



Noise Induced Hearing Loss:

Final Program Policy Decision and Supporting Rationale

March 2018

I – Introduction:

In January 2018 the WCB Board of Directors invited stakeholders to participate in a one stage (30 day) consultation on **Policy 1.2.5AR1: Occupational Hearing Loss – Injuries on or after January 1, 2000**. The consultation was initiated in response to a Nova Scotia Court of Appeal decision of November 2017, “**Surette v. Nova Scotia (Workers’ Compensation Board), 2017 NSCA 81**”. The Court summarized the issue and decision as follows:

Issue:

Was the Board Policy which required Mr. Surette to have an audiogram within five years of leaving his employment inconsistent with the *Act*?

Result:

The Board Policy was inconsistent with the *Act*. The *Act* sets out a statutory scheme for payment of compensation for occupational diseases such as noise-induced hearing loss. The imposition of the five-year audiogram rule was contrary to the express provisions of the *Act*.

The WCB Board of Directors determined that compliance with the Court’s direction made it necessary to remove the provision requiring a worker have an audiogram within five years of leaving his employment. Therefore, the WCB posted (January 17, 2018) the document [“Program Policy Background Paper: Noise Induced Hearing Loss”](#) to its website and e-mailed it to stakeholders. Stakeholders were asked to share feedback by February 16, 2018.

The remainder of this report provides:

- key issues raised by stakeholders during consultation;
- the rationale for why the WCB did or did not revise the draft program policy in response to stakeholder submissions received as a result of the consultation; and
- the WCB’s final policy decision as reflected in the final version of the program policy – Appendix B.

II - Issues Raised During Consultation:

The WCB received two submissions in response to the consultation, both representing the concerns of injured workers. Both stakeholders raised the following two issues:

- The Application date of the amended policy, and
- The date of Accident for adjudication purposes.

III – Stakeholder Feedback, Analysis, and Response:

#1: The Application date of the amended policy

Analysis and Response:

Stakeholders felt strongly that the application date of the amended Policy should be retroactive to January 1, 2015, the date in which the 5 year audiogram requirement was originally approved by the Board of Directors.

They also felt the Board should proactively identify claims denied because of the 5 year audiogram requirement and re-adjudicate these claims.

When adopting new or revised policies the Board of Directors considers **Policy 10.3.2R – Retroactivity of Policy Changes**. This policy states that a change in the law will normally have retrospective application only to those who are still within the system (i.e. any new claims or any claims that are still within the system by virtue of the adjudication and appeals processes). This principle is consistent with the common law doctrine of *res judicata* - any issue which has been finally decided in a previous proceeding cannot be raised again in a subsequent proceeding.

As stated in Policy 10.3.2R, the principals of good public administration (which involves striking a balance between fairness, finality, and administrative practicality) are considered when deciding if a policy change should be made retroactive. Making a policy change retroactive only for those who are still within the system has been viewed by the courts as striking an appropriate balance between fairness, practical requirements and the need for finality. In keeping with this approach, all appeals held by the Workers' Compensation Appeals Tribunal from the time the stated case was filed have been returned to the WCB for final adjudication without consideration of the 5 year audiogram.

Since the date the NS Court of Appeal rendered the decision on "***Surette v. Nova Scotia (Workers' Compensation Board), 2017 NSCA 81***" the WCB-adjudicated new Noise Induced Hearing Loss claims without applying the 5 year audiogram requirement.

For this reason the application date of the revised policy will be November 3, 2017, the date of the NS Court of Appeal decision.

#2: The date of Accident for adjudication purposes.

Analysis and Response:

Even with the removal of the 5 year audiogram requirement, stakeholders commented that the draft policy could still lead to inconsistent application of the legislative time line set out in Section 83 of the *Act* for determining the date of accident. They believe the sentence "The date of the audiogram indicating NIHL will be considered the date of accident for adjudication purposes" in the policy was confusing and potentially inconsistent with Section 83(2) of the *Act* which states:

Notice of accident or injury

83(2) In the case of an occupational disease, the Board shall not pay compensation except where,

- (a) the worker has given the employer notice of the injury as soon as practicable after the worker learns that the worker suffers from an occupational disease; and
- (b) the worker's claim for compensation is made within twelve months after the worker learns that the worker suffers from the occupational disease for which the worker is claiming compensation.

Therefore, stakeholders recommended the sentence "The date of the audiogram indicating NIHL will be considered the date of accident for adjudication purposes" be removed from the policy.

Stakeholders pointed out that the issue of when a worker "learns" they suffer from an occupational disease has already been addressed in several WCAT decisions.

The intent of including this sentence in the policy was to reflect WCAT's interpretation of Section 83 of the Act, and not to create a new requirement or encourage inconsistent application of section 83.

