

**Discussion Paper:
Apportioning Workers Benefits**

July 10, 2007

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Introduction:

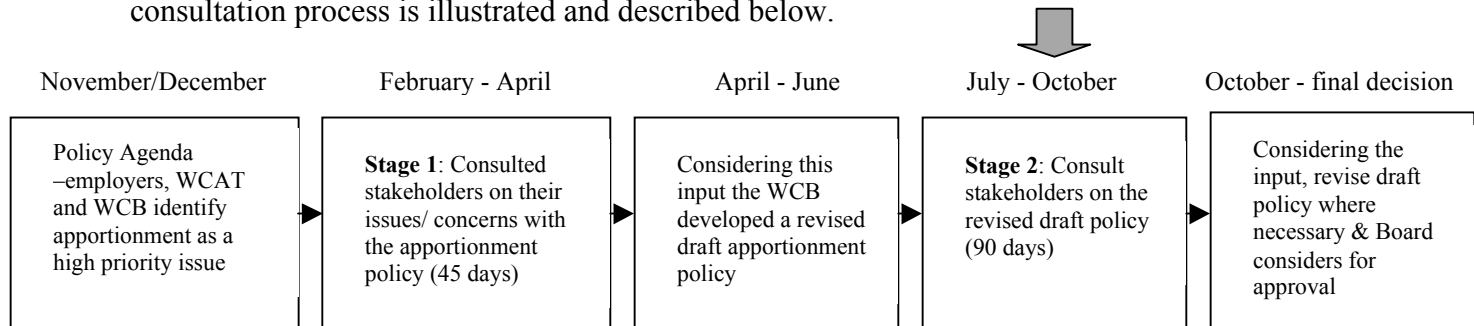
Each year, in setting the annual policy agenda, the WCB undertakes a policy issue identification process. This process involves the identification of policy issues where the development of new and/or the revision of existing policy statements will improve consistency in decision making and/or assist the WCB in achieving its corporate/system goals. Policy issues are identified through a number of sources including stakeholder input, our System partners (Workers' Advisers Program [WAP], Workers' Compensation Appeals Tribunal [WCAT] and Occupational Health and Safety [OHS]), WCB operations, and the WCB corporate business plan.

Stakeholder input is a critical step in the policy issue identification process. On November 29th, 2006 the WCB hosted a Fall Stakeholder Consultation session where stakeholders had an opportunity to discuss issues they would like considered in the development of the 2007 WCB policy agenda. Injured Workers/Labour and Employers considered a number of policy issues and prioritized them as either low or high priority. In December 2006, in determining the overall prioritization of all the policy issues identified, the Board of Directors decided that those issues identified as a high priority by one or both stakeholder groups (Injured Workers/Labour and/or Employers) will be included on the 2007 Policy Agenda. As a result, *Policy 3.9.11R – Apportionment of Benefits*, identified as a high priority by employers, is the first policy issue being reviewed.

In addition to the concerns identified by stakeholders, WCAT and WCB staff also identified challenges with the current apportionment policy and these also were considered during the policy review.

Apportionment Policy - Policy Consultation Process:

At various stages throughout the policy development process, the Board of Directors consults with stakeholders to seek their input on a policy issue. The Board of Directors has determined that the *Policy 3.9.11R - Apportionment of Benefits* is a major policy issue and as such the WCB will use a two-staged policy consultation approach. The consultation process is illustrated and described below.



Stage one of consultation occurred throughout February - April of this year and provided stakeholders with an opportunity to identify their issues and concerns related to apportionment of benefits. The input received from stakeholders during this initial stage

of consultation was considered by the WCB and informed the development of a revised draft apportionment policy.

This paper kicks-off stage two of consultation on the apportionment policy issue and is intended to provide stakeholders with an opportunity to comment on draft revisions to Policy 3.9.11R – *Apportionment of Benefits*.

The purpose of this discussion paper and draft policy is to provide stakeholders with an overview of the proposed changes to Policy 3.9.11R – *Apportionment of Benefits* and the supporting rationale. Prior to finalizing the revisions to this policy, the WCB would like to hear stakeholders' views on the suggested changes. The Board of Directors will consider the input received from stakeholders and will determine whether additional revisions are required to the draft policy before making a final policy decision.

Recognizing the complex nature of this issue and wanting stakeholders to have sufficient time to consider the documents and provide input, the Board of Directors has decided to extend the consultation period from a minimum of 30days to 90days.

Please review the background paper and draft policy, and provide your written feedback by **October 10th** to:

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This paper is also available at www.wcb.ns.ca under News & Events.

DEADLINE FOR COMMENTS: October 10th, 2007

Executive Summary

The Board of Directors included Policy 3.9.11R – *Apportionment of Benefits* on the 2007 Policy Agenda as a result of various consultations with stakeholders where the apportionment policy was identified by some employers, the Workers' Compensation Appeals Tribunal, and WCB staff as high priority issue requiring review.

Apportionment is generally defined as an estimate of the degree to which a non work-related factor and a work-related injury may have caused or contributed to the resulting permanent impairment and earnings loss.

Throughout February - April 2007, the WCB consulted with stakeholders regarding their specific issues with Policy 3.9.11R - *Apportionment of Benefits*. During this process, stakeholders identified a number of key issues requiring consideration during the review of this policy item. Overall, it is evident from the submissions received by the WCB that stakeholders have divergent views on the most appropriate approach to apportioning workers' benefits. Generally, employers identified the need to improve clarity and consistency in the apportionment of benefits process. Also, some employers felt the WCB should consider the apportionment of short-term benefits. On the other hand, Injured Workers and Labour Groups believe the current policy provides a clear and appropriate method for apportioning workers' benefits and that the issue is with the misinterpretation and application of the current policy.

The WCB has now drafted a revised apportionment policy taking into consideration stakeholders' submissions. The WCB believes the proposed policy revisions offer a fair and balanced approach to apportionment. The proposed revisions better align the policy with the intent of the *Act*; streamline the policy and simplify the language; provide clear guidelines and direction for the adjudication of claims requiring apportionment; ensure that the employer pays for impairment and loss of earnings only related to the compensable injury; and addresses gaps in the current policy.

The WCB is proposing a number of major changes to the existing apportionment policy. A summary of the changes is provided below.

1) Definitions Section:

a. Aggravation, acceleration, activation:

Current Policy: These terms are defined separately without clear rationale for the distinction. Also there is a lack of clarity regarding the distinction between temporary versus permanent aggravation, acceleration, or activation of a pre-existing disease or disability.

Proposed Policy: The terms aggravation, acceleration and activation are merged into a single definition of *aggravation* to refer to permanent worsening and a new definition of *exacerbation* is introduced to refer to temporary worsening. It is anticipated that these changes will address some stakeholders' concern regarding lack of clear direction on

appropriate approach to apportionment where there is a temporary worsening of the non work-related factor. These changes also are intended to simplify the language and provide additional clarity to the decision-making process.

b. *Non-compensable factor*:

Current Policy: Creates a distinction between “causes other than the injury” and “pre-existing disease or disability” and infers that a different approach to apportionment is used although supporting direction is not provided.

Proposed Policy: In reality, there is no difference in the approach to apportionment for a “pre-existing disease or disability” and “cause other than the injury”. To simplify the concepts addressed in the apportionment policy and to provide a more user-friendly approach, the WCB is proposing to combine the terms “pre-existing disease or disability” and “cause other than the injury” into a single definition of non-compensable factor. This new definition also will encompass non work-related factors that develop prior to or after a work-related injury.

c. *Minor, Moderate, Major*:

Current Policy: Uses four categories (minor, moderate, major, and severe) to determine the impact and severity of a non work-related factor on permanent impairment and extended loss of earnings. The definitions used for the Permanent Impairment Benefit and Extended Earnings Replacement Benefit (EERB) are the same both requiring an impact on working capacity.

Proposed Policy: Uses three categories (minor, moderate, and major) and eliminates the “severe” category. This proposed change will provide clearer distinction between the categories and simplify the classification process. Also, the definitions of minor, moderate and major in the permanent impairment section will now consider functional ability rather than working capacity. These same definitions also are proposed for the EERB section but a linkage to earning capacity is created. It is anticipated that these changes will reduce discretion, improve consistency and address some stakeholders’ concerns that the categories are ambiguous and difficult to apply.

Proposed changes also will include no apportionment of the EERB when the non work-related factor is classified as *minor* or when the work-related injury is classified as *major*.

