

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

Issues Identification Paper:

36 Month Review of Extended Earnings Replacement Benefit:
Timing and Scope of Review

Date: November 20, 2007

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Introduction

In 2006, approximately 31,800 were registered with the *Workers' Compensation Board* (WCB). Of these 31,800 claims, approximately 17,500 results in no time-loss from work and 6,000 are not pursued or disallowed. The remaining 8,300 claims go on to receive earning loss benefits.

To adjudicate this large volume of claims, the WCB relies on the framework provided by the *Workers' Compensation Act* (the *Act*) for determining coverage and entitlement to benefits. While the *Act* provides broad direction, the WCB Board of Directors may also approve policies to provide more detailed adjudicative criteria to guide decision-making. To access copies of the *Act* and WCB policies, go to www.wcb.ns.ca under Policy & Legislation.

At various points in the policy development process, the Board of Directors consults with stakeholders to seek their input on a particular policy issue. The Board of Directors has determined that the Review of Extended Earnings Replacement Benefit policy (Policy 3.4.2R1) is a major policy issue and as such the WCB will use a two-staged policy consultation approach. The first stage of consultation will provide stakeholders with an opportunity to identify issues related to this policy. The second stage of consultation will provide stakeholders with an opportunity to comment on draft revisions to the policy. For details on the WCB's policy consultation strategy, go to www.wcb.ns.ca under Policy & Legislation.

This issues identification paper is the kick-off to the first stage of the policy consultation process. It is intended to help readers understand how and when the WCB reviews its determination of the amount of compensation payable as an EERB and the issues that have been raised with regards to this policy.

We hope this paper encourages thought-provoking discussion and leads to practical suggestions for improving the WCB's policy on Review of Extended Earnings Replacement Benefit. We encourage all Nova Scotians to provide comments.

You are encouraged to consider the material in this paper and provide your comments in writing by January 9, 2008 to:

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The comments we hear from Nova Scotians will be considered as we review Policy 3.4.2R1 - Review of Extended Earnings Replacement Benefit. This paper also is available at www.wcb.ns.ca under News & Events.

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DEADLINE FOR COMMENTS: January 9, 2008

Background on Review of Extended Earnings Replacement Benefit

An Extended Earnings Replacement Benefit (EERB) is a long term earnings replacement benefit. An EERB is awarded to a worker who has a work-related permanent impairment, and as a result, is experiencing a permanent loss of earnings. The EERB compensates a worker for a percentage of his/her long-term loss of earnings due to the injury. The loss of earnings is based on the difference between the worker's earnings before the injury and his/her earnings or potential earnings after the injury.

In accordance with Section 73 of the *Workers' Compensation Act* (the "Act") the WCB may review and adjust the amount of an EERB in four circumstances:

- 36 months after the date of the initial award of an EERB;
- 24 months after the 36 month review if identified as necessary at the time of the 36 month review;
- after a change in a worker's permanent impairment rating of 10% or more, or;
- at any time where the EERB was awarded on the basis of a misrepresentation of fact.

Further, Section 73(3) states that the award of an EERB is final, with the exception of the above noted circumstances. Specifically, Section 73 of the *Act* states:

73 (1) Subject to subsection (2), the Board may review and adjust its determination of the amount of compensation payable to a worker as an extended earnings-replacement benefit

(a) once, commencing in the thirty-sixth month after the date of the initial award of the benefit;

(b) once, commencing in the twenty-fourth month after a review pursuant to clause (a) is completed, if at the time the review pursuant to clause (a) is completed the Board is of the opinion that a further review is necessary;

(c) after a review of the permanent-impairment rating of the worker pursuant to subsection 71(1) results in an adjustment of the permanent-impairment rating of at least ten percentage points according to the schedule established pursuant to Section 34; and

(d) at any time, where the extended earnings-replacement benefit was based on a misrepresentation of fact.

(2) The Board shall not vary the amount of compensation payable as an extended earnings-replacement benefit unless the amount of the variation would be equal to at least ten per cent of the amount of compensation being paid at the time of review.

(2A) Notwithstanding subsections (1) and (2), where a worker's permanent-impairment benefit is adjusted pursuant to Section 71, the Board may adjust the amount of compensation payable as an extended earnings-replacement benefit pursuant to this Section so that the adjusted permanent-impairment and extended earnings-replacement benefits total eighty-five per cent of the loss of earnings

(3) An award of an extended earnings-replacement benefit is final, subject to subsection (1), and shall not be further reviewed or adjusted. 1994-95, c. 10, s. 73; 1999, c. 1, s. 9.

