

Changes to Chronic Pain Policy 3.3.5

Introduction

As a result of Court of Appeal and WCAT decisions, the WCB is required to make changes to *Policy 3.3.5 – Eligibility Criteria and Compensation Related to Chronic Pain*. These changes are necessary to comply with the direction provided by the Court of Appeal and to ensure ongoing consistency between the language in the WCB policy and the *Chronic Pain Regulations*.

The revisions to the policy include:

1. Replace the word “developed” with the word “had” in section 12. This change is consistent with the direction provided in the *Cohen* decision and the language used in the *Chronic Pain Regulations*; and
2. Clarify that a worker is entitled to a PRI award during the time period that s/he is or was in receipt of an AIEL benefit. This change is consistent with the WCAT decision and the principles established by the Court of Appeal in the *Martell* decision.

While these policy changes are required as a result of decisions from the Court of Appeal and WCAT, in keeping with the WCB’s policy consultation approach, they are being shared with stakeholders to ensure a full understanding of the changes prior to Board of Directors’ final policy decision. Information on the changes is in the attached document. If you have any questions or concerns about the proposed policy revisions, by July 16, 2008, please contact:

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Background

(a) Cohen v. Nova Scotia Workers’ Compensation Board

In 2007, the Court of Appeal was asked whether injured workers who developed chronic pain before April 17, 1985 (sometimes called “pre-Charter” injured workers) are eligible for an assessment for chronic pain benefits and services.

The basis of the appeal was a discrepancy between the language in the Chronic Pain Policy and the *Chronic Pain Regulations*.

WCB policy states that a worker may be eligible to receive benefits if they “developed” chronic pain on or after April 17, 1985. The Chronic Pain Regulations state that a worker may be eligible to receive benefits if the worker “had” chronic pain on or after April 17, 1985. The language in the Regulations raised a question respecting entitlement to benefits for workers who were injured and developed chronic pain prior to April 17, 1985.

The Court held that the Policy is inconsistent with the Regulations and therefore “pre-Charter” injured workers are not barred from an assessment for chronic pain benefits under the Regulations.

As a result of this decision, a housekeeping change is required to the language of Policy 3.3.5 - section 12 to replace the word “developed” with the word “had”.

(b) WCAT decision – Interrelationship between PRI and AIEL

Policy 3.3.5 contains a number of provisions related to the determination of chronic pain benefits for the AIEL population. In particular, section 22 of the Policy indicates that a worker is not entitled to a PRI award during periods when s/he is or was in receipt of an AIEL award.

Specifically, section 22 of Policy 3.3.5 states:

For periods in which a worker, now in receipt of a section 10D award, was in receipt of an AIEL award, the Board shall compare the AIEL benefit to the cumulative CRS pension including the pain-related impairment for chronic pain, and shall pay the worker which ever is greater until age 65.

The *Chronic Pain Regulations* provide no specific direction related to benefit determination for the AIEL population.

In November 2007, WCAT was asked to consider whether a worker is entitled to a Pain Related Impairment (PRI) during times that a worker was paid Amended Interim Earnings Loss (AIEL) benefits under section 10D of the *Act*.

In coming to its decision, WCAT considered the principles underlying the Court of Appeal decision in *Martell*. In *Martell*, the Court found that the *Chronic Pain Regulations* are a separate and distinct scheme from the Act for dealing with chronic pain.

Based on this principle, WCAT found that there was nothing in the *Chronic Pain Regulations* or the Act that explicitly prohibits payment of a PRI award during times that a worker is in receipt of AIEL benefits. As a result, WCAT found that Policy 3.3.5 was inconsistent with the *Chronic Pain Regulations* and that a

worker is entitled to a PRI during times that s/he is or was in receipt of an AIEL benefit.

Complying with WCAT's decision requires adding the words "including the pain-related impairment for chronic pain" to section 22 of the Policy 3.3.5:

For periods in which a worker, now in receipt of a section 10D award, was in receipt of an AIEL award, the Board shall compare the AIEL benefit including the pain-related impairment for chronic pain to the cumulative CRS pension including the pain-related impairment for chronic pain, and shall pay the worker which ever is greater until age 65.

This revision clarifies that in determining chronic pain benefits for the AIEL population the WCB should compare Amended Interim Earning Loss + Pain Related Impairment to Clinical Rating System + Pain Related Impairment, and pay the worker whichever is greater (see Appendix A – Draft Policy).

POLICY NUMBER: 3. 3. 5R

Effective Date: xxxxx

Date Issued: xxxxx

Date Approved by Board of Directors xxxxx

Topic: Eligibility Criteria and Compensation Related to Chronic Pain

Section: Short-Term and Long-Term Benefits

Subsection: Compensation related to chronic pain

Preamble

The *Chronic Pain Regulations* provide a high level framework and general eligibility criteria for compensation related to chronic pain.