2) Short-Term Benefits Section:

Current Policy: Short-term benefits including Temporary Earnings Replacement Benefits, Medical Aid, and Vocational Rehabilitation benefits are not apportioned.

Proposed Policy: No major revisions are proposed to this section of the policy.

This is based on consideration of a number of factors including: WCB’s goal of safe and timely return to work, fair and reasonable test, and administrative implications.

3) Permanent Impairment Section:

Current Policy: The current policy uses four categories of classification (minor, moderate, major & severe) to classify the impact and severity of the non work-related factor. It apportions permanent impairment where the non-compensable factor is classified as *moderate*, *major* or *severe* but does not do so where it is classified as *minor*. For instance, the percentage of permanent impairment benefit payable is 100% for minor (no or minimal limitation), 75% for moderate (some limitations), 50% for major (significant limitations) and 25% for severe (significant limitations and will result in total disability regardless of work-related injury).

Proposed Policy: The “severe” category is eliminated. Also, the degree of the limitation and percentage of benefits payable associated with the other three categories has been realigned. The proposed policy will allow the apportionment of a *minor* non work-related factor where it is having a “slight” impact on a worker’s functional abilities at a rate of 75% of the whole person permanent impairment. Also, the percentage of permanent impairment benefit payable is 50% for moderate (substantial limitations) and 25% for major (severe limitations).

Current Policy: No explicit direction is provided on the apportionment of occupational hearing loss cases.

Proposed Policy: Direction on the apportionment of occupational hearing loss cases is provided. It is anticipated this change will address some stakeholders’ questions regarding the applicability of the current apportionment policy to occupational hearing loss cases.

4) Extended Earnings Replacement Benefits Section:

Current Policy: Under the current apportionment policy, four categories (minor, moderate, major, & severe) are used to determine the impact of the non work-related factor on a worker’s earning capacity. The impact and severity of the work-related injury on a worker’s earnings ability is not directly taken into consideration.

Proposed Policy: In the proposed revised policy, the WCB proposes to categorize both the work-related injury and the non-work related factor to ensure that a full picture of a worker’s injuries/conditions are considered and the significance of the work-related injury is taken into consideration when determining apportionment.

5) Complex Claims:

No specific changes are proposed to the existing policy to address complex claims such as chronic pain. Complex claims have been considered in the development of the new policy framework. The new framework presented in this paper ensures that all claims, regardless of their complexity, can be apportioned where it is appropriate to do so.

Background:

Pursuant to Section 10(5) of the *Workers' Compensation Act* (the "*Act*") the Workers' Compensation Board (WCB) is required to pay compensation only for the proportion of the loss of earnings or permanent impairment that may be reasonably attributed to a workplace injury. WCB Policy 3.9.11R - *Apportionment of Benefits* sets out the benefits that will be considered for apportionment and the process for determining the apportionment of them.

In 1997, the apportionment policy was developed to outline the WCB's approach to apportionment of benefits. In 2004, minor revisions were made to the policy to reflect the WCB's new approach to chronic pain. These minor changes allowed chronic pain claims to be apportioned in the same manner as any other claim. Prior to 2004, chronic pain claims were not subject to apportionment. Other than this change no other revisions have been made to the policy in 10 years.

For a 45 day period throughout February/March/April 2007, the WCB consulted stakeholders on the specific issues they would like the WCB to consider as part of the policy review and development process. This first phase of consultation concluded on April 23, 2007. During this initial consultation period, the WCB received 14 submissions from stakeholders outlining their issues and concerns with respect to apportionment of worker's benefits. Considering stakeholder input, the WCB has drafted a revised apportionment policy with the intent of achieving the following objectives:

- a) better align the policy with the intent of Section 10(5) of the *Act*;
- b) streamline the policy and simplify the language;
- c) provide clear guidelines for the adjudication of claims that may require apportionment to promote consistency, accuracy and accountability in WCB decision making;
- d) ensure that the employer pay for impairment and loss of earnings that is due to the workplace injury;
- e) address any gaps in the existing policy (i.e. asymptomatic conditions, temporary worsening of a condition);
- f) ensure the policy is fair to both workers and employers; and
- g) provide direction for apportionment in relation to the types of claims the WCB is seeing today.

What is apportionment of WCB Benefits?

Apportionment is generally defined as an estimate of the degree to which work related or non work-related factors may have caused or contributed to a worker's permanent impairment and/or loss of earnings. In a workers' compensation system, the concept of apportioning benefits ensures that the employer is responsible for compensating workers only for the proportion of impairment and loss of earnings that result from a work-related injury.

Legal Framework:

Section 10(5) of the *Workers' Compensation Act* (the “*Act*”) states that compensation can only be paid to an injured worker for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to a workplace injury.

Section 10(5) specifically states:

(5) Where a personal injury by accident referred to in subsection (1) results in loss of earnings or permanent impairment

(a) due in part to the injury and in part to causes other than the injury; or
(b) due 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 reasonably be attributed to the injury.

The mandatory language, “is payable”, used in Section 10(5) of the *Act*, requires the WCB to consider a “pre-existing disease or disability” and “causes other than the injury” when adjudicating a worker’s claim and failure to do so could be used as grounds of appeal by an employer or a worker.

The language used in Section 10(5) of the *Act* distinguishes between “disease” and “disability” and provides for apportionment of a worker’s benefits where there is an “aggravation, activation, or acceleration of a disease *or* disability existing prior to the injury”. The language of Section 10(5) provides for apportionment of a worker’s benefits where a work-related injury aggravates, activates or accelerates a pre-existing disease or disability, whether symptomatic or asymptotic before the injury.

Current Policy 3.9.11R – Apportionment of Benefits:

Under the current apportionment policy, the proportion of benefits payable is determined by the extent a pre-existing disease or disability or a non work-related factor impacts a worker’s level of permanent impairment and extended loss of earnings. If it is determined that the non work-related factor is having no or minimal impact on a worker’s working capacity, the permanent impairment and resulting extended loss of earnings are not apportioned.

If the non work-related factor is impacting a worker’s working capacity, the WCB will determine what percentage of the permanent impairment and extended loss of earnings is attributable to the non work-related factor and apportions the amount of benefits payable to the worker accordingly.

While the impact of an injury may be short or long term, the current policy only allows for apportionment of long-term benefits including Permanent Impairment Benefits (PIB) and Extended Earnings Replacement Benefits (EERB). Temporary benefits (such as Temporary Earnings Replacement Benefits (TERB), Medical Aid, and Vocational Rehabilitation) are not apportioned. This policy direction was based on the recognition that during the initial phase of recovery the compensable injury plays a significant role in a worker's temporary loss of earnings and/or medical needs. In 1997, when the policy was developed, it was the belief that all temporary benefits required by a worker following a work-related injury can be reasonably attributed to the work-related injury and therefore apportionment was not appropriate.

Issues outside the Scope of this Review:

During the first stage of consultation, stakeholders identified two issues that are considered outside the scope of Policy 3.9.11R – Apportionment of Benefits. These issues are *general entitlement* and *apportionment of claims costs*.

General Entitlement: A number of stakeholders identified issues related to the topic of “general entitlement” as an area requiring policy development. Specifically, stakeholders identified the need for clearer adjudicative guidelines that support the determination of whether an injury “arose out of and in the course of employment”.

Apportionment of Claim Costs: A number of consultation submissions also identified the issue of apportioning claim costs between employers as a policy item requiring consideration. While Policy 3.9.11R - *Apportionment of Benefits* addresses the issue of apportionment, it focuses exclusively on the process for apportioning workers' benefits. The topic of apportioning claim costs between employers has separate legal and administrative implications requiring independent analysis and a unique policy approach.

While the WCB acknowledges that these issues are important, they are outside the scope of this policy review. To allow further consideration of these issues, the WCB will add them to the list of potential policy issues to be considered for inclusion on future policy agendas.

Stage One of Stakeholder Consultation – Issue Identification:

Based on the first stage of the consultation process, the WCB identified/confirmed a number of key issues that require consideration as part of the review of the current apportionment policy.

Overall, it is evident from the submissions received by the WCB that stakeholders have divergent views on the most appropriate approach to apportioning workers' benefits. Employers generally believe that the apportionment policy requires revision and should permit the apportionment of both short-term and long-term benefits. In contrast, Injured Worker Associations and Labour generally believe that the current apportionment policy

does not require revision and that the policy permits apportionment to occur where it is appropriate. Details of the comments provided by stakeholder groups are attached as Appendix C.

