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

Background Paper:

Policy Manual Updates

May 1, 2024

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1. Background

The WCB reviews its policies on an ongoing basis to identify potential changes. This includes updates to reflect current practice and recommending policies to be rescinded. These changes help ensure policies are accurate, up-to-date, and relevant.

2. Scope

We have identified a number of policies we believe should be rescinded, as well as several that should be updated. See Appendix A and B for a full list and description of policy changes and policies to be rescinded, including rationale for the changes.

3. Consultation

Considering the WCB's *Policy 10.3.11 – Policy Consultation*, we will undertake a One-Stage consultation with a consultation period for **30 days starting May 1 and ending May 31** for the proposed changes. A One-Stage consultation is appropriate because the proposed changes do not impact entitlement or level of worker benefits, assessment rates or the financial health of the system. Rather, the recension of policies in Appendix A eliminate policies that are no longer relevant or required; and the proposed changes to policies in Appendix B don't impact policy intent.

Please note, the WCB is not consulting on policy intent or other substantive aspects of the policies discussed in this paper. The WCB Board of Directors will consider the input received from workers and employers before making final changes to the policies.

If you would like to comment on the policy updates, please provide your feedback by May 31 to:

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4. Proposed Policy Changes

Appendix A describes the policies to be rescinded and divides them into the following categories:

1) General Entitlement and Claims Management
2) Internal Appeals
3) Heath Care
4) Transitional (Chapter 7 – Specialized Adjudication)

Appendix B describes the policy changes being proposed and divides them into the following categories:

1) Occupational Disease
2) Earnings Loss
3) Rate Setting

In addition to the specific changes outlined in Appendix A and B, the following will also be updated for each policy:

- Revision number
- Effective date
- Date Issued
- Date approved
- Application (where applicable)

As well, some policies will require “consequential” amendments. In these instances, policies that reference a policy undergoing an update (Appendix A) will require an updated policy number. See Appendix C for a list of these policies.

Full versions of all WCB policies are available on the WCB’s website at wcb.ns.ca or by clicking on the following link: Policy Manual.

Appendix A – Policies to be Rescinded

General Entitlement and Claims Management

These policies are no longer required for the following reasons:

- Other policies adequately address the topic.
- The Nova Scotia Court of Appeal has added clarity to the issue.
- The policy is procedural/process focused and no longer relevant/used.

Policy to be Rescinded	Comment
1.1.2 - Coverage Police/Fire Fighters Employed in Off-Duty Hours	• This policy provides direction on determining when "members of police or fire departments" are in the course of their employment with police/fire services; or in the course of employment with another employer they may be working for in "off-duty" hours. Whether or not the worker is "under the control of their respective departments…" is identified in the policy as a criterion to be considered. • This policy is unnecessary because *Policy 1.3.7R General Entitlement – Arising out of and in the Course of Employment* (first effective in 2009) addresses the general topic of determining if a worker's injury arose out of and in the course of employment, making *Policy 1.1.2* (effective in 1996) redundant.
1.2.6R1 - Workplace Noise Levels	• The content of this policy has been updated and moved to *Policy 1.2.5AR2 Occupational Hearing loss – injuries on or after January 1, 2000.* See Appendix B – Policy Updates.
1.1.3 Claims Adjudication - Processing Continuing Claims	• This policy became effective in 1996 and focuses on process and procedural matters that are typically not included in policy. For example, it includes requirements related to intervals at which injured workers will be referred to "medical officers" or the forms that must be filled out, that quickly became outdated. Claims management processes and procedures address these matters. • The remaining content of the policy is covered by S. 37 of the *Workers' Compensation Act* (the "*Act*") (payment of earnings loss benefits), and policies *3.1.1R4- Calculation of Gross Earnings*, *3.2.1R- Calculation of Temporary Earnings-Replacement Benefit*, and *1.3.8 Recurrence of Compensable Injury*.
1.3.1 - Loss of Wages While Undergoing Active Medical Treatment	• Research indicates this policy (effective 1996) was intended to ensure the WCB could cover medical treatment for workers who had no earnings loss due to their work-related injury, and also allows the WCB to pay for treatment after the worker had returned to work following a period of earnings loss. • Since the implementation of this policy, the Nova Scotia Court of Appeal has clarified[1] a worker can receive medical aid benefits even though they have not (or are currently not) suffering a loss of earnings.

