

**Workers' Compensation Board of Nova Scotia**

**Apportioning Benefits for Workers:  
Consultation Summary**

**Date: April 30, 2007**

## **Introduction:**

At the February 2007 Board of Directors' meeting, the Board agreed to initiate consultation with stakeholders to gather input on the specific issues surrounding *Policy 3.9.11R - Apportionment of Benefits* that stakeholders would like the WCB to consider as part of the policy review and development process. On March 8, 2007, the Issues Identification Paper pertaining to "Apportionment of Benefits" was mailed to individuals on the key stakeholder mailing list including injured workers' associations and employers and posted to the WCB website for a period of 45 days. The public consultation concluded on April 23, 2007. The WCB has received submissions from 14 stakeholders regarding the issues identified with respect to apportionment.

The purpose of this document is to provide a high-level overview of stakeholder input received in response to the Issues Identification Paper pertaining to the apportionment policy. The submissions will be considered by the working group in the development of a revised apportionment policy. In June, we expect to present a draft policy and background paper to the Board of Directors for discussion. This date is tentative due to the scope of some of the issues raised during the consultation process.

## **Feedback Summary:**

A review of the submissions demonstrates that there are divergent views amongst stakeholders on the issue of apportioning benefits for workers. Generally, employers believe that the current apportionment policy should be revised to allow for consideration of apportionment of both short-term and long-term benefits, as well as apportionment of claim costs among employers. Comparatively, injured workers' associations and labour representatives generally believe that the current apportionment policy is in keeping with the legislative intent of the *Workers' Compensation Act (the "Act")*, permits apportionment when appropriate, and so does not require revision. The Injured Workers' Associations state that the problem lies with the WCB employees' misinterpretation and misapplication of the apportionment policy and emphasize the need for education and instruction on part of WCB employees.

Outlined below is a summary of general comments submitted by various stakeholders. It should be noted that there were a small number of submissions by injured workers that were claim specific in nature (such as history of the worker's injury). Given the confidential nature of claim information contained in these submissions, they will not be reported in this summary document. As well, issues raised by stakeholders that are outside the scope of the WCB policy or those not directly related to apportionment are not included in this summary document.

## **Employers:**

- A balanced approach to the issue of apportionment is essential to be successful. The legislative changes need to reflect both employer and employee concerns

while providing clarity to the adjudication of these claims without negatively affecting either side.

- Temporary Earnings Replacement Benefits, together with permanent benefits should be apportioned, particularly where there is clear evidence of a pre-existing condition.
- An assessment of apportionment should commence once a worker goes beyond the “normal recovery” period expected for an injury.
- Section 10 (5) of the *Act* must be applied objectively. In the matter of apportionment it was suggested that the Official Disability Guidelines (ODG) 2006 11<sup>th</sup> Ed. offered the best science and evidence around the questions of “usual” duration of a disability... associated with various specific clinical conditions. The underlying assumption would be that, in the absence of a pre-existing or independent complication, a worker would be able to return to the workplace after a usual interval of absence for that condition. The further assumption is that any absence in excess of the expected recovery time could be reasonably attributed to the pre-existing condition. This approach would allow the WCB to have consistent and objectively determined methodology by which to approach the timing of the initiation of apportionment. Restated, apportionment would begin following an absence calculated to end at the midrange of absence from all claims data for that condition. Following this logic would dictate that apportionment would begin at the date when usual return to work would have happened per the ODG.
- It is suggested that benefits be apportioned by applying the AMA Guidelines to the individual’s overall physical impairment. Then a determination can be made as to what portion would be applicable to the compensable condition. It is recognized that the “quantification” of the pre-existing injury must always remain a matter of clinical judgment and discretion by an appropriately trained professional.
- The existing categorization into “minor/moderate/major/severe” is a useful device to assist in establishing the magnitude of the pre-existing condition. The terms mild to severe are also best suited to determine whether whole or part of the responsibility should be relieved from the injury employer, and would have no adverse affect on an injured worker’s benefits until it could be determined whether the future benefits by way of pension entitlement is appropriate.
- Apportionment, particularly with respect to medically complex cases, should receive review and input from the technical expertise and judgment of appropriately trained physicians.