In 1995, the WCB adopted *Policy 3.4.2-Review of Extended Earnings Replacement Benefit* to provide clarification of the 36 month review process. Since that time, the policy has been revised on two separate occasions to allow for minor amendments. These changes did not impact the overall policy intent (see Appendix A for a copy of the current policy 3.4.2R1).

Generally, the existing policy simply reiterates the conditions for review outlined in the Act, with two exceptions. Firstly, the policy provides direction for determining during the 36 month review whether a 24 month review is necessary. Secondly, the policy clarifies that all workers who would be receiving an EERB if it were not for the fact that their Permanent Impairment Benefit is greater than 85% of their loss of earnings also qualify for review. In these cases, the review will occur 36 months after the permanent impairment rating determination.

The existing policy is silent with respect to how the 36 month review date is determined. This timing question has been codified by way of practice. The determination of the appropriate timing of the 36 month review is described later in this paper under the header: WCB's Current Practice.

Why is WCB reviewing this policy?

On November 29th, 2006, the WCB Board of Directors hosted a consultation session to provide stakeholders with an opportunity to share issues and concerns respecting policy priorities for 2007. During this session, Injured Workers Associations/Labour and Employers indicated that Policy 3.4.2R1 - Review of Extended Earnings Replacement Benefit is a high priority policy issue. As a

result, the Board of Directors agreed to review this issue as part of its 2007 policy agenda.

Outlined below are some of the issues with the existing policy that have been identified so far.

The Issues

1. Injured Workers' Associations feel that clarity is required on when in the decision making process the WCB should start "counting" for the purpose of determining the timing of the review of an EERB.

Injured Workers' Associations feel that there should be clarity on what constitutes an "initial award". They believe that the WCB has wrongly interpreted the phrase "initial award of the benefit" to mean the date of the final determination of the benefit after all appeals have been exhausted. They support the approach that the intention of the legislation is to review the benefit 36 months from the date of the first EERB decision, whether or not the decision is changed by an appeal.

Injured Workers' Associations have also noted that the wording of the policy is inconsistent with the *Act*. The *Act* states that the WCB "may" review the EERB in 36 months, while the policy says "will review".

2. Some Employers feel that the WCB should consider expanding the scope of the review to consider functional capacity in addition to reviewing changes in a worker's earnings.

Some Employers feel that the WCB's current approach to reviews is limited to looking at whether there has been a change in the worker's financial situation that may impact the amount of the EERB awarded, rather than reassessing a worker's functional capacity and whether he/she is capable of returning to work in some form. Some Employers feel that the WCB should broaden the type of information being considered during the review of an EERB to include functional capacity information and potential return to work opportunities.

WCB's Current Practice

Timing of 36 Month Review

Currently, the WCB determines the date of a 36 month review based on the "initial award of the benefit". The WCB has interpreted the phrase "initial award of benefit" to mean the date of the final EERB decision. The final EERB decision is the date of the original decision if it is not altered on appeal. If the EERB decision is altered on appeal, "the date of the initial award of benefit" is the date

of the appeal decision. For example, if a worker is first awarded an EERB in September 2005, even though there may be an appeal decision(s) after September 2005 that *confirms* the amount of the EERB, the first review is 36 months after the September 2005 decision. However, if there is an appeal decision in January 2006 that *changes* the September 2005 EERB decision, then the first review would be 36 months from the January 2006 appeal decision. The next possible review would then be 24 months after the 36 month review.

While an EERB is identified for a 36 month review on a specific date, the actual review may not take place until sometime after that date due to the necessity of waiting for receipt of necessary earnings/medical information. For instance, an EERB may be scheduled for review in February 2008, but, income tax information for the previous year is not filed until April 2008, so the review must be delayed until the WCB can obtain all the necessary information for the review.

Scope of Review

The intent of the review process is to ensure that EERBs continue to accurately compensate workers for their loss of earnings due to the work-related injury. Generally, reviews are primarily financial reviews focused on identifying any changes in a worker's earnings. However, more in depth reviews of earning capacity will take place if the medical evidence on file indicates a change in the worker's medical condition.

Sometime before the 36 or 24 month review date, the WCB sends a letter to the worker informing him/her that a review of their EERB will take place in the near future. In this letter, the WCB requests that the worker forward financial and medical information to the WCB to be considered during the review.

With respect to the earnings information, income tax returns are requested. With respect to medical evidence, workers are asked to forward any medical evidence that they would like the WCB to consider during the review. If medical evidence is provided, it will be considered, along with any medical on file from the time of the initial award of the EERB to the 36 month review (or between the 36 and 24 month review). Generally, other than internal medical opinions, the WCB typically does not request medical evidence from outside sources (i.e. treating specialists) during reviews. The WCB reviews decisions based solely on the information on the file at the time of the review.