Policy Statement

Subject to the limitations set out in this Policy and in other Board policies, the Board shall use an individualized assessment based on Chapter 18 of the American Medical Association "Guides to the Evaluation of Permanent Impairment - Fifth Edition", as modified by the *Chronic Pain Regulations* and this policy, to determine the existence and degree of a worker's pain-related impairment.

Definitions

1. "Chronic Pain," as defined in section 10A, means pain:
 - a. continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered or otherwise predated the pain; or
 - b. disproportionate to the type of personal injury that precipitated, triggered, or otherwise predated the pain;

and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions, but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate the injury has not healed.

2. "Individualized assessment" means an assessment consisting of a medical examination and/or a file review depending on which approach, in the opinion of the Board, is most appropriate.
3. "Normal recovery time" means an estimate determined by the Board of the normal time required for workers with a specific type of personal injury to return to work after the injury.
4. "Permanent impairment" means impairment associated with a permanent medical impairment and/or a pain-related impairment.
5. "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.
6. "Usual pain" means all pain except for chronic pain as defined by the *Act*, *Chronic Pain Regulations* and this policy.
 7. "Pain -related impairment" means impairment associated with chronic pain.
 8. "Slight" pain-related impairment means a pain-related impairment that has, in the opinion of the Board, increased the impact of the worker's original compensable injury mildly to moderately as described in Table 18-3 of Chapter 18 of the American Medical Association "Guides to the Evaluation of Permanent Impairment-Fifth Edition." In determining the appropriate class of impairment, the WCB will use a Pain-Related Impairment Assessment Tool as outlined in Appendix A.
 9. "Substantial" pain-related impairment means a pain-related impairment that has, in the opinion of the Board, increased the impact of the worker's original compensable injury moderate severely to severely as described in Table 18-3 of Chapter 18 of the American Medical Association "Guides to the Evaluation of Permanent Impairment-Fifth Edition". In determining the appropriate class of impairment, the WCB will use a Pain-Related Impairment Assessment Tool as outlined in Appendix A.
 10. "Original compensable injury" means a personal injury by accident arising out of and in the course of employment
 - i. that the Board has accepted or may accept as compensable under the *Act*; and
 - ii. that pre-dates the commencement of the worker's chronic pain.
 11. "Unratable pain", as contemplated by the American Medical Association "Guides to the Evaluation of Permanent Impairment-Fifth Edition," means controversial and ambiguous pain syndromes that cannot be related to a well-established medical condition and are not widely accepted by physicians as having a well-defined pathophysiological basis. Unratable pain includes chronic pain syndrome, fibromyalgia and myofascial pain syndrome.

Eligibility

12. A worker is entitled to an assessment to determine eligibility for benefits and services outlined in the Chronic Pain Regulations where the medical evidence establishes that on or after April 17, 1985, the worker **had** chronic pain that is causally connected to an original compensable injury.

13. A pain-related impairment will be assessed using a modified approach to Chapter 18 of the American Medical Association "Guides to the Evaluation of Permanent Impairment-Fifth Edition". In determining the appropriate class of impairment, the WCB will use a Pain-Related Impairment Assessment Tool as outlined in Appendix A. In cases where a worker's pain is considered "unratable",

the worker will be assessed using the approach described in this policy. Considering the overall assessment findings, the Board Medical Adviser will make a clinical judgment as to the recommended pain-related impairment in accordance with the rating schedule outlined in paragraph #14.

14. Where a worker is found to have a pain-related impairment, the Board shall pay the worker a permanent benefit based upon a permanent impairment rating of 3% where the worker experiences a slight pain-related impairment or 6% where the worker experiences a substantial pain-related impairment.

15. Permanent impairment ratings are expressed as a percentage of total body impairment with one hundred percent (100%) being the maximum possible rating. Subject to paragraph #26, in the case of a pain-related impairment 6% is the maximum possible rating any one person can receive for chronic pain.

16. Where a worker's original compensable injury occurred before March 23, 1990, and the worker is found to have a pain-related impairment, the worker's permanent benefit will be calculated in accordance with sections 226 and 227 of the Act and the worker is not eligible to receive an Extended Earnings Replacement Benefit (EERB).

17. Where a worker's original compensable injury occurred on or after March 23, 1990 and the worker is found to have a pain-related impairment, the worker's permanent benefits will be calculated in accordance with sections 34-48 of the Act and the worker may be eligible to receive an EERB.

18. Subject to sections 34-48 and 229 of the Act, where a worker is eligible to receive a permanent benefit in accordance with this Policy, the Board will commence payment of the benefit from the date on which the Board determines the worker has a pain-related impairment.

