

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

**36 Month Review of Extended Earnings Replacement Benefit:
Consultation Summary – Stage 1**

Date: January 28, 2008

Introduction:

At the November 29, 2006 Stakeholder Consultation Session, Injured Workers Associations/Labour and Employers indicated that Policy 3.4.2R1 – Review of Extended Earnings Replacement Benefit (EERB) is a high priority policy issue. At the November 1, 2007 Board of Directors' meeting, the Board agreed to initiate consultation with stakeholders to gather input on their specific issues regarding the timing and scope of the 36-month EERB review to be considered in the policy review process.

On November 20, 2007, the Issues Identification Paper entitled "36 Month Review of Extended Earnings Replacement Benefit: Timing and Scope of Review" was mailed to individuals on the key stakeholder mailing list and posted to the WCB website for a period of 45 days. At the request of stakeholders, the deadline for submissions was extended one week to January 18, 2007. The WCB has received submissions from 8 stakeholders (including stakeholders associations, individual employers and rehabilitation centers) regarding their issues with the timing and scope of the 36-month EERB review.

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 timing and scope of the 36-month EERB review. The submissions are presented as submitted (with minor grammar edits) by stakeholders. The submissions have not been analyzed by staff with a view to reconciling or validating them in comparison to WCB or other jurisdiction's current practice. This will occur in the next stage of the policy process when they are considered by the policy working group. In May 2008, we expect to present a draft policy and background paper to the Board of Directors for consideration and discussion.

Feedback Summary:

A review of the submissions indicates that there are divergent views amongst stakeholders on the issue of the timing and scope of the 36-month EERB review.

Generally, employers believe that the WCB's current interpretation of the "initial award of the benefit" should continue to be followed. Regarding the scope of the 36-month EERB review, employers generally believe that the scope needs to be expanded beyond a review of earnings to include a review of functional capabilities and health status to provide a fuller picture of potential earnings.

In regards to timing of 36-month EERB review, injured workers' associations and Labour generally believe that the WCB has wrongly interpreted the phrase "initial award of the benefit" and believe this should be interpreted as the date of the first

EERB decision. They do not support any changes to expand the scope of the 36-month EERB review.

Outlined below is a summary of general comments submitted by various stakeholders.

Employers:

Timing of Review

- We agree that the 36 month review date should continue to follow the current policy and occur 36 months after the final decision (including a change coming from an appeal). The date of the “initial reward” should remain defined as either a: the initial date of the decisions; b: the date of any decision conveying an adjusted award resulting from an appeal or as a result of additional evidence that warrants reconsideration.
- The Ontario program option of yearly reviews for 6 years looks like the best of the provincial models.
- EERB reviews should be completed annually in keeping with the majority of other jurisdictions.
- The Act and policy should be consistent. The Act should reflect “will review” rather than “may”, to be consistent with policy.

Scope of Review

- The 36 month review should include not only a review of earnings, but of medical condition and capacity to work. Furthermore, there should be some financial incentive for an injured worker to pursue new work opportunities and/or retraining if the medical/physical potential exists to increase earned income through full or part-time work. Leaving people on benefits for the rest of their working lives is a waste and incentives need to be there to make the life long benefit option less lucrative than returning to some kind of work. Perhaps a 6 month transition period where work related income and benefits exceeds benefits alone might provide the right kind of incentive to injured workers who have the capacity to do alternative work.
- The Ontario review that includes earnings/income information, employment status and health status seems to be the one that might result in greater return to work and earnings. We would back the adoption of the Ontario approach.
- There are varying factors that impact the potential earnings of any injured worker such as higher or lower earning capacity than first anticipated by the WCB, deterioration/improvement in their compensable condition. We agree that the financial component of the review is primary – however we do not believe discounting the clinical picture of the individual should be set aside if everything remains equal. It is interesting if one asks the question of earnings, that this would not rely solely on the T4 tax return as the basis of determining whether the EERB is still reflective of the injured

worker's long term earning capacity. The WCB should have an intake interview with the injured worker to confirm their occupation, length of time in employment, nature of their employment, etc.