During reviews, where earnings have been estimated, the WCB's current practice is to confirm the estimated occupation is still suitable and reasonably available. Only if a job isn't suitable or reasonably available, will the WCB look at alternate occupations. The WCB also considers whether or not a permanent impairment reassessment is required.

As previously noted, a 24 month review will take place when it is deemed necessary during the 36 month review. Under the current policy, as a general guideline, an EERB will undergo a 24 month review if:

- the worker has not established a consistent earnings pattern during the first 36 months the worker was in receipt of an EERB; or
- the worker has shown a significant deterioration in his/her compensable condition.

Following the 36 month review, the WCB may choose not to set another review date if the information on file indicates the worker's employment pattern, although casual or seasonal, is still an established pattern.

How do other jurisdictions review benefits?

Every WCB has its own legislation and policies that guide how benefits are reviewed. Overall, most provinces have policies that set out timelines for reviewing benefits, as well as what information should be considered during the review process.

Most jurisdictions either review benefits annually or use variations of the 36 month and/or 24 month review approach. With respect to how the review dates are chosen, there are a variety of different methods. Generally, the most popular methods of establishing the review date include the anniversary date of either the initial or extended loss of earnings payment or the date of the decision granting the earnings loss payment. For details on the timing used in each jurisdiction, please see attached Appendix B.

Typically, with respect to the scope of review, in most jurisdictions the primary purpose of reviews is to conduct a financial review for each worker. Only if there is medical information that indicates a change in a worker's medical condition and a change in return to work potential, will some jurisdictions take a more detailed look at a worker's earnings ability. For more detail on what each jurisdiction considers, please see attached Appendix B.

Providing your comments

We are interested to hear your comments on the information presented in this paper. In particular, we would like you to answer the following question:

- ▶ Are there any additional issues you would like to see addressed through a review of Policy *3.4.2R1-Review of Extended Earnings Replacement Benefit*?

All comments will be considered as we review Policy *3.4.2R1-Review of Extended Earnings Replacement Benefit*.

Appendix A- Current Policy

POLICY

NUMBER: 3. 4. 2R1

Effective Date: September 10th, 2004

Topic: Review of Extended Earnings-Replacement Benefit

Date Issued: September 13th, 2004

Section: Short-Term and Long-Term Benefits

Date Approved by Board of Directors: September 9th, 2004

Subsection: Extended Earnings-Replacement Benefit (EERB)

Policy Statement

1. Extended Earnings-Replacement Benefits (EERBs) will be reviewed 36 months after the date the EERB was determined.
2. This review will also take place for all workers who would be receiving an EERB if it were not for the fact that their Permanent Impairment Benefit (PIB) is greater than 85% of their loss of earnings. In these cases, the review date will be 36 months after the permanent impairment rating determination. Subsequent reviews (see paragraphs 3, 4, and 5) will be based on the same criteria as the EERB.
3. An EERB may be reviewed 24 months after the 36-month review, if it is determined to be necessary by the Board at the time of the 36 month review. As a general guideline, an EERB will be reviewed a second time if the worker has not established a consistent earnings pattern during the first 36 months the worker was in receipt of the EERB or the worker has shown significant deterioration in his/her compensable condition. The Board may choose not to set another review date if the information on the

file indicates the worker's employment pattern, although casual or seasonal, is still an established pattern.

4. An EERB may be reviewed at any time if:
 - a) a review of a permanent impairment rating results in an adjustment to the Permanent Impairment rating of at least ten percentage points, or
 - b) it is determined the EERB was based on misrepresentation of fact.

5. The EERB (or EERB that would be payable but for the fact that the worker's PIB is greater than 85% of the loss of earnings) will not be increased or decreased unless the adjustment is equal to or greater than 10% of the compensation currently being paid to the worker as a result of the injury.

Application

This Policy replaces Policy 3.4.2R, issued May 17, 1999, and effective April 16, 1999. This Policy applies to workers injured on or after March 23, 1990 who have been awarded an EERB.

References

Workers' Compensation Act (Chapter 10, Acts of 1994 - 95), Sections 73, 228.

An Act to Amend Chapter 10 of the Acts of 1994-95, *the Workers' Compensation Act*, Clause 9.