[1] Halifax (Regional Municipality) v. Hoelke, 2011 NSCA 96

Policy to be Rescinded	Comment
	• Section 37 of the *Act* and policies related to earnings loss benefits (discussed above) cover content of the policy related to earning loss benefits. In making these decisions, the WCB considers both objective and subjective medical evidence. When there is conflicting medical evidence, *Policy 1.4.3 Weighing Conflicting Medical Evidence is applied.*

Internal Appeals

The WCB recommends these policies be rescinded because the circumstances/purpose for which they were drafted no longer exists.

Policy to be Rescinded	Comment
8.1.6- Referrals to Medical Review Commission	• This policy was established to support the operation of the Medical Review Commission referenced in Sections 203-205 of the *Act*. • The Commission was never established, and this policy has never been used. If the Commission is established at some point in the future, new policy (and procedures) would be required.
8.1.8- Requests for Reconsideration pursuant to former s.196 of Chapter 10 of the Acts of 1994-95	• This policy applied to requests for reconsiderations pursuant to the former s.196 of Chapter 10 of the Acts of 1994-95 **received by the Board prior to April 16, 1999**. This date is long past and these requests would have been addressed many years ago. Therefore, the policy is no longer required.

Heath Care

In 1995/1996, to support the implementation of the then "new" *Act* (which included new provisions like earnings loss benefits) the WCB had to establish a new policy manual. This meant that some existing older policies were essentially "grandfathered" into the new policy manual without going through a policy review process. This is particularly relevant to the group of health care policies we are recommending be rescinded, the content of which were originally approved between 1987 and 1989. While it may be appropriate to have policy on specific heath care topics, we believe the age, specificity, and content of these policies are not aligned with the WCB's approach to ensuring injured workers receive the heath care they need.

The WCB believes these policies are no longer necessary for the following reasons:

- *Policy 2.3.1R Provision of Health Care Services* sets out the decision framework the WCB considers when considering requests for health care.
- Strict adherence to the requirements in these policies may prevent workers from obtaining the health care they should receive.

- The level of detail and direction in the policies oversteps patient care decisions that should be made by specialists or treating physicians. Some policies state what type of physician can do a procedure. The WCB only uses approved service providers, and the NS College of Physicians and Surgeons determines the scope of practice for providers.
- Some of the policies stipulate administrative conditions for using devices (e.g., the machine will be loaned and returned to the WCB when no longer needed). The WCB has contracts with suppliers that address these types of issues.

In light of these considerations, we recommend the policies listed below be rescinded.

Policy to be Rescinded	Comment
2.2.1R – Spinal Fusion – Second Opinion	• This policy is very prescriptive in nature, specifying when second and third opinions are required for spinal fusion surgery. The WCB has no policy requirement like this for other types of surgery. The WCB considers the need for second opinions on a case-by-case basis.
2.2.3R - Home Breathing Machines ***2.2.6R - Home Oxygen Therapy*** ***2.2.7R - Portable Home Oxygen Therapy***	• Strict adherence to these three policies could require denial of health care that should be provided. • For example, *Policy 2.2.3* states that "These machines will only be purchased for the treatment of obstructive lung disease and not for restrictive lung disease or for a diffusion defect". However, it may be "necessary or expedient" (as per Section 102 of the *Act*) that a worker be provided with such treatment even if these requirements are not met.
2.2.5 - Treatment: Pain Clinic ***2.2.8R - Epidural Analgesia and Paravertebral Blocks*** ***2.2.4 Chemonucleolysis***	• These three policies deal with treatment for pain associated with a work-related injury. • Injured workers now access treatment for pain through the WCB Tiered Services Program. The protocols in *Policy 2.2.5* are out of date and no longer relevant. • *Policies 2.2.8R* and *2.2.4* are specific to the treatment of pain related to back and spine injury. These policies are very prescriptive and strict adherence could interfere with injured worker treatment.
2.3.2 - Hospital Admissions: Semi-Private	• This policy is no longer relevant to hospital admissions.
2.3.3 - Double Doctoring – Prescriptions	• This topic is covered by the WCB general policy on fraud *Policy 10.3.7R2- Fraud and Misrepresentation*. Also, the WCB would not cover the cost of any drug obtained through "double doctoring". From a prevention perspective, the Nova Scotia Prescription Monitoring Program (NSPMP) tracks the utilization of monitored drugs in the province and provides reporting and support services that promote good prescribing practices and inform research activities.