Recognizing the divergent views of stakeholders, the WCB is proposing revisions to Policy 3.9.11R – *Apportionment of Benefits* that it believes offers a fair and balanced approach to apportionment. In particular, the proposed changes were developed to provide a workable framework that supports apportionment of benefits where a non work-related factor is contributing to a worker’s functional limitations and/or long-term earnings capacity.

Proposed Policy Revisions:

The new framework presented in this paper ensures that all claims, regardless of their complexity, can be apportioned where it is appropriate to do so.

Regardless of the type of claim under review for apportionment, the apportionment of benefits will be determined based on the evidence (i.e. chart notes, specialist’s reports, x-rays, etc) gathered with respect to the impact of the non work-related factor on a worker’s permanent impairment and extended loss of earnings.

It should be noted that no specific changes were made to the revised apportionment policy to address complex claims such as chronic pain. Complex claims were considered in the development of the new policy framework and it was determined that these claims will be treated in the same manner as all others.

This section of the paper identifies the proposed major changes to the current apportionment policy and the supporting rationale. Please see Appendix B for a copy of the proposed draft policy.

1. Definitions of aggravation, activation and acceleration

Section 10(5) of the *Act* refers to apportionment of permanent impairment or loss of earnings due to an “*aggravation, activation or acceleration*” of a disease or disability existing prior to the work-related injury. The existing policy defines each of the terms “*aggravation, activation or acceleration*” separately as distinct entities. In practice, the terms are not recognized as distinct or separate but are used interchangeably, complicating the adjudication process. In particular, medical reports and medical advice received by the WCB use these terms interchangeably to mean the same thing – a permanent worsening of a pre-existing disease or disability arising from the compensable injury. As a result, to simplify the intent and meaning of these terms, it is proposed that the terms “*aggravation, activation or acceleration*” be merged into a single definition of *aggravation* as they all refer to a *permanent worsening* of a pre-existing disease or disability.

Further, the current policy also uses the term *aggravation* to mean a temporary or permanent increase in impairment or loss of earnings. To clearly distinguish between temporary and permanent worsening, it is proposed that a new definition of *exacerbation* be introduced. The term *exacerbation* is often used in medical reports and in medical advice received by the WCB to refer to a temporary worsening. This proposed change addresses the gap identified by some stakeholders that the current policy does not provide clear direction on apportionment of benefits for a temporary worsening of a condition. Clarifying the language and intent will also promote consistency and accuracy in decision-making.

In summary, to better align the policy with the language seen in medical reports and to provide additional clarification on the approach to apportionment, the definition of *aggravation* has been limited to a *permanent worsening* and a new definition of *exacerbation* has been added to refer to a *temporary worsening* of a pre-existing disease or disability.

| Current Language | Proposed Change to Language |
|--|--|
| <p>“acceleration” means a permanent worsening of a worker’s pre-existing disease or disability resulting from a compensable injury;</p> <p>“activation” means the act or process of rendering active;</p> <p>“aggravation” means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in a temporary or permanent increase in the impairment and/or loss of earning capacity resulting from the pre-existing disease or disability;</p> | <p>“aggravation” means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in a permanent activation, acceleration or increase in the impairment and/or loss of earning capacity resulting from the pre-existing disease or disability;</p> <p>“exacerbation” means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in a temporary increase in the impairment and/or loss of earning capacity resulting from the pre-existing disease or disability;</p> |

2. Definition of non-compensable factor

Today, the policy defines separately “cause other than the injury” and “pre-existing disease or disability”. The language of the policy suggests that a different approach to apportionment is used for the two situations. Some sections of the current policy refer specifically to “a pre-existing disease or disability”, but are silent on whether it applies to a “cause other than the injury”. This differing terminology also causes confusion for decision-makers as it is not clear whether the relevant sections of the policy apply to both a “pre-existing disease or disability” and “cause other than the injury”, or just the one explicitly stated.

In reality, there is no difference in the approach to apportionment for a “pre-existing disease or disability” and “cause other than the injury”. To simplify the concepts addressed in the apportionment policy and to provide a more user-friendly approach, the WCB is proposing to combine the terms “pre-existing disease or disability” and “cause other than the injury” into a single definition of “non-compensable factor”.

The proposed adoption of the term “non-compensable factor” will also address an issue raised by some stakeholders during the consultation process. Specifically, stakeholders indicated revisions to the apportionment policy should provide clearer guidance on how the WCB considers the apportionment of non work-related factors that develop after the work-related injury and impact a worker’s permanent impairment and earnings loss. The proposed definition of “non-compensable factor” encompasses both non work-related factors that exist prior to the work-related injury or develop post-injury.

| Current Language | Proposed Change to Language |
|--|--|
| <p>“cause other than the injury” means any aspect of the physical condition of an individual worker which, due to its nature or severity, could be reasonably expected to have a significant impact on the duration and/or the degree of a worker’s loss of earnings or permanent impairment resulting from a compensable injury;</p> <p>“disease or disability existing prior to the injury” or “pre-existing disease or disability” means a non-compensable disease or disability which existed prior to the compensable injury.</p> | <p>“non-compensable factor” means any condition unrelated to a compensable injury which may affect recovery and/or the extent of impairment/earnings loss. A non-compensable factor may exist prior to a compensable injury or it may develop post-injury. This includes causes other than the injury and pre-existing diseases or disabilities;</p> |

3. Temporary Earnings Replacement Benefits (TERB); Medical Aid; Vocational Rehabilitation (VR)

A principle underlying the current policy is that any temporary loss of earnings experienced by a worker following a workplace injury can be reasonably attributed to the work-related injury even if a non work-related factor contributes to the temporary loss of earnings. Based on this principle, TERB is not apportioned. That being said, the WCB will only continue to award TERB so long as the work-related injury is playing some role in a worker’s ongoing loss of earnings.

Some stakeholders have indicated that the WCB should consider the apportionment of short-term benefits. Based on the analysis, this is not being recommended for a number of reasons including:

- **Potential inconsistency with WCB’s goal of safe and timely return to work**

Apportioning TERB may put undue pressure on workers to return to work before it is safe to do so because of financial pressures (workers only receive a portion of their earnings replacement benefits). This in turn, may lead to increased risk of recurrence of the initial work-related injury resulting in a more serious and complex injury, prolonging recovery unnecessarily and possibly increasing the overall time away from work.

- **Fair and Reasonable**

To apportion short-term benefits may be viewed as contrary to the concept of fair and reasonable, “but for the compensable injury” the worker would not be experiencing a temporary earnings loss and would be working. Also, no other jurisdiction in Canada apportions temporary benefits where the compensable injury is contributing to a worker’s temporary loss of earnings.

Further, it may be considered unjust to apportion Medical Aid (i.e. hearing aids) where the evidence demonstrates that the work-related injury, irrespective of the non work-related factor, would require it. For example, if a worker has occupational hearing loss resulting in impairment and has a non work-related factor increasing the impairment, the work-related injury is still a significant contributing factor to the worker’s need of a hearing aid.

- **Administratively Feasible – Methodology for Apportioning Temporary Benefits**

The WCB has objective, medically based tools including the *American Medical Association Guidelines for Permanent Impairment*, (*AMA Guidelines*) 4th edition, and the *Permanent Medical Impairment Guidelines (PMI Guidelines)* to help inform the apportionment of permanent benefits. These tools are used after an injury has stabilized and a worker reaches maximum medical recovery (recovery has plateaued and the condition is not expected to improve). As a result, these tools are not appropriate for guiding apportionment of temporary earnings benefits, where a worker’s recovery from an injury is still progressing and improving. The WCB explored other tools for apportioning short-term benefits but could not identify one that provided a fair, reasonable and administratively useable approach to apportioning short-term benefits.

- **Administrative Efficiency**

The apportionment of short-term benefits may also increase administrative costs as the number of claims that could be considered for apportionment would increase to 8500 claims (# of claims receiving short-term benefits) from 1300 claims (# of claims receiving long-term benefits) annually.

In summary, the WCB is not recommending any changes to the original intent of the TERB, Medical Aid and VR section of the policy. The analysis conducted did not support a departure from the original principles underlying this section of the current policy. A few minor changes are proposed to this section of the policy to simplify the language and incorporate the new definitions.

4. Permanent Impairment

When a permanent impairment remains after a worker reaches maximum medical recovery the WCB must determine what proportion of the permanent impairment is a result of the work-related injury and what proportion is due to the non work-related factor. The WCB awards a permanent impairment for only the work-related proportion of the impairment.