Executive Corporate Secretary

Appendix B- Jurisdictional Scan

PROVINCE	TIMING OF REVIEWS	SCOPE OF REVIEWS
Alberta	<p>Earnings loss payments (ELP) are reviewed 36 months after they are first awarded. ELPs are then reviewed annually until a worker reaches retirement age (65). However, annual reviews may be deemed unnecessary in some circumstances (i.e. the worker is severely disabled and it is clear their earning capacity will not change).</p> <p>“First awarded” means the date of the decision granting the ELP benefit. However, if an ELP changes before the 36 month review because of new evidence or an appeal, they reschedule the 36 month review to 36 months following the new decision. In addition, they can have reviews prior to the 36 month review, if necessary.</p> <p>WCB may conduct interim reviews before the 36 month review in some cases: i.e. the worker requests an interim review, the worker is in an apprenticeship, or the worker is expected to have significant changes in earnings before the 36 month review.</p> <p>While reviews normally cease when a worker turns 65, workers can rebut the presumption that they would have retired at 65 if the injury had not occurred.</p>	<p>WCB considers gross earnings from all employment sources for the review period. After the 36 month review, workers will submit required earnings information annually until the WCB says it is no longer necessary.</p> <p>Alberta mostly reviews earnings and earnings capacity. They will review medical and/or work restrictions if there is a reason to do so (i.e. new medical) but that is not primary purpose of ELP review. Unless there is an indication the Worker’s condition has changed, they review earnings. Their experience is that a significant number of workers do improve their earnings and earning capacity over time even though work restrictions haven’t changed, so that is why reviews are now annual. They will adjust the ELP up or down as necessary.</p>

PROVINCE	TIMING OF REVIEWS	SCOPE OF REVIEWS
	As a result, theoretically, a worker could continue receiving ELP beyond age 65.	
British Columbia	<p>Workers are awarded either a loss of function or a loss of earnings award, but not both. An award can be “re-opened” if there is a significant change in the work-related medical condition, if there is a recurrence of the injury, or if a decision was based on misrepresentation/fraud.</p> <p>A significant change is defined as a change in the worker’s physical/psychological condition that warrants consideration of a change in compensation or rehabilitation benefits.</p> <p>There is no timeline set out for these reviews. They usually take place as a result of workers requesting them.</p>	If either award is re-opened, the Board will request/review what information they deem necessary to make a decision.
New Brunswick	Loss of earnings (LOE) benefits are reviewed annually as of the first day of the month in which the injury took place or a recurrence of an injury. Reviews take place until the LOE ceases to exist or the worker reaches 65 years of age.	<p>Workers are required to submit previous year’s tax return information for annual reviews. Annual reviews are solely financial reviews.</p> <p>Reviews of medical information are separate and take place when new medical information is received by the Board. There is no set time frame for these reviews. While medical reviews can affect the worker’s earning capacity, and therefore, their loss of earnings benefits,</p>

PROVINCE	TIMING OF REVIEWS	SCOPE OF REVIEWS
		reviewing medical is separate from the annual reviews.
Ontario	<p>Loss of earnings (LOE) payments are reviewed every year or if there is a material change in circumstances. A material change is a decrease or increase in net actual earnings of 10% or more.</p> <p>Reviews continue until 72 months after the injury date. The final LOE review starts 67 months post injury and must be completed by the end of the 72nd month, unless one of the following exceptions apply:</p> <p>A final LOE review can take place beyond 72 months if:</p> <ol style="list-style-type: none"> 1) there was a change in circumstances that took place prior to the 72 months that the worker failed to report, or engages in fraud or misrepresentation in connection to his/her claim for benefits; 2) The worker participated in a labour market re-entry plan (LMR) that is not completed within the 72 months; 3) after the 72 month review, the worker experiences a significant deterioration that results in a re-determination of Permanent Impairment(PI), an initial determination of a PI, or is likely to result in a re-determination of a PI; 	<p>LOE benefit reviews are conducted to determine whether or not a worker's ongoing loss of earnings continues to be related to the work-related injury.</p> <p>During a review, earnings/income information, employment status and health status are considered.</p> <p>If the worker suffers a significant reduction in earnings or is not able to work due to a recurrence, deterioration in the work-related impairment, a job change related to the injury, or another situation directly related to the injury, the WSIB may increase the LOE benefit.</p> <p>The WSIB may decrease an LOE benefit if the worker experiences a significant increase in earnings from employment or receives CPP/QPP disability benefit which exceeds the amount the worker determined to be able to earn after the injury.</p>