- It is recommended that a panel of three medical experts be established to review all cases of apportionment that come to appeal, and that the consensus on medical matters of that panel be provided to any appeals body.
- Remove, in section 1.1 of the policy, the wording “only in the very obvious cases”. It is redundant, constrictive and misleading.
- Workers’ Compensation forms should be modified to reflect the possibility of previous injuries or illnesses as the employers would not have a prior knowledge of any previous injuries. The opportunity to apportion benefits may not be realized unless the forms reflect the possibility of a prior injury or illness to the same body part in the beginning.
- All medical evidence from the person involved should be made available to the WCB (or medical designate), which must include information pertaining to both work injuries as well as non-work related injuries.
- Apportionment should flow from a medical opinion based on all relevant information that may be a cause or potential cause of the worker’s PMI or earnings loss, and as such the Injury Form should be revised to gather information about other potential causes.
- There should be apportionment of claim costs. In particular, claim costs for injuries which occur “over a period of time” and those in which there has been a reoccurrence within three years should be reviewed and considered for apportionment amongst the number of employers with whom the worker was employed where similar claims were filed and approved by the WCB.
- There should be a balanced approach to the apportionment policy to enable staff to fulfill the intent of section 10(5) of the *Act*, that it is applied fairly and that benefits are only paid for the loss of earnings or PMI that “may be reasonably attributed to the injury”.
- The current language in the existing policy is not clear. It should create a trigger to identify the cases appropriate for apportionment.
- The current policy is overly legalistic and takes a common law "thin skull" causation approach which is inconsistent with the language and intent of section 10(5) of the *Act*. It clearly states that apportionment can occur for an aggravation, activation, and acceleration of pre-existing conditions. Pre-existing conditions should also refer to personal attributes or behaviors such as, smoking, obesity, drug abuse, or past physical or mental abuse.
- The current policy does not clearly define how to apportion for Permanent Medical Impairment ("PMI") and for earnings loss. For example, the terms, "minor", "moderate", "major", and "severe" are ambiguous and practically

impossible to apply, and the associated loss percentages are arbitrary and impractical.

- The current policy does not truly permit apportionment of permanent benefits and earnings loss in chronic pain cases. Chronic Pain has been acknowledged as being multi-causal in origin, and partially based on socio-economic factors. Accordingly, all chronic pain benefits should be evaluated for apportionment.
- In terms of PMI or extended earnings benefits, all cases should be evaluated for apportionment in the normal course of a PMI evaluation. The trigger should be the PMI evaluation. In no cases should an apportionment be limited by factors such as whether a worker was fit for work prior to an injury. Apportionment must consider any and all external or non workplace factors that may have played a role in the disability.

### **Injured Workers' Associations and NS Federation of Labour:**

The submissions were similar in focus and all agreed that the current apportionment policy does not require revision. They specifically stated:

- The current policy is clear, logical, and an appropriate method of apportioning a worker's benefits. The policy is consistent with the scheme of the workers' compensation system and the legislation.
- The current policy is both fair to employers and injured workers. It adequately compensates people for their work-related injuries. The employers are only responsible for the work-related portion of the impairment that can be attributed to the employment. Injured workers do not expect employers to pay for injuries that are not work-related.
- Any deviation from the present wording would be to the advantage of only one of the stakeholders, would be unfair to the other stakeholders and be inconsistent with the intent of this policy revision.
- Any issues or problems associated with the policy are founded in the decision-making process. WCB, WCAT, WAP staff, and Injured Workers' Associations would benefit from training and education to ensure consistency in the interpretation and application of the existing policy.
- Temporary earnings loss benefits, medical aid and vocational rehabilitation services should not be considered for apportionment. The continued exclusion of these benefits is consistent with the WCB's focus on reduced claim durations and safe and timely return to work initiatives. A worker would jeopardize the safety of himself/herself if a return to work was necessary due to financial reasons rather than medical clearance and physical capability.

- The apportioning of workers' benefits should be rare. The current policy thoroughly addresses situations where a pre-existing injury had an impact on a worker's earnings ability.
- In keeping with the Supreme Court of Canada decision in *Martin and Laseur*, the WCB must treat all compensable injuries the same. The adjudication of chronic pain and repetitive strain injuries must be treated the same as all other claims. The complexity of claims make the task more difficult but proper training on interpretation and application of the policy would be beneficial.
- The *Act* and policy are clear and provide direction for both "cause other than the injury" and "pre-existing diseases and disabilities". It is recommended that the WCB insert "... a cause other than the injury or ..." immediately before the words "... pre-existing disease or disability..." in paragraphs 2.8 to 2.12 of the current policy. This should assist in resolving any confusion. Where an injured worker has a pre-existing condition but does not experience any symptoms and/or loss of earnings as a result of it before the compensable injury, then there should be no apportionment of benefits. However, if there is evidence of previous permanent impairment, the WCB can apply the appropriate provisions of the apportionment policy. Any deviation from the current policy would be construed as an attempt to decrease benefits to injured workers to which they are entitled.
- There is concern of how the WCB will determine apportionment in the case of the injured worker who is a lifetime smoker and who is exposed to a chemical on the job. The evidence shows that the worker has reduced lung capacity and has emphysema as a result of smoking. While it is acknowledged that the employer would not be responsible for the loss of lung function due to smoking, the question arises of how such claim would be apportioned as it is not possible to separate the effects of smoking from the other effects on the lungs.
- Any changes that take place 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... If these reviews result in a reduction of benefits, this would be inconsistent with the purpose of the legislation which is to compensate injured workers for any impairment that is established as existing through the evidence provided in the claim file and the application of the relevant sections of the *Act*. If this is established, the injured worker has a right to receive compensation as per the *Act*.