The current policy outlines the approach used by the WCB to determine what proportion of a worker's overall impairment is work-related. The current policy directs the WCB to determine, based on the evidence gathered (i.e. x-rays, medical reports etc), the degree of impairment produced by the non work-related factor. This can be done in one of two ways:

- 1) Using the *AMA* or *PMI Guidelines*, assign a permanent impairment rating to both the worker's post-injury impairment and non work-related factor. Subtract the non work-related permanent impairment rating from the post-injury impairment rating to establish the work-related permanent impairment; or
- 2) If step one is not doable because the non work-related factor cannot be rated under the *AMA* or *PMI Guidelines*, the current policy directs staff to classify the non work-related factor into one of four categories: minor (no apportionment), moderate (75%), major (50%), or severe (25%). The post-injury impairment is then multiplied by the percentage assigned to the non-compensable factor, as directed by the Permanent Impairment Table included in the policy, to establish the compensable impairment.

In the proposed revised policy, the WCB is not recommending any significant changes to step 1 of the process described above. Any revisions proposed to this section of the policy are to simplify and clarify the language. However, a number of major changes are proposed for step 2.

In particular, for step 2 above the WCB is proposing to:

- a. reduce the overall number of categories from 4 to 3;
- b. revise the definitions of minor, moderate, major;
- c. realign the percentage of Permanent Impairment Benefit payable associated with each of the 3 categories; and
- d. provide direction on apportionment of occupational hearing loss.

Each of these changes is explained in more detail below.

A. Reduce the Number of Categories:

The current apportionment policy uses four categories (minor, moderate, major & severe) to determine the impact of a non work-related factor on permanent impairment. In turn, this categorization is then used to determine the proportion (%) of the Permanent Impairment Benefit (PIB) that is payable for the work-related injury. Upon researching how other provinces apportion benefits, it was discovered that those who use a categorization approach use two or three categories. Further, based on adjudicative experience, it was recognized that the distinction between the definitions of “major” and “severe” is not material, making adjudication difficult and increasing the level of discretion necessary.

For these reasons, it is proposed that the “severe” category be removed. The elimination of the “severe” category will reduce the amount of discretion needed to classify the non work-related factor as there will be a clearer distinction between the three categories.

B. Revise the definitions of minor, moderate and major:

Under the current policy, the definitions of minor, moderate and major refer to the degree of limitation caused by the impairment on a worker’s working capacity. The reference to working capacity in the definitions associated with Permanent Impairment Benefit is inconsistent with its general meaning. Simply stated, permanent impairment measures the loss of a body part and/or body function (i.e. amputation, or loss of range of motion) and does not directly consider the impact on earnings capacity - this is considered under the EERB section of the policy. Creating a linkage to work capacity in the permanent impairment section of the policy has led to confusion and has prevented the application of the apportionment policy in situations where it may have been appropriate.

As a result, it is proposed that in the permanent impairment section of the policy the definitions of minor, moderate and major be revised to remove reference to working capacity and to focus exclusively on a worker’s functional abilities. This proposed revision will allow for a more accurate rating of the effect of the non work-related factor on the permanent impairment.

Also, the current policy directs that where there is a non-work related factor that is degenerative in nature, the WCB will gather evidence with respect to how the worker's condition would have progressed without the occurrence of the work-related injury. In the proposed policy this concept has been incorporated into the revised definitions of minor, moderate and major. The proposed new definitions now consider (a) the limitations that existed prior to the work-related injury and (b) how the non work-related factor would have been expected to limit functional ability in the absence of the work-related injury. This proposed change to the definitions addresses some stakeholders' concerns that the current policy offers no clear direction for cases where the pre-existing disease or disability exhibits no symptoms prior to the work-related injury but becomes symptomatic after the injury.

| Current Language | Proposed Change to Language |
|--|--|
| <p>For Permanent Impairment:</p> <p>“minor” refers to an impairment which produced no or minimal limitations on working capacity but required occasional medical care</p> <p>“moderate” refers to an impairment which produced some limitations on working capacity and required periodic medical care</p> <p>“major” refers to an impairment which produced significant limitations on working capacity requiring ongoing medical care</p> <p>“severe” refers to an impairment which produced significant limitations on working capacity, required ongoing medical care and would certainly have resulted in total disability independent of the compensable injury</p> | <p>For Permanent Impairment:</p> <p>“minor” – Non-compensable factor(s) has been documented to cause or would likely cause slight reduction in a worker's <i>functional ability</i></p> <p>“moderate” – Non-compensable factor(s) has been documented to cause or would likely cause substantial reduction in a worker's <i>functional ability</i></p> <p>“major” – Non-compensable factor(s) has been documented to cause or would likely cause severe reduction in a worker's <i>functional ability</i></p> |

C. Realign the Percentage of Permanent Impairment Benefit Payable Associated with each Category:

The proposal to eliminate the “severe” category and to introduce new definitions of minor, moderate, and major requires the WCB also to adjust the percentages associated with each category.

Under the current policy, the definition of “minor” includes “no or minimal limitations” and results in no apportionment. In the revised definition of “minor” the WCB has collapsed the existing definitions of “minor” and “moderate” and has removed the “no

limitation” component. With this merge the WCB is proposing now to apply the percentage of impairment payable under the current “moderate” category to the “minor” category – apportionment at 75%.

Similarly, the WCB has also re-aligned the definitions of “moderate” and “major” and has increased the degree of impact on a worker’s functional ability associated with each. As a result, the percentage of benefits payable related with the new definitions has also been adjusted. For instance, the proposed definition of “moderate” now reflects functional limitations similar to the existing definition of “major” and is apportioned at 50% - the percentage currently linked to the “major” category (see Table B below for details). Similarly, the new proposed definition of “major” now requires “severe” limitations of functional abilities and in turn is apportioned at 25% of the percentage currently associated with the “severe” category.

A practical mapping of old to new categories follows;

Table A: Merge of Categories

| Current Category | Proposed Category |
|-------------------------|--------------------------|
| Old Minor & Moderate | New Minor |
| Old Major | New Moderate |
| Old Severe | New Major |

Table B: Proposed Changes for Permanent Impairment Benefit Payable:

| Current Language | | Proposed Change to Language | |
|--|---|--|--|
| Degree of Pre-existing Disease or Disability | Compensable Portion of Post-Injury Permanent Impairment | Classification of Non-Compensable Factor | Compensable Percentage of Permanent Impairment |
| Minor | 100% (no apportionment) | Minor | 75% |
| Moderate | 75% | Moderate | 50% |
| Major | 50% | Major | 25% |
| Severe | 25% | | |

D. Occupational Hearing Loss:

One further revision to the Permanent Impairment section of the policy is the addition of a new paragraph to explicitly address occupational hearing loss. The proposed revisions clarify that the apportionment policy applies to occupational hearing loss and outlines the process to be followed where it is appropriate to do so. This proposed change addresses some stakeholders’ questions related to the applicability of the current apportionment policy to occupational hearing loss and the uncertainty of how to appropriately apply the policy to these claims.

5. Extended Earnings Replacement Benefits (EERB)

Where a worker is experiencing an ongoing loss of earnings as a result of a permanent impairment that remains after a work-related injury, the WCB will determine what proportion of the loss of earnings is attributable to the work-related injury and what proportion is due to a non work-related factor. An EERB will only be paid for the proportion of the ongoing loss of earnings that result from the work-related injury.

Under the current policy, the determination of the work-related proportion of the loss of earnings is based on the evidence gathered with respect to the impact of a worker's pre-existing disease or disability on a worker's ability to work before the injury. This information is then used to categorize the severity of the non-work related factor into one of four categories minor (no apportionment of EERB), moderate (75%), major (50%) or severe (25%).

To clarify and simplify the process for apportioning an EERB and to create a balanced approach that considers both the severity of the work-related and non work-related factor on a worker's earning capacity the WCB is proposing four major changes to this section of the policy.

Specifically, the WCB is recommending:

- a. categorize both the work-related injury and non work-related factor;
- b. reduce the overall number of categories from 4 to 3;
- c. revise the definitions of minor, moderate, major; and
- d. realign the percentage of EERB payable associated with each category.