Section 10D - AIEL Population

19. Where a worker with chronic pain has been awarded benefits in accordance with section 10D of the *Act*, the worker is entitled to an individualized assessment and where eligible a calculation of benefits in accordance with the *Chronic Pain Regulations and Policy*.

20. Subject to sections 226 and 227 of the *Act*, for periods in which a worker was in receipt of a Clinical Ratings Scale (CRS) pension for the original compensable injury, the worker is eligible to receive a benefit in accordance with this Policy commencing the date on which the Board determines the worker has a pain-related impairment.

21. With the coming into force of the current *Act*, where an Amended Interim Earnings Loss (AIEL) award was replaced by a CRS pension, the worker is

eligible to receive a benefit in accordance with this policy commencing the date the CRS pension was reinstated.

22. For periods in which a worker, now in receipt of a section 10D award, was in receipt of an AIEL award, the Board shall compare the AIEL benefit **including the pain-related impairment for chronic pain** to the cumulative CRS pension including the pain-related impairment for chronic pain, and shall pay the worker which ever is greater until age 65.

23. Upon reaching the age of 65 years, a worker who was in receipt of an AIEL award shall receive an amount equivalent to the cumulative CRS pension, including the pain-related impairment for chronic pain.

Section 10E Population

24. Where a worker with chronic pain has been awarded benefits in accordance with section 10E of the *Act*, the worker is entitled to an individualized assessment and recalculation of benefits in accordance with the *Chronic Pain Regulations* and Policy.

25. Subject to sections 34 to 48 of the Act, where the recalculation results in a greater combined EERB/PIB benefit than that awarded under section 10E, the Board will pay the worker

- i. the recalculated award from the date the Board determines the worker has a pain-related impairment until the date section 10E benefits commenced; and
- ii. the difference between the recalculated award and the section 10E benefits from the date the worker's section 10E benefits commenced until the coming into force of the Chronic Pain Regulations; and
- iii. effective the date the Chronic Pain Regulations come into force, the recalculated award.

26. Subject to sections 34 to 48 of the Act, where the recalculation results in a lesser combined EERB/PIB benefit than that awarded under section 10E, the worker shall be entitled to:

- i. the recalculated award from the date the Board determines the worker has a pain-related impairment until the date section 10E benefits commenced; and
- ii. effective the date the worker's section 10E benefits commenced, the section 10E award is continued.

Application

This Policy applies to all decisions made on or after September 10, 2004 as it

relates to chronic pain.

References

An Act to Amend Chapter 10 of the Acts of 1994-1995, *the Workers' Compensation Act* (Chapter 1, Acts of 1999). *Chronic Pain Regulations*. Policy 2.4.7R and Policy 7.3.14.

Appendix A
PRI Assessment Tool

Assessment Questions	Descriptors for pain related impairment categories			Supporting documentation Medical Adviser's reasoning for decision
<p>Section A Medical Information Sources: GP reports, Specialist reports, Board Medical Adviser</p> <p>For claims closed prior to the passing of the chronic pain regulations, the medical adviser may deviate from the above sources when information is not available, and use the worker's self report tool(s) such as I3 or ADL questionnaire.</p>	<p>No Pain related impairment</p>	<p>Slight</p>	<p>Substantial</p>	<p>Medical Adviser's Comments</p>

<p>(1)Examining the worker's medical history, what level of pain has the worker exhibited? Score 0 for no pain, 10 for most severe pain</p> <p>a) What is the level of pain on average? (0-10) b) What is the level of pain at its worst? (0-10) c) How frequently does the worker experience pain? (1-10)</p> <p>Average score = (a+b+c) / 3</p>	<p>Average score = 0 out of 10</p>	<p>Average score = 1 to 5 out of 10</p>	<p>Average score = 6 to 10 out of 10</p>	
<p>(2) Again, using the worker's medical history, is the worker's pain aggravated by activity?</p>	<p>No pain at rest or during activity</p>	<p>Pain is mildly or moderately aggravated by activity</p>	<p>Pain is severely aggravated by activity</p>	
<p>(3) How often does the worker visit a physician due to their pain?</p>	<p>Worker does not see physician</p>	<p>Worker sees physician no more than once per month</p>	<p>Worker sees physician more than once per month</p>	
<p>(4) Is the worker using medication due to their pain?</p>	<p>Worker does not take medication</p>	<p>Worker takes medication daily or as needed. May take OTC meds on a regular</p>	<p>Worker takes the regular maintenance dosage of prescription medication to control</p>	