- The legislation does not provide for apportionment when a pre-existing disease or disability exhibits no symptoms before a workplace injury but becomes symptomatic after the workplace injury occurs. It is only where the pre-existing condition disables an employee from working to some extent that benefits are apportioned. The question is whether there is a pre-existing disability in the sense that it is used in the definition of “disability” in the apportionment of benefits policy. As a matter of statutory interpretation the word ‘disease’ in Section 10(5) is properly interpreted as a disease resulting in a disability to be consistent with all of para. 10(5)(b). It is important not to confuse pre-existing disabilities with pre-existing conditions. The legislative policy is that compensation should not be reduced by apportionment where the worker suffered no disability before the injury.
- Some employers may wish to expand apportionment when it is really an assessment matter. A current employer wants part of a claim to be attributed to an earlier employer or to an injury outside the workplace. The WCB should not confuse assessment issues with a proper application of the *Act* to individual workers.
- Apportionment in the case of chronic pain is a matter relating to issues of causation and the nature of chronic pain itself. Apportionment in chronic pain cases is best dealt with in the consultation that is currently underway on chronic pain.

### **The Workers’ Advisers Program:**

- Policy 3.9.11R 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. It strikes a good balance between fairness to participants in the workers’ compensation system and administrative efficiency.
- There is no evidence in recent Court of Appeal decisions that Policy 3.9.11R is complicated or confusing, which might otherwise be expected if it was presenting onerous interpretation or application challenges.
- The concerns regarding Policy 3.9.11R may reflect a misunderstanding of its purpose. In particular, at times there is a failure to realize that apportionment principles arising under s.10(5) of the *Act* and Policy 3.9.11 do not apply to the causation analysis under s. 10(1) of the *Act*. Consideration of apportionment of benefits under s.10 (5) and Policy 3.9.11R is only relevant after an injury under s.10 (1) has been established and which results in a loss of earnings or permanent impairment.
- The concerns regarding Policy 3.9.11R may also partly reflect employers’ frustrations with assessment issues where a worker’s injury and loss of earnings

resulted from compensable injuries in employment with two or more assessable employers. However, apportionment of a worker's benefits under Policy 3.9.11R would have no application in such a case ... as assessable employers under the *Act* are collectively liable for the financial consequences of a worker's injury. It occasionally appears that employers do not appreciate that a worker's claim for workers' compensation benefits is not against any particular employer but rather against the Accident Fund that the WCB administers and which all employers collectively are required to maintain.

- The paper notes all other jurisdictions reviewed assume full responsibility for disability immediately following a workplace injury and will not apportion benefit entitlement during the temporary earnings loss period. The paper notes that several jurisdictions have indicated that attempting to apportion temporary earnings loss benefits poses evidentiary and administrative difficulties. Most jurisdictions, however, apportion permanent benefits, where appropriate, when a workplace injury aggravates a pre-existing condition. The same difficulties would arise in Nova Scotia if the WCB tries to apportion temporary earnings loss benefits.

#### **The Workers' Compensation Appeals Tribunal:**

- 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 earnings loss/earnings capacity and permanent impairment.
- The present apportionment policy does not specifically address whether its provisions apply to the adjudication of hearing loss. Generally, under the policy, there is no apportionment of medical aid assistance. As hearing aids are medical aid items, it may follow that provided a worker's hearing threshold meets the criteria for medical aid, and at least some of that loss is due to occupational noise exposure, then the worker should be entitled to medical aid. In the case of permanent medical impairment for hearing loss, if the general provisions of the policy were to apply, one would assess hearing loss globally, and then determine what portion of the total hearing loss would be due to occupational exposure. Given the uncertainty as to whether the apportionment policy applies to hearing loss claims, it is uncertain whether claims are being adjudicated in this fashion.
- 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. Such determinations should be capable of being reviewed periodically to ensure that they are still correct.
- The apportionment policy does not address the claim cost issue, and there is only limited relief available for certain circumstances in Section 9 of the policy

manual. Employers are seeking relief from the full amount of claim costs in relation to an injury. The argument is made that a worker's loss of earnings and/or permanent impairment is not due entirely to that Employer, but should be attributed in whole or in part to past Employers... While this is not an issue regarding the apportionment of benefits, per se, it is a related issue which the Tribunal has heard in appeals.

- The present policy makes distinctions 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.
- 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.

**Other:**

- There should be apportionment of hearing loss due to noise induced exposure. The individual is exposed to sound in all manner of circumstances and may suffer noise induced hearing loss from these exposures. At present the WCB does not apportion medical aid, even if the workplace is a minimal contributor to the loss. The general fund is paying the complete cost of the hearing aids required as well as the cost of batteries and any permanent impairment. However, the newer technologies of digital aids and cochlear implants are driving these costs upwards considerably and the language and practice of the WCB and WCAT places an unfair burden on the employers to absorb the entire cost of this particular medical aid. The trend to non-occupational noise induced hearing loss is becoming epidemic ... Proper apportionment via a comprehensive causation analysis is necessary in adjudicating these claims.