PROVINCE	TIMING OF REVIEWS	SCOPE OF REVIEWS
	<p>4) after 72 month review, the worker experiences a significant temporary deterioration;</p> <p>5) when 72 month review expires, the worker and employer are cooperating in a workers' early and safe RTW or the worker is cooperating in health care measures.</p> <p>A worker who is 55 + years of age at the time of an injury and who is at maximum medical recovery and has participated in a LMR plan may elect "no review" which would lock in the LOE benefit until he is 65 years old.</p> <p>The review date is based on the date of the initial LOE payment. That is, the date the Worker starts to experience a loss of earnings.</p>	
Saskatchewan	<p>Saskatchewan verifies earnings on an annual basis. This is a separate process from reviewing medical information and is solely a financial review.</p> <p>When verifying earnings, Saskatchewan sends workers who are on long term benefits an annual questionnaire asking them to outline their current employment status and asks for copies of tax returns. The results of the questionnaires are used to assess whether entitlement needs to be adjusted.</p>	<p>Income information is required for the earnings verification.</p> <p>Medical information is only reviewed and considered if new information is provided by the worker. There is no set timeline for reviewing medical information.</p> <p>If medical information indicates the permanent functional impairment award is no longer adequate, they arrange for reassessment. They</p>

PROVINCE	TIMING OF REVIEWS	SCOPE OF REVIEWS
	<p>Verifying earnings takes place each year on the anniversary date of the initial loss of earnings payment.</p>	<p>also review medical to determine if amount of wage loss benefits need to be adjusted. If worker is not seeking ongoing medical care, the Board will assume the worker's condition has not changed, and therefore, there is no change in the earning capacity.</p>
<p>Prince Edward Island</p>	<p>Extended wage loss (EWL) benefits are reviewed 36 months after the date of the initial award and again 24 months after the 36 month review. All workers are subject to the 24 month review except for those workers who turn 65 between the 36 and 24 month reviews; or those who are specifically excluded during the 36 month review.</p> <p>The date of the 36 month review is determined using the date of the initial decision awarding benefits (same as NS).</p> <p>If a worker is in receipt of a 100% extended wage loss benefit and there is no change in medical condition or earnings at the end of the 36 month review, that worker will not be subject to a further review.</p> <p>EWL is final and will not be reviewed (except for the 36 and 24) unless there is an adjustment in PI or the benefits are based on a misrepresentation of fact.</p>	<p>PEI reviews earnings information and medical information.</p> <p>If a change in the worker's medical condition is indicated at the 36 or 24 month reviews, a functional capacity evaluation will be used to determine the change in level of disability.</p>
<p>Manitoba</p>	<p>For permanent benefits, reviews are done at any time</p>	<p>The purpose of the review is to adjust the</p>

PROVINCE	TIMING OF REVIEWS	SCOPE OF REVIEWS
	<p>there is a significant change in circumstances that may affect actual or potential earnings; and at the indexing date under s 40(2).</p> <p>Indexing date is the 1st day of the month following the 2nd anniversary date of the accident (24 months) and annually thereafter.</p> <p>Where indexing date follows shortly after a review due to change in circumstances, the index review can be completed at the time of the change in circumstances review, but the next review will still be on the indexing day.</p>	<p>benefits based on a comparison between the worker's actual loss of earning capacity at the date of the review and the loss of earning capacity estimated at the time of the previous review. If the information indicates that there is a change in the worker's medical condition, a further review of the worker's earning capacity will take place.</p>
Newfoundland	<p>Currently, there is no policy regarding reviews. In the past they did have a policy regarding annual reviews but it was rescinded in 2002. They still follow the annual review process.</p> <p>The date of the annual review is the anniversary date of when a worker began receiving Extended Earnings loss (EEL) benefits.</p> <p>The worker is sent a questionnaire which asks about their current financial and medical status. Workers are asked to send in confirmation of their medical status and their earnings information.</p>	<p>The reviews look at financial and medical information. The review is not a revisiting of past decisions with respect to earning capacity. The purpose of the review is to ensure that there is no significant change in the medical condition and/or earnings of a worker. It is also an opportunity to apply indexing. However, if the medical evidence shows that a worker's medical condition is significantly worse, or the worker's earnings have increased, or the worker is doing a heavier job than originally estimated as capable of doing, they may review the original EEL decision to determine what is now appropriate.</p>

PROVINCE	TIMING OF REVIEWS	SCOPE OF REVIEWS
Yukon	Loss of earnings capacity is reviewed annually.	Annual reviews are used to determine changes in earnings, changes in a worker's fitness for employment, and to review any new information that may affect a claim.
NWT/Nunavut	NWT/Nunavut does not pay wage loss benefits.	There is no policy or formalized procedures for reviewing benefits. Medical information will be reviewed when a worker requests it, or if medical evidence shows deterioration in his/her medical condition.