A. Categorize both the work-related injury and non work-related factors:

Under the current apportionment policy, four categories (minor, moderate, major, & severe) are used to determine the impact of the non work-related factor on a worker's earning capacity. The impact of the work-related injury on a worker's earnings ability is not directly taken into consideration. In the proposed revised policy, the WCB proposes to categorize both the work-related injury and the non-work related factor to ensure that a full picture of a worker's injuries/conditions are considered and the significance of the work-related injury is taken into consideration when determining apportionment.

For example, consider a situation where a non work-related factor is considered moderate and the work-related injury is regarded as major. Under the current policy, a worker would be entitled to 75% of his/her EERB. In comparison, under the proposed policy, this same worker would receive a full EERB (no apportionment) due to the significance of the work related injury. On the other hand, consider a situation where the non work-related factor is moderate and the work-related injury is minor. Under the current policy, a worker would be entitled to receive 75% of his/her EERB. In contrast, under the proposed policy, this same worker would receive 50% of his/her EERB.

Overall, the proposed approach permits the consideration of the impact of both the work-related injury and the non work-related factor on a worker's functional limitations and corresponding impact on earning capacity. This is not the case under the current policy where consideration is given solely to the impact of the non work-related factor on a worker's earnings capacity.

B. Reduce the overall number of categories from 4 to 3:

Similar to the permanent impairment section, the current apportionment policy uses the same four categories (minor, moderate, major & severe) to determine the impact of a non work-related factor on a worker's earning capacity. In turn, the categorization is used to determine the proportion of the EERB payable for the work-related injury. For the same reasons recommended in the permanent impairment section for reducing the number of categories from four to three (minor, moderate & major), it is also suggested that the same thing be done under the EERB section of the revised policy. The elimination of the "severe" category will reduce the amount of discretion needed to classify the non work-related factor and work-related injury as there will be a more distinct difference between the three categories.

C. Revise the definitions of minor, moderate and major:

Under the current policy, the definitions of minor, moderate and major refer to the degree of limitation caused by the impairment on a worker's working capacity. Where there is no direct evidence that the impairment prevented a worker from working before the work-related injury, the EERB is typically not apportioned. Given that in most cases the worker is working prior to the injury (otherwise they would not have had a work-related injury), it is often difficult to show that the non work-related factor impacted his/her earnings capacity, although evidence may indicate that the non work-related factor has caused functional limitations (sometimes significant).

Considering the above, under the EERB section of the proposed policy, the definitions of minor, moderate, and major will now consider a worker's functional abilities. Given that functional ability is defined as an individual's ability to carry out activities of daily living, including work, it is reasonable to assume that if evidence shows that a non work-related condition is impacting a worker's functional ability, it is also impacting their ability to return to work. In particular, the proposed changes to the definitions of "moderate" and "major" remove the requirement to prove that a non work-related factor is having an impact on the worker's earnings capacity. Where a non work-related factor is classified as "moderate" or "major", meaning the documented evidence shows that the non work-related factor is having a "substantial" or "severe" impact on a worker's functional abilities, it will be assumed that it is also impacting a worker's earnings capacity and the EERB will be apportioned. However, it is important to point out that the determination of apportionment of an EERB is still an evidence based decision. That is, the evidence must be gathered to demonstrate the degree of impact of the non work-

related factor on a worker's functional ability and whether it is properly classified as minor, moderate or major.

Overall, the proposed definitions of minor, moderate and major are similar to those proposed for the permanent impairment section of the revised policy, the only difference being the link to earnings capacity. The evidence gathered by the WCB to determine the appropriate classification of a non work-related factor on a worker's permanent impairment also will be considered in the classification process under the EERB section. It is anticipated that the classification of the non work-related factor under the permanent impairment section may result in the same classification of the non work-related factor under EERB section (i.e. if the non work-related factor is considered moderate under the permanent impairment section of the policy, it may be considered moderate under the EERB section).

| Current Language | Proposed Change to Language |
|--|---|
| <p>For Extended Earnings Replacement Benefits:</p> <p>“minor” refers to an impairment which produced no or minimal limitations on working capacity but required occasional medical care</p> <p>“moderate” refers to an impairment which produced some limitations on working capacity and required periodic medical care</p> <p>“major” refers to an impairment which produced significant limitations on working capacity requiring ongoing medical care</p> <p>“severe” refers to an impairment which produced significant limitations on working capacity, required ongoing medical care and would certainly have resulted in total disability independent of the compensable injury</p> | <p>For Extended Earnings Replacement Benefits (EERBs):</p> <p>“minor” – Non-compensable factor(s)/compensable injury has been documented to cause or would likely cause slight reduction in a worker's functional ability and therefore is expected to contribute minimally to limitations in <i>earnings capacity</i></p> <p>“moderate” – Non-compensable factor(s)/compensable injury has been documented to cause or would likely cause substantial reduction in a worker's functional ability and therefore is expected to contribute to limitations in <i>earnings capacity</i></p> <p>“major” – Non-compensable factor(s)/compensable injury has been documented to cause or would likely cause severe reduction in a worker's functional ability and therefore is expected to contribute to limitations in <i>earnings capacity</i></p> |

D. Realign the Percentage of EERB Payable Associated with each Category:

In the proposed policy, it is recommended that apportionment not occur in the more extreme situations specifically where the non work-related factor is “minor” and where the work-related factor is “major”.

It is proposed where the classification of the non work-related factor is “minor”, meaning it is causing “slight” reduction in a worker’s functional abilities, it is recommended that the EERB not be apportioned. This is based on the belief that if a non work-related factor is causing only a “slight” reduction in a worker’s functional ability, it is reasonable to assume that a “slight” functional limitation will not result in an inability to return to work and that the work-related injury is the primary cause of the impact on earnings capacity. Also, from a practical evidentiary perspective, it is difficult to show that a “minor” non work-related factor has affected a worker’s earnings capacity and in practice apportionment in this type of situation is rarely successful.

It is recognized that the approach to apportionment of a “minor” non work-related factor differs in the Permanent Impairment section versus the EERB section of the proposed policy. The apportionment of a “minor” non work-related factor is possible under the proposed Permanent Impairment section (apportionment at 75%) because permanent impairment is directly measuring the loss of function. If a “minor” non work-related factor is causing a “slight” reduction in a worker’s functional ability this must be taken into consideration in the apportionment of the Permanent Impairment Benefit as the work-related injury is not the sole cause of the existing functional limitations. The EERB section on the other hand, is considering the impact of functional limitations on earnings capacity. A “slight” reduction in functional abilities should not prevent a successful return to work; therefore it will not be apportioned under the proposed changes.

Under the current policy the severity of the work-related injury is not taken into consideration in apportioning an EERB. As a result, the EERB is apportioned if the non work-related factor is classified as “moderate, major or severe” irrespective of the classification of the work-related injury. In the revised policy, it is proposed that the EERB not be apportioned where the work-related injury is classified as “major”. This recommendation is based on the recognition, based on evidence, that the workplace injury is significant and is causing a severe reduction, per the definition, in the worker’s functional ability and in turn is impacting a worker’s earnings capacity. In this situation, it appears fair and reasonable to determine that a major work-related injury is a significant contributing factor to a worker’s inability to return to work and the associated EERB should not be apportioned.

The proposed classification of the work-related and non-worked factors is based on the approach to proportionment adopted by the Workplace Health, Safety and Compensation Commission of Newfoundland and Labrador with refinement to the percentage of EERB payable. Based on Newfoundland’s practical experience with their policy, it was suggested that the percentages be adjusted upward to better reflect the impact of the non work-related and work-related factors on earnings capacity.

Proposed Table Changes EERB % Payable:

| Current Language | | Proposed Change to Language | | |
|--|-------------------------|--------------------------------------|---|----------------------------|
| Degree of Pre-existing Disease or Disability | % of EERB Payable | Classification of Compensable Injury | Classification of Non-Compensable Factor(s) | Percentage of EERB Payable |
| Minor | 100% (no apportionment) | Minor | Moderate | 50% |
| Moderate | 75% | Moderate | Moderate | 75% |
| Major | 50% | Major | Moderate | 100% |
| Severe | 25% | Minor | Major | 25% |
| | | Moderate | Major | 50% |
| | | Major | Major | 100% |

Conclusion:

We are interested in hearing your comments on the proposed changes presented in this paper. In particular, we would like you to answer the following questions:

- Do you agree/disagree with the proposed revisions to the WCB apportionment policy? Please explain.
- Are there additional changes you would like to see included in the revised apportionment policy?

All comments will be considered as the WCB finalizes revisions to the apportionment policy.

