurrence.

- AB, MB, NB, NF, ON, and PEI specify that there must be clinical/medical compatibility between the original compensable injury and the recurrence. BC, NB, NF, ON, and PE also consider continuity of symptoms in the period between the compensable injury and the current disability/symptoms as an indicator that the worker has had a recurrence.

#### d) Stakeholder feedback

Stage 1 consultation on this program policy topic took place on January 27<sup>th</sup>, 2011 by way of a stakeholder working group meeting. At a high level, the feedback/input provided by the working group as it directly related to the topic of recurrence of compensable injury included:

- The new policy must consider and ensure consistency with existing policies that address recurrences in some manner.
- The issues/topics of medical compatibility, pre-existing conditions, and the concept of “recovery” are particularly relevant to the topic of recurrences and should be considered.
- The consideration of pre-existing conditions is important. Employers emphasized that a worker’s pre-existing non-compensable conditions should be considered when adjudicating potential recurrences. Alternatively, injured worker/Labour believe any pre-existing conditions should be considered during adjudication of the original injury, not during recurrence adjudication, and apportionment of benefits applied accordingly.
- The implications/relevance of “recovery” should be considered in the development of a policy on recurrence of compensable injury.

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

## 5. PROPOSED PROGRAM POLICY APPROACH

The WCB proposes a new program policy “Recurrence of Compensable Injury” be implemented that will identify and communicate the factors/criteria the WCB considers in determining whether a worker has suffered a recurrence of their compensable injury (please see Appendix 3 for a copy of the proposed program policy). The intent of the program policy is not to change, expand, or limit the existing criteria used to determine whether a worker has had a recurrence, but rather to improve transparency and accountability regarding the WCB’s decision-making process. The factors/criteria outlined in this program policy are not new and are currently considered by WCB decision makers when making recurrence decisions. The following is a high-level overview of the proposed new program policy.

### *Preamble and definitions*

The Preamble section of the program policy establishes the purpose of the policy and provides context for the policy statements that follow. The policy is intended to ensure clear and consistent usage of the term recurrences and outline the factors/criteria the WCB considers when determining if a worker has suffered a recurrence of their compensable injury. The WCB has defined “recurrence of compensable injury” as:

the return of, or increase in, clinically demonstrated disability or symptoms 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 proposed definition is inclusive, and reflects the WCB practice of considering increases in disability or symptoms to be recurrences of the compensable injury. To assist in understanding the scope of the definition, the WCB has also defined the term “maximum medical recovery” as:

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.

These definitions reflect existing WCB practice and are consistent with existing WCB policies that reference recurrences.

### *Overview*

Section 1. “Overview” was included in the program policy to provide a high-level outline of the recurrence decision making framework. In particular, the WCB generally considers whether there: 1) has been an intervening incident that may have, by itself, caused a new injury; and 2) is medical compatibility between the worker’s current disability/symptoms and the compensable injury. The WCB considers continuity (continuation of symptoms and/or disability) if medical compatibility is not a reliable indicator of the causal relationship between the current disability or symptoms and the compensable injury.

### *Intervening event*

Section 2. “Intervening event” explains that where a worker’s symptoms or disability are caused by an event that may have, on its own, caused a new injury, the claim will be adjudicated as a new accident using existing *Policy 1.3.7 General Entitlement - Arising out of and in the Course of Employment*. If it is determined the worker has suffered a new injury that is work related, a new compensation claim will be registered. This is consistent with WCB practice and the approach taken in other Canadian WCBs.

### *Medical compatibility*

Section 3. “*Medical compatibility*” is intended to further clarify the requirement for medical compatibility between a worker’s current disability or symptoms and the compensable injury. Essentially, the worker’s current disability or symptoms must result from, and be consistent with, the compensable injury. This requirement is consistent with current WCB practice, the approach taken in other Canadian WCB’s, and the feedback received from employer and worker/Labour stakeholders during Stage 1 consultation. Additionally, WCAT consistently references the factors listed in *A Guide to Workers’ Compensation in Ontario*<sup>7</sup>, which cite medical compatibility as supporting a finding a worker has suffered a recurrence of their compensable injury.

This section also includes a series of factors/criteria the WCB considers when determining if there is medical compatibility between the worker’s current disability or symptoms and the compensable injury. This is consistent with WCB current practice and the approach taken in other Canadian WCBs.

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<sup>7</sup> Douglas G. Gilbert, John Mastoras, L.A. Liversidge’s, *A Guide To Workers’ Compensation In Ontario*, 2nd ed., (Ontario: Canada Law Book Inc.,1995)



Both employers and injured worker/Labour stakeholders highlighted the need to consider the impact or implications of a worker's recovery from a compensable injury when adjudicating a recurrence claim. The WCB agrees this is an important concept and should be considered. Therefore, as part of the medical compatibility factors/criteria, the WCB has included a provision to consider the nature of, and medical prognosis (including recovery) for, the compensable injury when determining medical compatibility. This means the WCB will review the nature of the original injury (e.g. minor soft tissue injury ankle vs. traumatic injury with long recovery period) and the MMR achieved (or expected if the worker has not yet reached MMR) for the injury.

