

Workers' Compensation Board of Nova Scotia

Issues Identification Paper:
Apportioning Benefits for Workers

Date: February 6, 2007

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Introduction

In general, on an annual basis, the *Workers' Compensation Board* (WCB) adjudicates approximately 34,000 claims. Of these 34,000 claims, approximately 25,000 result in no time-loss from work and only 2% get appealed. The remaining 9,000 claims receive short-term benefits and of these 1,300 go on to receive long-term benefits (including Permanent Impairment Benefits and/or Extended Earnings Replacement 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 Apportionment of Benefits Policy (Policy 3.9.11R) is a major policy issue and as such the WCB will use a two-staged policy consultation approach. The first stage will provide stakeholders with an opportunity to identify issues related to this policy. The second stage 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 the WCB apportions benefits for injured employees 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 apportionment policy. 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 April 23, 2007 to:

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The comments we hear from Nova Scotians will be considered as we work to revise the current apportionment of benefits policy. This paper also is available at www.wcb.ns.ca under News & Events.

DEADLINE FOR COMMENTS: April 23, 2007

Background on apportionment of 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 particular impairment and/or loss of earnings. In a workers' compensation system, the concept of apportioning benefits provides that the workers' compensation system is responsible to compensate workers only for the consequences of injuries which are work-related.

Section 10(5) of the *Workers' Compensation Act* (the *Act*) states that compensation can only be paid to an injured worker for the portion of the loss of earnings or permanent impairment that may reasonably be attributed to a workplace injury. Full wording reads as follows:

“(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.”

For instance, consider a worker who has been a heavy smoker for most of his life who is exposed to a chemical on the job. Medical reports indicate the worker has reduced lung capacity and has emphysema as a result of his smoking. In this case, the WCB may only pay benefits for the portion of the loss of lung capacity that is attributable to the chemical exposure. We would not compensate the worker for the loss of lung capacity due to smoking.

It is important to note that Section 10(5) of the *Act* uses mandatory language (“is payable”). This means the WCB is required to implement this section and a failure to do so could be used as grounds of appeal by an employer or a worker.

Policy 3.9.11 *Apportionment of Benefits* was developed in 1997 to outline the rules for how to apportion benefits. The policy remained unchanged until 2004 when minor amendments were made to reflect the new chronic pain regulations. In keeping with the chronic pain regulations, the revisions allowed chronic pain claims to be apportioned in the same manner as any other claim. Other than this minor change, no other revisions have been made to the policy (see Appendix A for a copy of the current policy 3.9.11R).

Apportionment is determined by the extent to which a pre-existing disease/disability or a non-work related injury impacts a worker's level of permanent impairment or extended loss of earnings. If the extent of impact of the non-work related factor is negligible, the WCB accepts full financial responsibility for the permanent impairment and resulting loss of earnings. However, if the non-work related factor is materially impacting impairment or earnings capacity, the WCB will determine what percentage of the permanent impairment and/or loss of earnings can be attributed to something other than the injury and reduce/apportion the amount of compensation paid to the worker accordingly.

While *loss of earnings* can be both temporary and long-term, the existing policy directs that temporary benefits (such as earnings loss, medical aid, and vocational rehabilitation) are not apportioned. This position is based on the recognition that during the initial phase the compensable injury plays a significant role in the worker's earnings capacity and/or medical needs. In 1997 when the policy was developed, we took the position that all temporary benefits payable following a compensable injury can be reasonably attributed to the compensable injury and therefore under the current policy temporary benefits are not apportioned.

Why is the WCB reviewing this policy?

The intent of making any revisions to the apportionment policy is to a) ensure that we pay for impairment and loss of earnings that is due to the workplace injury, b) provide clear guidelines for the adjudication of claims that may require apportionment to promote WCB consistency, accuracy and accountability in decision making, c) ensure the policy is fair to both workers and employers, and d) provide direction for apportionment in relation to the types of claims we are seeing today.

Through ongoing discussions, the apportionment policy has been identified by some employers, WCAT and our employees as a policy that requires review. In addition, at the Stakeholder Consultation Sessions held on November 29th, 2006 and January 10th of this year, stakeholders raised concerns regarding the current apportionment policy and any potential changes to the policy.

Outlined below are some of the challenges with the current apportionment policy that have been identified so far.

The issues

1. Employers support apportioning both temporary earnings replacement benefits and permanent benefits

Certain employers in Nova Scotia take the position that only some portion of the temporary loss of earnings caused by a workplace injury in combination with a non-work related injury can be “reasonably attributed” to the workplace injury. For this reason, they support the apportionment of temporary earnings replacement benefits.

Feedback from the January 10th Stakeholder Consultation Session suggests employers also support the apportionment of permanent benefits and feel that the current policy does not sufficiently do this.