Transitional Policies (Chapter 7 of the Policy Manual - Specialized Adjudication)

On March 23, 1990, the Nova Scotia Court of Appeal issued a decision[2] (the "Hayden" decision) that resulted in a fundamental change in the way the WCB determined an injured worker's work-related injury earnings loss. Prior to this decision, the WCB used the percentage of physical impairment (using the Clinical Rating Schedule) to estimate future wage loss and calculate benefits. The Court, after considering the philosophy and history of the legislation, found it was not appropriate to equate the level of physical impairment with the impairment of earning capacity, which may be totally different.

The Hayden decision resulted in a six-year transition period culminating in a new *Workers' Compensation Act* on February 1, 1996. Between March 1990 and February 1996, the WCB implemented a series of transitional approaches to earnings loss benefit calculation. Chapter 7 of the policy manual includes the polices created to support the implementation of these approaches. Two more polices related to this transitional period are found in Chapter 3.

The current *Act* has been in place for over 27 years. A review of the eligibility requirements for the various benefit types in the policies indicates it is highly unlikely the WCB would receive new claims requiring the application of these policies. In the event this did occur, the WCB would apply the provisions of the *Act* (upon which the policies are based) to adjudicate the claim. Therefore, the WCB recommends the 19 policies (including 2 related polices from Chapter 3) listed below be rescinded.

Chapter 7 (and related) Policies to be Rescinded
7.1.1 - Benefits on or After February 1, 1996 for Injuries Before February 1, 1996
7.2.1 - Recalculation of Awards Where Injury Occurred On or After March 23, 1990
7.3.1 - Statement of Principles
7.3.2 - Eligibility for Award
7.3.4 - Effective Date of Awards
7.3.5 - Calculation of Award

[2] Hayden v. Nova Scotia (Workers' Compensation Appeal Board), 1990 NSCA 2

Chapter 7 (and related) Policies to be Rescinded
7.3.6R - Pre-Accident Earnings
7.3.7 - Indexing of Pre-Accident Earnings
7.3.8R - Post-Accident Earnings – Documentation
7.3.9 - Post-Accident Earnings – Canada Pension Plan (CPP) Disability Benefits
7.3.10 - Post-Accident Earnings – Permanent Partial Disability Awards
7.3.11 - Duration of Benefits
7.3.12 - Workers Reaching Normal Retirement Age
7.3.13 - Commutation of Awards
7.3.14 - Reinstated AIEL benefit for pre-March 23, 1990 injuries
7.5.6R1 - Criteria for Compensation for chronic pain
3.9.6R1 - Implementation of Appeal Board Decisions on Permanent Compensation in the Absence of Measurable Impairment
3.9.10 - Payment of Interest on Transitional Benefits

Appendix B - Policy Updates

Occupational Disease

In *Policies 1.2.7R - Lead Poisoning* and *1.2.6R1 - Workplace Noise Levels* the WCB adopts Threshold Limit Values (TLVs) and Biological Exposure Indices (BEI) for noise and lead as part of the criteria for adjudicating lead poisoning and noise induced hearing loss (NIHL) claims. TLVs and BEIs are guidelines designed to assist in the control of health hazards in the workplace and are often referenced/adopted by workplace safety regulators (as is the case in Nova Scotia). The following issues with the polices have been identified:

- The WCB is inconsistent in the way it adopts TLVs and BEIs:
    - *Policy 1.2.6R1 - Workplace Noise Levels* states that hearing loss claims will be considered when noise exposure exceeds levels adopted by the Department of Labour (now LSI). The policy then includes a table of permissible noise exposure levels. LSI, in Section 2.3 of the *Workplace Health and Safety Regulations*, adopts the **latest version** of the *TLVs and BEIs* book published by the American Conference of Governmental Industrial Hygienists (ACGIH) as the standard Nova Scotia workplaces must meet. This includes the TLVs and BEIs for noise and lead.
    - *Policy 1.2.7R - Lead Poisoning* specifies a blood lead level (BLL) that must be met before a claim can be accepted for lead poisoning. This level is also from the *TLVs and BEIs* book referenced above and adopted by LSI. However, unlike *Policy 1.2.6R1*, the policy makes no mention of LSI or the source of the BLL level included in the policy.
- The WCB is inconsistent in its reference to workplace exposure to the hazard in question. In *Policy 1.2.5AR2* the WCB states that noise claims will be considered when the "worker has a history of occupational exposure to noise in excess of permissible levels". The lead level policy *1.2.7R* makes no mention of occupational exposure.
- The noise level table and lead BLL referenced in the policies are out of date. While the numerical values in the noise level table remain accurate, the descriptors and notes to the table are no longer current[3]. As well, the BLL referenced in *Policy 1.2.7R - Lead Poisoning* comes from the 1996 version of the *TLVs and BEIs* book. It was changed to a lower BLL in 2017. Including actual values from the *TLVs and BEIs* book in policy increases the chances of the policy becoming out of date.