Please review the background paper and provide your written feedback by **October 10th** to:

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This paper is also available at www.wcb.ns.ca under News & Events.

DEADLINE FOR COMMENTS: **October 10th, 2007**

Appendix A: Current Policy

POLICY NUMBER: 3. 9. 11R

Effective Date: September 10, 2004

Date Issued: September 13, 2004

Date Approved by Board of Directors: September 9, 2004

Topic: Apportionment of Benefits

Section: Short-Term and Long-Term Benefits

Subsection: General

Preamble

The Board is directed by Section [10\(5\)](#) of the *Workers' Compensation Act* (the "Act") to pay compensation only for the proportion of a worker's loss of earnings or permanent impairment that may reasonably be attributed to a personal injury by accident arising out of and in the course of employment. Compensation is not payable for the proportion of the loss of earnings or permanent impairment which is attributable to causes other than the injury or to the aggravation, activation or acceleration of a disease or disability existing prior to a work related injury. The Board has adopted the following Policy with respect to the effect of Section [10\(5\)](#) on the amounts of compensation benefits payable.

Definitions

For the purposes of this Policy, the following definitions shall apply:

"acceleration" means a permanent worsening of a worker's pre-existing disease or disability resulting from a compensable injury;

"activation" means the act or process of rendering active;

"aggravation" means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in a temporary or permanent increase in the impairment and/or loss of earning capacity resulting from the pre-existing disease or disability;

"cause other than injury" means any aspect of the physical condition of an individual worker which, due to its nature or severity, could be reasonably expected to have a significant impact on the duration and/or the degree of a worker's loss of earnings or permanent impairment resulting from a compensable injury

"compensable injury" means a personal injury by accident arising out of and in the course

of employment;

"degenerative" means characterized by progressive, often irreversible, deterioration;

"disability" means the limiting loss or absence of capacity of a worker to meet personal, social or occupational demands;

"disease" means any deviation from or interruption of the normal structure or function of any part, organ or system (or combination thereof) of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology and prognosis may be known or unknown;

"disease or disability existing prior to the injury" or "pre-existing disease or disability" means a non-compensable disease or disability which existed prior to the compensable injury.

Policy Statement

1. General Principles

The Board will apply the following general principles when determining the impact of Section [10\(5\)](#) on compensation benefits payable:

1.1 Apportionment of benefits under Section [10\(5\)\(a\)](#) will be considered only in very obvious cases where there is clear evidence that a "cause other than the injury" has made a material contribution to a worker's permanent impairment or loss of earnings; i.e., there must be clear evidence that such cause has resulted in a greater loss of earnings or permanent impairment subsequent to the compensable injury than would have occurred if the cause other than the injury had not been present.

1.2 Only the presence of a non-compensable pre-existing disease or disability will give rise to the application of Section [10\(5\)\(b\)](#). Section [10\(5\)\(b\)](#) does not apply where a worker has a pre-existing disease or disability arising from a compensable injury. However, if the worker has already been awarded benefits for the permanent impairment produced by the earlier compensable injury and the new compensable injury involves the same area of the body, any permanent benefits awarded for the new injury will be reduced accordingly.

1.3 The mere presence of a pre-existing disease or disability is not sufficient to give rise to the application of Section [10\(5\)\(b\)](#). Where the worker has a pre-existing disease or disability, causation of the aggravation, activation or acceleration must be determined. There must be medical compatibility between the change in the pre-existing disease or disability and the compensable injury.

1.4 Benefits payable for temporary earnings loss, medical aid, vocational rehabilitation and death/survivors' benefits will generally not be subject to apportionment under Section [10\(5\)](#) because they are not paid directly as compensation for permanent impairment or loss of earnings.

1.5 Benefits payable for permanent impairment and extended earnings loss will be subject to apportionment in accordance with the provisions of this Policy.

2. Impact on Benefits Payable

A. Temporary Earnings-Replacement Benefits (TERB)

The Board takes the position that all of the temporary loss of earnings subsequent to a compensable injury can be "reasonably attributed" to the compensable injury even if a cause other than the injury is a factor in the loss of earnings or the compensable injury caused an aggravation, activation or acceleration of a pre-existing disease or disability. Workers whose injuries fall within the terms of Section [10\(5\)](#) will be paid TERB as follows:

2.1 TERB will be paid not only during the normal recovery period for the compensable injury but also during any prolongation of the recovery period which is the result of such other cause, aggravation, activation or acceleration.

2.2 So long as there are medical findings to substantiate that the worker's on-going loss of earnings is a result of (i) the compensable injury; (ii) complications arising out of the impact of the compensable injury on a pre-existing disease or disability; or (iii) the combined impact of the compensable injury and a cause other than the injury, TERB will be payable.

B. Medical Aid

Medical aid is paid to compensate for the cost of health care services provided to injured workers, as well as for reasonable expenses incurred by workers to obtain such services, rather than as direct compensation for loss of earnings or permanent impairment. Therefore, compensation paid for medical aid with respect to injuries which fall within the scope of Section [10\(5\)](#) of the Act will not be subject to apportionment.

C. Vocational Rehabilitation Benefits and Services

Vocational rehabilitation services and accompanying benefits may be provided to injured workers who are likely to suffer a permanent medical

impairment (PMI) as a result of a compensable injury and who may experience an earnings loss as a result of the PMI. When determining the eligibility for vocational rehabilitation services of workers whose injuries fall within the scope of Section [10\(5\)](#) of the *Act*, the following principles shall apply:

2.4 Where the Board determines that no proportion of a worker's PMI can be attributed to a compensable injury, vocational rehabilitation services will not be offered to the worker.

2.5 Where the Board determines that some proportion of a worker's PMI can be attributed to a compensable injury, medical advice should be sought to assist in determining what portion of the anticipated long-term earnings loss can reasonably be attributed to the compensable injury. If any portion of the anticipated long-term loss of earnings can be attributed to the compensable injury, vocational rehabilitation services and accompanying benefits will be provided to the worker in accordance with normal guidelines, without apportionment.

2.6 Where it is clear that no portion of the anticipated long-term loss of earnings can be attributed to the compensable injury, vocational rehabilitation services will generally not be offered to the worker.

D. Permanent Impairment Benefits (PIBs)

When permanent impairment remains after all remedial medical or surgical treatment has been completed (i.e. when maximum medical recovery has been reached), the Board will determine what proportion of the permanent impairment can be attributed to the compensable injury and what proportion can be attributed to a cause other than the injury or to a pre-existing disease or disability. PIBs will be paid only for the proportion of the permanent impairment which can be attributed to the compensable injury. In order to make this determination the Board will proceed as follows:

2.7 The Board will seek to obtain as much evidence as possible with respect to the nature of the cause other than the injury or the pre-existing disease or disability. This evidence may include previous notes taken by treating physicians, the results of previous diagnostic tests such as X-rays, CT scans, etc., information obtained from the worker and the employer and information contained in previous claims for compensation benefits.

On the basis of the information obtained, the Board will categorize the pre-existing disease or disability according to its nature and according to

the degree of impairment produced prior to the compensable injury.

If the pre-existing disease or disability is one which can be rated for permanent impairment in accordance with the Guidelines for Assessment of Permanent Medical Impairment ("PMI Guidelines") contained in Policy [3.3.2](#), the level of compensable permanent impairment will be determined in accordance with the procedure set out in paragraph 2.9(a) of this Policy. If the pre-existing disease or disability is one which cannot readily be rated for permanent impairment in accordance with the PMI Guidelines, the Board will proceed further to categorize the degree of impairment produced by the pre-existing disease or disability as "minor", "moderate", "major" or "severe". In such cases, the level of compensable permanent impairment will be determined in accordance with the procedure set out in paragraph 2.9(b) of this Policy.

For the purposes of sections 2.9 to 2.12 of this Policy, the following definitions shall apply:

"minor" refers to an impairment which produced no or minimal limitations on working capacity but required occasional medical care.

"moderate" refers to an impairment which produced some limitations on working capacity and required periodic medical care.

"major" refers to an impairment which produced significant limitations on working capacity requiring ongoing medical care.

"severe" refers to an impairment which produced significant limitations on working capacity, required ongoing medical care and would certainly have resulted in total disability independent of the compensable injury.