Impact on Sitting				
Impact on Lifting				
Other: Household chores, dressing, bathing, eating, shopping, etc				
Impact on worker's socialization and recreation				
(2) What is the impact on the worker's sleep due to their pain? Determine both sleep interference & requirement for sleep aids.	No interference & no aids required	Minor interference. Sleep aids required occasionally	Major interference. Regular use of sleep aids	
(3) What is the impact on the worker's sexual activities due to their pain? <i>Use only if information is already available or volunteered, do not specifically request from worker.</i>	No impact	Workers has minimal or moderate difficulty performing	Worker has extreme difficulty performing or not able to perform at all	
(4) What is the impact on the worker's cognitive abilities due to their pain? i.e.	No impact	Workers has minimal or moderate difficulty performing	Worker has extreme difficulty performing or not able to perform at all	

<p>Their ability to concentrate; to write letters, answer the phone, etc.</p>									
<p>Section C Emotional Distress Sources: psychiatrists, psychologists, worker, employer, GPs or specialists, physiotherapists, case workers.</p>	<p>No Pain related impairment</p>	<p>Slight</p>	<p>Substantial</p>	<p>Medical Adviser's Comments</p>					
<p>(1) Does the worker appear to be experiencing emotional distress due to pain? i.e. Depressed, frustrated, anxious, irritable, worried, afraid, stressed.</p>	<p>Worker's emotional state is not affected by pain</p>	<p>Worker's emotional state is occasionally affected by pain</p>	<p>Worker's emotional state is frequently affected by pain</p>						
<p>Section D Functional Abilities Sources: health professional (i.e. Physiotherapist, Occupational Therapist, Kinesiologist)</p>	<p>No Pain related impairment</p>	<p>Slight</p>	<p>Substantial</p>	<p>Medical Adviser's Comments</p>					
<p>(1) Does the worker have the functional ability to perform activities such as: <input type="text" value="Range of"/></p>	<p>Overall, worker is able to perform with no difficulty and no modifications</p>	<p>Overall, worker has minimal or moderate difficulty performing them and is able to</p>	<p>Overall, worker has extreme difficulty performing them and is only able to perform with</p>	<table border="1"> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> <tr><td> </td></tr> </table>					

Motion		perform with reasonable modifications	substantial modifications or assistance	
Lifting, Pushing & Pulling				
Hand Strength				
Sitting & Standing				
Gross Mobility (ie. Walking, carrying, climbing, balancing, stooping, kneeling, crouching, crawling, reaching, handling)				
(2) During the evaluation, what degree of pain does the worker exhibit? Ie. What are the objective signs of pain, frequency of pain, need for unscheduled breaks b/c of pain, etc.	Worker is aware of pain but no handicap in the performance of activity	Worker can tolerate pain but there is <u>some</u> to <u>marked</u> handicap in the performance of activity	Worker cannot tolerate pain and it <u>precludes</u> them from performing the activity	
Subtotal	No Pain related impairment	Slight	Substantial	
Subtotal the number of ratings in each PRI category to determine the pain picture.				The Board Medical Advisor performs a consistency check to determine if the tool presents a consistent picture of the impact pain is having on the original

		compensable injury before recommending the final PRI rating.
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Section E
Final Considerations

<p>The Medical Adviser needs to consider if the information is presenting a consistent or conflicting picture of the impact pain is having on the worker's original compensable injury. In contemplating this issue, the Medical Adviser may want to consider the following:</p>	<p>In this section, the Board Medical Adviser should consider each of the questions included in Section E and provide responses to those question that are relevant to the claim at hand.</p> <p>If information is conflicting, the Medical Adviser should:</p> <ol style="list-style-type: none"> 1. Determine if there is any outstanding formal tests that could be performed; and/or 2. Perform a formal in-person PRI exam to gather more information. <p>If the Medical Adviser does not believe additional information is available or would help resolve the discrepancy, he/she will make a clinical judgment re the appropriate PRI rating.</p>
<p>Is worker's report of Activities of Daily Living ability consistent with Functional Abilities (FA) information?</p>	
<p>Does FA information support pain related limitations identified during PRI</p>	

<p>exam? Does FA information related to degree of pain support level of pain in medical section?</p>	
<p>Is information about worker's pain level consistent with emotional distress level?</p>	
<p>Does the worker exhibit any pain behaviors upon interview or examination? (As outlined in Chapter 18, Table 18-5)</p>	

Section F
Final Determination

PRI Rating Recommended: _____

Medical Advisor's final comments:

Section G
Summary of Permanent Impairment

Step #1	Document the worker's diagnosis
Step #2	Document the worker's PMI rating (if any)
Step #3	Is the worker's pain already compensated for under their

	existing PMI?
Step #4	Complete the PRI Assessment Tool
Step #5	Document the PRI Rating recommended
Step #6	<p><u>Document the worker's TOTAL IMPAIRMENT RATING:</u></p> <p>PMI = _____ PRI = _____</p> <p>(1) If PMI assigned under PMI Guidelines, PMI + PRI = _____ Total Impairment Rating</p> <p>(2) If PMI assigned under AMA 4th Guides, PMI combined with PRI = _____ Total Impairment Rating</p>