As was the case with the concept of recovery, both employers and injured worker/Labour representatives commented on if/how injured workers pre-existing conditions should be considered in recurrence adjudication. Therefore, this section specifies the WCB may consider the impact of non-work related factors as appropriate. For example, a pre-existing condition may have been identified during the original adjudication of the claim for compensation. Where appropriate, the WCB would consider the medical evidence and determine if the pre-existing condition is linked/causing the current symptoms or disability. Additionally, in some cases, a worker develops a non-work related condition (e.g. age related, sports related) after they have experienced the compensable injury. Similar to a situation where pre-existing condition existed at the time of the original adjudication of the workplace injury, the WCB would consider the potential impact of the non-work related condition on the current disability or symptoms of the worker. The WCB, in all claim decision making, 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.

As noted in the discussion of the preamble and definitions, the WCB's definition of "recurrence of compensable injury" includes "a further injury, condition, or disablement caused by, and considered part of, the compensable injury". For example, a stomach ulcer that develops as a result of treatment for a shoulder injury would be considered compensable. However, given the unique nature of these injuries, inflexibly applying the factors/criteria listed in the section to injuries such as these (considered non-"traditional" recurrences) could result in some conditions that are clearly compensable, not being considered compensable recurrences. To ensure these types of recurrences are appropriately adjudicated, and in keeping with WCB current practice, a statement has been included that clarifies that it may not be appropriate to consider or apply all the factors listed in the section. For these types of injuries, the WCB considers generally whether the original compensable injury is of significance in the development of the current disability or symptoms.

### *Continuity*

Section 4. "Continuity" explains what is meant by continuity and how it is considered in the adjudication of recurrence claims. The WCB considers continuity where medical compatibility, by itself, is not a reliable indicator of the causal relationship between the compensable injury and the current disability or symptoms. In establishing continuity, the WCB considers a series of factors that are clearly outlined to ensure transparency. The consideration of continuity (and the factors listed) in the adjudication of recurrence claims is consistent with WCB current practice, the approach taken in other Canadian WCBs, and WCAT decisions.

### *Application and references*

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

Section 5. “Application” directs that the program policy will apply to all new recurrence claims for compensation after a date to be determined by the WCB Board of Directors, who have the final authority to approve program policy.

Section 6. “Reference” states the sections of the *Act* from which the WCB gains its authority to make program policy and as well as the sections specific to the content of the policy.

## **6. PROVIDING YOUR COMMENTS**

We are interested to hear your comments on this proposed program policy and the information presented in this paper. In particular, we encourage you to consider whether there **are any recommended changes or additional topics you would like to see addressed in the proposed “Recurrence of Compensable Injury” program policy.** Comments received will assist the WCB in ensuring all the issues are considered in the development of this program policy.

You can provide comments in 2 ways:

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

Nancy Stacey  
Manager Strategy Support and Planning (Acting)  
Workers’ Compensation Board of Nova Scotia  
PO Box 1150  
Halifax NS B3J 2Y2  
Phone: (902) 491-8904

The deadline for comments is **October 31, 2011.**

## **APPENDICES**

**Appendix - 1**  
**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 – 2**

### **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.



**Appendix 3  
Draft Program Policy – Recurrence of Compensable Injury**

# DRAFT PROGRAM POLICY

**NUMBER: 1.3.8**

Effective Date:	<b>Topic:</b>	<b>Recurrence of injury</b>
Date Issued:	<b>Section:</b>	Entitlement
Date Approved by Board of Directors:	<b>Subsection:</b>	General

## Preamble

The purpose of this program policy is to outline the factors that will be considered by the WCB when determining if 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 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:

- 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 disability or symptoms.

Where medical compatibility, by itself, is not a reliable indicator of the causal relationship between the compensable injury and the current disability or symptoms, the WCB will consider a combination of medical compatibility and continuity. If medical compatibility has been established, continuity 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 disability or symptoms must result from, and be consistent with, the compensable injury. In determining medical compatibility, the WCB will compare (using, but not limited to, medical opinions, the worker's medical history, and medical/scientific literature) the worker's current medical diagnosis to the diagnosis of the compensable injury. In particular, the WCB considers:

- a) whether the parts of the body affected now are the same as, or related to, those affected initially;
- b) whether the body functions affected now are the same as, or related to, those affected initially;
- c) the degree to which body functions affected now are similar when compared to the affect of the compensable injury;
- d) the nature of, and medical prognosis for, the compensable injury.

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

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.

### **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 disability or symptoms.

To establish continuity the WCB considers factors, including but not limited to, whether the worker:

- a) has had on-going treatment for the compensable injury;
- b) required modified work duties and/or restrictions on some work activities;
- c) demonstrated ongoing symptoms since the compensable injury;
- d) 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 new claims for compensation 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.