2. Injured Workers’ Associations feel apportionment of benefits should be rare and the current policy is appropriate

The Injured Workers’ Associations in Nova Scotia support the position that the workplace injury was the reason why the worker was removed from the workforce, not pre-existing conditions. Therefore, apportionment of benefits should be rare.

Feedback from the January 10th Stakeholder Consultation Session suggests Injured Workers’ Associations also support the position that the current policy, as written, is consistent with the legislation and are concerned that any changes made to this policy will result in litigation and appeals. They also believe the issues with the apportionment policy lie with its interpretation and application, not with the policy itself.

3. Certain employers and WCB employees feel the current policy does not provide a useable approach for complex claims such as chronic pain and repetitive strain injury.

Over the last number of years there has been an increase in the number of complex claims such as repetitive strain injuries and chronic pain. These types of claims were not considered when the policy was originally developed or last revised. The current policy does not provide decision makers with clear and easy adjudicative criteria to guide consistent decision making in this area.

4. WCB employees feel the current policy does not provide clear direction for pre-existing diseases or disabilities

Section 10(5)(b) of the *Act* refers to an aggravation, activation or acceleration of a disease or disability existing prior to the compensable injury. WCB employees have identified a gap in the current policy as it does not provide clear direction on apportioning benefits where a pre-existing disease or disability exhibits no

symptoms before the workplace injury but becomes symptomatic after the workplace injury occurs.

Another gap in the current policy is that it does not provide clear direction on apportioning benefits in the case of a temporary aggravation or acceleration of a pre-existing disease or disability. This refers to a situation where the compensable injury caused a temporary worsening of a pre-existing disease or disability so that the permanent impairment that results is solely related to the continued worsening of the pre-existing disease or disability, not to the compensable injury. For example, consider a worker who sprained their knee while at work. Medical reports show that this worker had major difficulty with this knee since an injury which occurred 15 years ago, not related to work. The knee sprain aggravated the worker's existing knee problems and medical evidence supports that the subsequent impairment is solely related to the worker's previous knee problems, while the temporary worsening has healed. In this situation, the impact of the work-related injury was only temporary, therefore should the worker receive permanent benefits?

5. WCB employees and WCAT feel the current policy is complicated and the concepts are confusing

WCAT and WCB employees have indicated that the current policy does not provide clear guidance for Section 10(5)(a) which refers to loss of earnings or permanent impairment due in part to the injury and in part to causes other than the injury. Currently, the policy provides detailed direction for Section 10(5)(b) which refers to a loss of earnings or permanent impairment due to an aggravation, activation or acceleration of a disease or disability existing prior to the injury. However, policy direction for Section 10(5)(a) is inter-mixed with the detailed direction for Section 10(5)(b) making it confusing to apply in decision making.

How do other provinces apportion benefits?

Every WCB has its own legislation and policies that guide how benefits are apportioned in Canada. Overall, most provinces consider pre-existing conditions and will adjust the compensation payable to reflect the impact of the pre-existing condition. The following is a summary of how other provinces apportion benefits.

For which benefits do you apply apportionment?

All jurisdictions assume full responsibility for disability immediately following a workplace injury and will not apportion benefit entitlement during the temporary earnings loss period. The goal is to return the worker to his or her pre-injury status; temporary earnings loss benefits are paid until that goal is achieved or until no further improvement is expected and the worker is considered for

permanent benefits. Only when it is determined that the earnings loss is solely the result of the non-work related injury are temporary earnings loss benefits terminated. Several jurisdictions have indicated that attempting to apportion temporary earnings loss benefits poses evidentiary and administrative difficulties.

Most jurisdictions will apportion permanent benefits (permanent impairment and extended earnings loss benefits), where appropriate, when a workplace injury aggravates a pre-existing condition.

How do you apportion benefits?

New Brunswick, Saskatchewan, Alberta and British Columbia only use medical evidence to determine if it is appropriate to apportion permanent benefits. Their policies provide no additional guidance for how this evidence is used to apportion benefits. Newfoundland, Ontario and Manitoba also use medical evidence but take it one step further and classify the pre-existing condition as minor, moderate or major. The classification is then applied to a defined table of percentages to determine the percentage of compensation payable for permanent impairment or extended earnings loss benefits.

Ontario, Alberta and the Northwest Territories offer a “once only repair” whereby if a surgery or treatment is required solely for a pre-existing condition, the jurisdictions will cover the cost of the surgery or treatment, on a once-only basis, if it enhances recovery.

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 revisions to the WCB's apportionment policy?

All comments will be considered as we revise the apportionment policy. We will circulate the draft revised policy for comments later this year.

Appendix A

POLICY

NUMBER: 3. 9. 11R

Effective Date: September 10th, 2004

Topic: Apportionment of Benefits

Date Issued: September 13th, 2004

Section: Short-Term and Long-Term Benefits

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

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 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;

“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.

- 2.8 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 Proportion of Extended Earnings Loss
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)

Executive Corporate Secretary