[3] Examples include: 1) The table in the policy does not use the descriptors found in the TLVs and BEIs book. For example, the title of the table in the book is "Threshold Limit Values for Audible Sound"; the title for the table in the WCB policy is "Permissible Noise Exposures (Steady-State Noise)". 2) WCB policy states "No exposure to impulse or impact noise in excess of 140 dBA peak sound pressure level is permitted, as determined by the N.S. Department of Labour (Occupational Health and Safety Division)" . The book adopted by LSI in regulation states "No exposures of an unprotected ear in excess of C-weighted peak sound pressure level of 140 dBA are permitted".

- It is unnecessary to have the stand-alone *Policy 1.2.6R1 - Workplace Noise Levels* for noise TLVs. *Policy 1.2.5AR2 Occupational Hearing loss – injuries on or after January 1, 2000* is the policy where the noise TLVs are actually used to adjudicate NIHL claims.
- The *Workers' Compensation General Regulations* (the "*Regulations*") designates "lead poisoning or its sequelae" caused by "any process involving the use of lead or its preparations or compounds" as an occupational disease. *Policy 1.2.7R - Lead Poisoning* as currently written is inconsistent with the *Regulations*. The policy depends solely on BLLs to start and stop compensation. This makes the policy inconsistent with the *Regulations* because it does not account for the complications or conditions caused by lead poisoning (the sequalae). Complications or conditions caused by lead poisoning may require treatment or earnings loss benefits even if BLLs have returned to normal.

Considering the issues identified with the policies described above, the WCB recommends:

- Explicitly adopting the NS Department of Labour, Skills, and Immigration's TLVs and BEIs in **both** policies. This increases transparency and ensures the policies remain up-to-date.
- Removing reference to the specific levels in policy. The WCB will maintain an up-to-date copy of the ACGIH's *TLVs and BEIs* book. Copies of the book are also made available by LSI in public libraries across the province.
- Modifying the wording in *Policy 1.2.7R - Lead Poisoning* to ensure it is consistent with the *Regulations*. Reference to the requirement for occupational exposure, like in the noise policy, has also been included.
- Rescinding *Policy 1.2.6R1 - Workplace Noise Levels* and moving the content into *Policy 1.2.5AR2 Occupational Hearing loss – injuries on or after January 1, 2000*. (see Appendix A of this paper).

Policy	**Proposed Policy Change** **(**~~strikethroughs~~ are deletions and additions are **bold and underlined**)
1.2.7R - Lead Poisoning	~~1. Lead poisoning cases will be considered as per the following criteria:~~ ~~1.1. The Workers' Compensation Board, after having reviewed current information on lead poisoning, states that claims for lead poisoning be accepted with the blood levels in excess of 1.45 moles/litre (30 ug/100ml) and that compensation be continued until the blood lead level falls below this level~~. Claims for lead poisoning will be considered for acceptance when **there is a history of occupational exposure to lead and** blood lead levels ~~are in excess of~~ **exceed** the level **adopted by the NS Department of Labour, Skills, and Immigration.**
1.2.5AR2 Occupational Hearing loss – injuries on or after January 1, 2000	2. Claims for occupational NIHL will be considered as follows: Step 1: The worker has a history of occupational exposure to noise in excess of permissible levels ~~outlined in Policy 1.2.6R~~. **adopted by the Department of Labour, Skills, and Immigration.**

Policy	Proposed Policy Change (~~strikethroughs~~ are deletions and additions are **bold and underlined**)
	References *Workers' Compensation Act* (Chapter 10, Acts of 1994-95), Section 2(v). ~~Policy 1.2.6R1.~~

Earnings Loss

Some people work for more than one employer. If they have a compensable injury and require earnings loss benefits, the WCB will consider the earnings lost from all employers when calculating earnings loss benefits. In these cases, the accident employer is charged with the portion of the claim cost for which they are directly responsible (the percentage of costs based on earnings at the accident employer).