2.9 The Board will assign a PMI rating to the permanent impairment remaining after the compensable injury as follows:

- a. If the worker has a pre-existing disease or disability which can be rated in accordance with the PMI Guidelines and then suffers a compensable injury to the same body area, both the pre-existing disease or disability and the post-injury impairment will be assigned a PMI rating. The PMI rating for the pre-existing disease or disability will be subtracted from the PMI rating for the post-injury impairment to determine the compensable permanent impairment.
- b. If the worker has a pre-existing disease or disability which cannot readily be rated in accordance with the PMI Guidelines and then suffers a compensable injury which is determined to have

aggravated, activated or accelerated the pre-existing disease or disability, the worker's post-injury impairment will be assigned a PMI rating and the pre-existing disease or disability will be classified as "minor", "moderate", "major" or "severe".

The compensable permanent impairment will then be determined in accordance with the following table:

| Degree of Pre-existing Disease or Disability | Compensable Portion of Post-Injury Permanent Impairment |
|---|--|
| Minor | 100% (no apportionment) |
| Moderate | 75% |
| Major | 50% |
| Severe | 25% |

- c. If a cause other than the injury has increased the degree of permanent impairment remaining after the compensable injury, the Board will determine the percentage of post-injury impairment which is attributable to the cause other than the injury and reduce the PMI rating for the post-injury impairment by that percentage.

E. Extended Earnings-Replacement Benefits (EERBs)

Where the worker is experiencing an on-going loss of earnings as a result of the permanent impairment remaining after the compensable injury, the Board will determine what proportion of the loss of earnings can be attributed to the compensable injury and what proportion can be attributed to a cause other than the injury or to a pre-existing disease or disability. EERBs will be paid only for the proportion of the on-going loss of earnings which can be attributed to the compensable injury. In order to make this determination the Board will proceed as follows:

2.10 The Board will seek to obtain as much evidence as possible with respect to the impact of any pre-existing disease or disability, or any cause other than the injury which pre-dated the compensable injury, on the worker's earning capacity prior to the compensable injury. This evidence will generally be obtained from the sources referred to in section 2.7 of this Policy.

2.11 Where the Board determines that a pre-existing disease or disability was only a latent weakness or susceptibility and there is no evidence: (a) that it had any impact on the worker's pre-injury earning capacity; or (b)

that it would have progressed to produce loss of earning capacity without the occurrence of the compensable injury, it will be considered that the entire extended loss of earnings can be attributed to the compensable injury and EERBs will be paid without apportionment under Section 10(5) of the *Act*.

2.12 Where the Board determines that a pre-existing disease or disability is degenerative in nature, medical evidence will be sought with respect to how the worker's condition would have progressed without the occurrence of the compensable injury.

The compensable proportion of the extended earnings loss will be determined by again taking into consideration the degree of the pre-existing disease or disability in accordance with the following table:

| Degree of Pre-existing Disease or Disability | Compensable Portion of Post-Injury Permanent Impairment |
|---|--|
| Minor* | 100% (no apportionment) |
| Moderate* | 75% |
| Major* | 50% |
| Severe* | 25% |

*As determined in accordance with Sections 2.8 and 2.9 of this Policy

F. Death/Survivors' Benefits

If the Board determines that a compensable injury was a factor contributing to a worker's death, death and survivors' benefits are payable in the full amounts provided for in the *Act*, without apportionment, since such benefits are not paid as compensation for loss of earnings or permanent impairment.

Application

This policy replaces Policy 3.9.11 issued on December 15th, 1997 and effective January 1, 1998. This Policy applies to all decisions made on or after September 10th, 2004.

References

Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section [10\(5\)](#)

DRAFT POLICY

Number: 3.9.11R1

| | | |
|--------------------------------------|--------------------|-----------------------------------|
| Effective Date: | Topic: | Apportionment of Benefits |
| Date Issued: | Section: | Short-Term and Long-Term Benefits |
| Date Approved by Board of Directors: | Subsection: | General |

Preamble

Where a personal injury by accident arising out of and in the course of employment results in loss of earnings or permanent impairment due (a) in part to the injury and in part to causes other than the injury; or (b) to an aggravation, acceleration, or activation of a disease or disability existing prior to the injury, the WCB is directed by Section 10(5) of the *Workers' Compensation Act* ("the Act") to pay compensation for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury. For the purposes of this policy, the terms aggravation, acceleration and activation refer to a permanent worsening of a disease or disability.

The WCB has adopted the following Policy with respect to the effect of Section 10(5) on the amounts of compensation benefits payable.

Definitions

For the purpose of the Policy, the following definitions shall apply:

"aggravation" means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in a permanent activation, acceleration or increase in the impairment and/or loss of earnings capacity resulting from the pre-existing disease or disability;

"compensable injury" means a personal injury by accident arising out of and in the course of employment, pursuant to Section 10(1) of the Act;

"degenerative" is characterized by progressive, often irreversible, deterioration;

"disability" means a decrease in, or the loss or absence of, the capacity of a worker to meet personal, social or occupational demands;

"disease" means the specific pathophysiologic process involved, which gives rise to the worker's signs and symptoms and their progression;

"earnings capacity" means the capacity of an individual to meet the

demands of a job and the conditions of employment associated with that job as defined by an employer, with or without accommodation;

“exacerbation” means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in a temporary increase in the impairment and/or loss of earnings capacity resulting from the pre-existing disease or disability;

“functional ability” means what an individual can do at a given time in terms of the ability to carry out activities of daily living;

“impairment” means the loss of, loss of use of, or derangement of any body part, system or function;

“non-compensable factor” means any condition unrelated to a compensable injury which may affect recovery and/or the extent of impairment/earnings loss. A non-compensable factor may exist prior to a compensable injury or it may develop post-injury. This includes causes other than the injury and pre-existing diseases or disabilities;

“permanent impairment” means impairment associated with a permanent medical impairment and/or a pain-related impairment;

“permanent medical impairment” means any impairment that has become static or stabilized and that is unlikely to improve despite further medical treatment. A permanent medical impairment also accounts for the usual pain that accompanies the type of injury and resulting impairment;

“pain-related impairment” means impairment associated with chronic pain.

General Policy Statement

1. Temporary Earnings Replacement Benefit (TERB)

1.1 Where:

- (a) the compensable injury causes an exacerbation or aggravation of a pre-existing disease or disability; or
- (b) the loss of earnings is due in part to the compensable injury and in part to a non-compensable factor which developed post-injury,

the WCB will assume full responsibility for TERB without apportionment as long as the compensable injury is contributing to some degree to the loss of earnings, even if a non-compensable factor(s) is prolonging recovery and/or loss of earnings.

1.2 Where a worker is unable to commence or continue medical treatment for a compensable injury due to a non-compensable factor,

the WCB will apply Policy 1.3.2R (Interruption of Medical Treatment – Circumstances Beyond Worker’s Control).

2. Medical Aid

- 2.1 Medical aid required as a result of the compensable injury will not be subject to apportionment.

3. Vocational Rehabilitation

- 3.1 Where the compensable injury solely causes an exacerbation of a pre-existing disease or disability, vocational rehabilitation services will not be offered to the worker.
- 3.2 Where:
- (a) the compensable injury causes an aggravation of a pre-existing disease or disability; or
 - (b) the anticipated permanent impairment is due in part to the compensable injury and in part to a non-compensable factor(s) which developed post-injury,
- and a portion of the anticipated long-term loss of earnings can be attributed to the compensable injury, vocational rehabilitation services will be provided to the worker in accordance with normal guidelines, without apportionment.