- The income tax returns are objective measures of workers' earnings. Asking workers to forward any evidence that they would like considered is not an objective measure of "potential earnings". Assessments of the injured workers' functional capacities would be more in keeping with an objective measure of "potential earnings" and should be an essential aspect of the EERB review.

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Injured Workers' Associations and Labour

Timing of Review

- There has to be clarity on what constitutes an "initial award". We firmly believe that the WCB has wrongly interpreted the phrase "initial award". We believe that this is when the EERB was established, i.e. the date of the first EERB decision.
- The interpretation by the WCB that the phrase "initial award of the benefit" is the date of the final determination of the award, if appealed, is inconsistent with the intent of the legislation.
- We agree with the Ontario model which bases the review date on the initial Loss of Earnings Payment, that is, the date the worker starts to experience a loss of earnings.
- WCB's practice of interpreting the 36 month review based on initial award of benefit being after all appeals have been exhausted is wrong, in our opinion. It is unfair to allow the date of the initial award of the benefit to be the date the EERB was finally determined following a successful appeal of the first EERB. If the initial EERB decision is successfully appealed, the WCB did not make the correct decision in the first place, so the worker would be penalized for a WCB error.
- If the initial EERB decision is successfully appealed, the WCB did not make the correct decision at first instance – the WCB made an error. By relying on the interpretation of the initial award of the benefit as being the date of final determination after an appeal decision, the WCB is not being held accountable for its errors. The worker should not be penalized with an EERB review timeframe of potentially 7 or 8 years after the date of the initial determination of the benefit because the WCB made an error. The Legislature did not intend for the WCB to extend the time frame of a 36 month review when a Hearing Officer, Appeals Commissioner or a Court of Appeal Justice decides that the WCB made an error in the first place.
- The WCB's current policy of a general guideline that an EERB will undergo a 24 month review is not always accurate. If there is a current policy on this issue, it needs to be followed, which it is not, on a consistent basis. Determination of the 24 month review seems to be left up to the

individual case worker. The case worker has too much discretion when it comes to practices and internal policies and not following the Act.

- Section 73(1) of the Act states the Board may review the amount payable as an EERB whereas Policy Statement 1 of Policy 3.4.2R1 states the EERB "...will be reviewed..." The policy should be amended to reflect the intent of the legislation.
- The WCB should be responsible to provide thorough reasons for deciding to conduct second review at the time of the 36 month review. The current practice of the WCB is to include a general statement in the 36 month review decision that the benefit would be subject to a further review in 24 months. The current practice of the WCB is not to include detailed reasons in the 36 month review decision to support its decision to conduct a further review. The policy should be changed to ensure the WCB provides firm reasons to support a second review.

Scope of Review

- We do not support broadening the scope of the review of an EERB, although we believe clarification is needed. The current practice of the WCB to review an EERB based upon workers' employment earnings information during the review period and based upon medical evidence on file is consistent with the finality of the legislation and we do not support any changes to expand the scope of the review.

Service Providers :

Scope of Review

- Financial information appears to be the focus of the EERB review in most if not all provinces. Additional medical reports may also be considered. This practice may be somewhat anachronistic, given the increasing emphasis on physical functional capabilities as we embrace the biopsychosocial approach to injury management. It is only in PEI that we find mention of the use of functional capacity assessments in the EERB review.
- Any influence applied through standard medical information needs to be measured or weighed within the context of the effect that the medical status has on the functional abilities of the injured client, with reference to available or potential job tasks and job descriptions.
- In the scope of review the WCB also considers whether or not a permanent impairment reassessment is required. Philosophically, the concept of "permanent impairment reassessment" rather than a reassessment that determines demonstrated level of ability, seems out of step with the current concept of determining functional capabilities, rather than, as it would appear on the surface at least, taking a leap of faith regarding ability, using medical reports as your primary guide.