Prior to a 2009 Workers' Compensation Appeals Tribunal (WCAT) decision, the WCB only considered the pre-accident earnings from all of a worker's assessed (covered) employers when calculating earnings loss benefits. In 2009 the WCB accepted WCAT's interpretation of the *Act* where the tribunal determined that earnings from both assessed and non-assessed (not covered) employers should be considered in determining a worker's pre-accident loss of earnings. The decision was considered legally sound and the WCB implemented this approach to determining pre-accident earnings for workers with more than one employer. While WCAT did not find the WCB's earnings policies inconsistent with the *Act* because they did not explicitly exclude earnings from non-assessed employers, they are not clear that earnings from both assessed and non-assessed employers is considered in determining earnings loss.

The WCB proposes the following changes to *Policy - 3.1.1R4 - Calculation of Gross Earnings* and *9.6.2- Apportionment of Claims Costs Under Concurrent Employment* to bring the polices in line with current practice.

Policy	Proposed Policy Change (~~strikethroughs~~ are deletions and additions are **bold and underlined**)
3.1.1R4 - Calculation of Gross Earnings	**Concurrent Employment: (Section 44)** 12. For purposes of both the initial and long-term earnings profile, when a worker is employed by more than one employer, the pre-LOE average earnings will be computed based on what the worker was earning from all employers **(both covered and non-covered).** ~~The word 'employers' is defined as per Section 2(a) of the Act - i.e. employers covered by the Act.~~
9.6.2- Apportionment of Claims Costs Under Concurrent Employment	**Policy Statement** 1. If a worker is employed with two or more ~~assessed~~ employers **(both covered and non-covered)** and suffers an injury at one employer, the accident employer will only be charged with the portion of the claim cost for which they are directly

Policy	Proposed Policy Change (~~strikethroughs~~ are deletions and additions are **<u>bold and underlined</u>**)
	responsible (the percentage of costs based on earnings at the accident employer). The remaining cost of the claim will be charged to an internal account, which forms part of the overall collective liability. **Example** A worker earns $10,000 at employer A and $15,000 at employer B, for a total earnings of $25,000. If the worker is injured at employer A, the loss of earnings will be calculated based on what the worker was earning from employer A and B. ~~provided that both employers had WCB coverage.~~ Under apportionment, employer A will only be charged with costs associated with 2/5ths, or 40%, of the total cost [$10,000 / ($10,000 + $15,000)]. All costs above this will be charged an internal account, which forms part of the overall collective liability.

Rate Setting

As a result of rescinding the transitional period related policies (in particular policy *3.9.10 Payment of Interest on Transitional Benefits*) two rate setting policies must be updated. Policies *9.3.5R- Claims Costs Which are Excluded From Rate Setting* and *9.4.4R2- Claims Costs Which are Excluded from Experience Rating* state that costs associated with the payment of interest pursuant to *Policy 3.9.10* are excluded from rate setting and experience rating.

During the transitional period between the Hayden decision and the passage of the new *Act* in 1996, some earnings loss benefit awards were delayed in anticipation of the new approach to the calculation of benefits. It was determined that workers should be paid interest on the delayed benefits and *Policy 3.9.10* set out how this would be done. These payments were paid many years ago and reference to the policy (which will be rescinded) is no longer required.

Policy	Proposed Policy Changes Required by Rescinding Chapter 7 Policies (~~strikethroughs~~ are deletions and additions are **<u>bold and underlined</u>**)
9.3.5R- Claims Costs Which are Excluded From Rate Setting	**Policy Statement** 1. The following are claims costs which are excluded from consideration for Rate Setting Purposes… ~~1.9. Costs associated with payment of interest pursuant to Policy 3.9.10.~~
9.4.4R2- Claims Costs Which are Excluded from Experience Rating	**Policy Statement** 1. The following are claims costs which are excluded from consideration for calculating a firm's experience rate… ~~1.8. Costs associated with payment of interest pursuant to Policy 3.9.10.~~

Appendix C - Consequential Amendments

The following polices will have their policy references updated:

- 3.3.5R1- Eligibility Criteria and Compensation related to chronic pain
- 3.1.2R1- Calculation of Net Earnings
- 9.1.2R- Special Protection Coverage

As well, the glossary of the Policy Manual will updated with new policy references (or policy references removed for rescinded policies)