4. Permanent Impairment

- 4.1 Where a non-compensable factor(s) is contributing to the worker’s permanent impairment, the permanent impairment may be adjusted to reflect the impact of this non-compensable factor(s).
- 4.2 If the non-compensable factor(s) is degenerative in nature, medical evidence will be sought with respect to how the condition would have progressed in the absence of the compensable injury.
- 4.3 To determine the impact of the non-compensable factor(s) on the permanent impairment, the WCB will gather evidence which can include, but is not limited to:
- Physician chart notes;
 - Specialist reports;
 - Diagnostic test results (i.e. x-ray, CT scan, MRI);
 - Physiotherapy, chiropractor and occupational therapy reports;
 - Accident Report;
 - Information from disability insurance providers and/or the employer;
 - Employment-related information.
- 4.4 Where:
- (a) the compensable injury causes an aggravation of a pre-existing

- disease or disability; or
- (b) the permanent impairment is due in part to the compensable injury and in part to a non-compensable factor(s).
- the WCB will determine the portion of the permanent impairment that is compensable in the following ways:
- 4.4.1 (a) Determine the total permanent impairment rating using the applicable permanent impairment rating schedule in accordance with Policy 3.3.2R2 (Permanent Impairment Rating Schedule).
- 4.4.1 (b) Assign the impairment that results from the non-compensable factor(s) a permanent impairment rating and subtract this from the total permanent impairment rating to determine the portion of permanent impairment that is compensable.
- 4.4.1 (c) In hearing loss cases where the:
- (i) Occupational hearing loss meets the threshold for impairment, as set out in the *AMA Guidelines* and/or *PMI Guidelines* ; and
 - (ii) There is evidence that a non-compensable factor(s) is contributing to that impairment; and
 - (iii) The hearing loss due to the non-compensable factor(s) does not meet the threshold for impairment, as set out in the *AMA Guidelines* and/or *PMI Guidelines* ;
- apportionment will be determined in accordance with Section 4.4.2.
- 4.4.2 (a) If it is not possible to apply Policy Statement 4.4.1(b), determine the degree of permanent impairment that results from the non-compensable factor(s) by applying the following definitions:
- Minor – Non-compensable factor(s) has been documented to cause or would likely cause slight reduction in a worker’s functional ability.
- Moderate – Non-compensable factor(s) has been documented to cause or would likely cause substantial reduction in a worker’s functional ability.
- Major – Non-compensable factor(s) has been documented to cause or would likely cause severe reduction in a worker’s functional ability.
- (b) Determine the portion of permanent impairment that is compensable by multiplying the total permanent impairment rating by the percentage from the table below which corresponds to the applicable definition:

| Classification of Non- | Compensable |
|------------------------|-------------|
|------------------------|-------------|

| | Permanent Impairment |
|----------|-----------------------------|
| Minor | 75% |
| Moderate | 50% |
| Major | 25% |

- 4.4.5 If the evidence indicates that the permanent impairment is solely due to the non-compensable factor(s), the WCB will not be responsible for the permanent impairment.
- 4.4.6 The WCB will not apportion the permanent impairment when it would have resulted regardless of the non-compensable factor(s).

5. Extended Earnings Replacement Benefit (EERB)

- 5.1 Where a non-compensable factor(s) is contributing or is expected to contribute to limitations on the worker's earnings capacity, the EERB may be adjusted to reflect the impact of this non-compensable factor(s) on the worker's extended loss of earnings.
- 5.2 The WCB will not apportion the EERB where the classification of the non-compensable factor is minor.
- 5.3 Where the classification of the non-compensable factor is greater than minor as defined in Policy Statement 5.3.2, the WCB will determine the portion of the EERB that is compensable in the following way:
- 5.3.1 Determine the total EERB in accordance with normal guidelines.
- 5.3.2 Determine the degree of the extended loss of earnings that results from the non-compensable factor and the compensable injury by applying the following definitions:

Minor – The non-compensable factor(s) /compensable injury has been documented to cause or would likely cause slight reduction in a worker's functional ability, and therefore is expected to contribute minimally to limitations in *earnings capacity*

Moderate – The non-compensable factor(s)/compensable injury has been documented to cause or would likely cause substantial reduction in a worker's functional ability, and therefore is expected to contribute to limitations in earnings capacity.

Major – The non-compensable factor(s)/compensable injury has been documented to cause or would likely cause severe reduction in a worker's functional ability, and therefore is expected to contribute to limitations in earnings capacity.

- 5.3.3 Determine the portion of EERB that is compensable by multiplying the total EERB by the percentage from the table below which corresponds to the applicable definitions for both the compensable injury and the non-compensable factor:

| Classification of Compensable Injury | Classification of Non-Compensable Factor(s) | Percentage of EERB Payable |
|---|--|---|
| Minor | Moderate | 50% |
| Moderate | Moderate | 75% |
| Major | Moderate | 100% |
| Minor | Major | 25% |
| Moderate | Major | 50% |
| Major | Major | 100% |

6. Death/Survivors' Benefits

- 6.1 If the WCB determines that a compensable injury was a factor contributing to a worker's death, death and survivors' benefits are payable in the full amounts provided for in the Act, without apportionment, since such benefits are not paid as compensation for loss of earnings or permanent impairment.

Appendix C: Stakeholder Overview

A high level overview of the key issues raised by some employers is outlined below:

- The current apportionment policy should be revised to allow for consideration of both short-term and long-term benefits. Employers support apportioning both temporary benefits and permanent benefits.
- The current language in the existing policy is not clear; the policy itself is legalistic and does not clearly define how to apportion benefits.
- The current apportionment policy should be revised to allow for consideration of apportionment of claim costs among employers.
- Emphasize the need for a balanced approach with respect to the issue of apportionment. Legislative changes need to reflect both employer and employee concerns while providing clarity to the adjudication of these claims without negatively affecting either party.
- Section 10(5) must be applied objectively by rating the impairment arising from the non-compensable factor and compensable injury, should require input from medical experts and should be based on objective medical evidence.
- Workers' compensation forms should be modified to reflect the possibility of previous injury/illness as the employer would not have a prior knowledge of any previous accident.

The following is a brief summary of submissions made by the Injured Worker Associations (IWA) and/Labour:

- The current apportionment policy is in keeping with the Workers' Compensation Act, permits apportionment where appropriate, and does not require revision.
- The current policy is clear, logical, and an appropriate method of apportioning a worker's benefits. Any deviation from the present wording would be to the advantage of only one set of stakeholders, unfair to the other stakeholders, and would be inconsistent with the intent of policy revision.
- Injured Workers' Associations feel apportionment of benefits should be rare and the current policy is appropriate.
- Temporary earnings loss benefits, medical aid and vocational rehabilitation should not be considered for apportionment.
- The issue lies with the misinterpretation and misapplication of the apportionment policy, and emphasizes the need for education and instruction.
- Some employers may wish to expand apportionment when it is really an assessment issue re apportionment of claim costs between employers.
- Any changes to the policy must be with the sole purpose of clarifying the *Act* and not an attempt to find a balance between paying for the system and compensating workers for their injuries.

In addition, the WCB's employees, together with its partner agencies of WCAT and WAP made the following submissions:

- WCB employees feel the current policy does not provide a useable approach for complex claims such as chronic pain and repetitive strain injury.
- WCB employees feel the current policy does not provide clear direction for pre-existing diseases or disabilities.
- WCAT submits that the current policy is complicated and the concepts are confusing.
- WCAT questions whether the current apportionment policy applies to occupational hearing loss cases and associated medical aid. If it does, then WCAT questioned the method that WCB staff are applying in the current apportionment policy to hearing loss cases.
- WCAT submit that the present apportionment policy does not contemplate non-compensable conditions which develop after the compensable injury, and the impact that those conditions have on either or both a worker's earnings loss and permanent impairment.
- WCAT also states that there is uncertainty as to whether apportionment determinations are subject to review and whether they can be re-visited at the time of a permanent impairment review or extended earnings replacement benefit review. WCAT submits that such determinations should be capable of being reviewed periodically to ensure that they are still correct.
- WCAT states that the present policy makes a distinction between pre-existing diseases and disabilities, and causes other than the injury. The question arises as to whether the separate characterizations for pre-existing causes are necessary, or if they can be collapsed into a more user friendly method.
- WCAT also states that where a pre-existing disease or disability is degenerative in nature, there is a direction in section 2.12 of the policy for the Board to obtain a medical opinion as to how the condition would have progressed had the compensable injury not occurred. If this provision is difficult to apply, then it should be removed.
- WAP states that the current policy is not complicated or confusing. Rather, the policy strikes a good balance between the need to have definite general classes of claims involving pre-existing conditions, while maintaining flexibility in dealing with individual cases. WAP also states that the policy strikes a good balance between fairness to participants in the workers' compensation system and administrative efficiency.
- WAP states that the concerns regarding the current policy may reflect a misunderstanding of its purpose, namely that there is a failure to realize that apportionment principles arising under Section 10(5) of the *Act* and Policy 3.9.11R do not apply to the causation analysis under Section 10(1) of the *Act*.
- WAP also states the concerns regarding Policy 3.9.11R may partly reflect employers' frustrations with assessment issues and the apportionment of claim costs, particularly where a worker's injury and loss of earnings results from two or more compensable injuries in employment with two or more assessable employers.
- WAP submits that temporary benefits should not be apportioned. WAP notes that the WCB's current practice is in keeping with all other jurisdictions across Canada and states that it should maintain its current practice of not doing so.