As section 83 sets out the time line requirements for filing an occupational disease claim, removal of the sentence "The date of the audiogram indicating NIHL will be considered the date of accident for adjudication purposes" will support consistent application of this legislative requirement.

Appendix A – Final DRAFT Policy 1.2.5AR2
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Yellow additions

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WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

POLICY

NUMBER: 1.2.5AR12

Effective Date: ~~January 1, 2015~~ November 3, 2017

**Topic: Occupational Hearing Loss
– Injuries on or after
January 1, 2000**

Date Issued: ~~November 25, 2014~~ TBD

Section: Entitlement

Date Approved by Board of Directors: ~~October 31, 2014~~ TBD

Subsection: Occupational Disease

DEFINITIONS

Noise-Induced Hearing Loss

Noise- induced hearing loss means the gradual deterioration of hearing as a result of exposure to hazardous noise over a period of time.

Sensorineural

Sensorineural hearing loss is due to damage to the cochlea of the cochlear nerve or the auditory pathways in the brain.

Tinnitus

Sounds heard in one or both ears or in the head (central tinnitus) in the absence of an external stimulus. Can include sounds like ringing, roaring, hissing, or buzzing.

American College of Occupational and Environmental Medicine (ACOEM)

ACOEM is the largest national college of its type in the United States that comprises a group of physicians encompassing specialists in a variety of medical practices to develop positions and policies on vital issues relevant to the practice of preventative medicine both within and outside of the workplace. It is considered the medical expert in occupational medicine.

POLICY STATEMENT

1. Noise-induced hearing loss (NIHL) is recognized as an occupational disease and must arise from an industrial process, trade or occupation wherein the noise exposure and hazard is characteristic of or particular thereto. This means that in addition to meeting the entitlement criteria set out in this policy,

the injury must meet the definition of occupational disease set out in the Workers' Compensation Act and Policy 1.2.14—General Entitlement—Occupational Disease Recognition.

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. Where actual noise levels are unavailable the Workers' Compensation Board (WCB) may estimate the expected noise levels based on the information obtained from similar industries or types of work. Workers who have not been exposed to these levels will not receive compensation for NIHL because their hearing loss is not occupational.

Step 2: After it has been determined that a worker was exposed to noise in excess of permissible levels, the worker must provide audiogram evidence that shows a pattern consistent with NIHL, as per the current ACOEM Guidance Statement. In determining a pattern consistent with NIHL, the WCB uses the ACOEM Guidance Statement¹ as highlighted by the following characteristics:

- It is always sensorineural, primarily affecting the cochlear hair cells in the inner ear;
- It is typically bilateral, since most noise exposures are symmetric;
- There is insufficient evidence to conclude that hearing loss due to noise progresses once the noise exposure is discontinued. Nevertheless, on the basis of available human and animal data, which evaluated the normal recovery process, it is unlikely that such delayed effects occur; and
- Its first sign is a 'notching' of the audiogram at the high frequencies of 3000, 4000, or 6000 Hz with recovery at 8000 Hz.

The audiogram frequencies of 250-8000 Hz shall be assessed, evaluated, and rated to determine if the hearing loss pattern is consistent with NIHL as noted above.

Acknowledging some variance in specific cases, if the occupational NIHL does not meet the above pattern of hearing loss, the claim will not be accepted because the hearing loss is not caused by occupational noise.

~~To consider entitlement for NIHL, once a worker is no longer exposed to workplace noise in excess of permissible levels, the worker must have an audiogram performed within 5 years of leaving the workplace location with the excessive noise. The date of the audiogram indicating NIHL will be considered the date of accident for adjudication purposes.~~

Step 3: After it has been determined that the worker was both exposed to occupational noise and has hearing loss showing a pattern consistent with NIHL, it must then be established that the worker meets the definition of occupational disease by satisfying one of the following criteria: death, loss of earnings, or a permanent medical impairment. To determine a permanent medical impairment, hearing loss shall be assessed, evaluated, and rated on the basis of an audiogram, as specifically plotted at the frequency levels of 500, 1000, 2000, and 3000 Hz. If the worker does not meet the requirements of an occupational disease, the claim will not be accepted because the worker does not have an injury that

¹ Occupational Noise-Induced Hearing Loss. 2012

meets the requirements under the *Workers' Compensation Act* and related policies.

3. Medical Aid in the form of a hearing aid shall be provided to a worker for hearing loss when necessary if they have a compensable NIHL.
4. The existence and degree of a worker's permanent medical impairment rating for NIHL will be determined using the American Medical Association's "Guides to the Evaluation of Permanent Impairment—Fourth Edition" (the "AMA Guides").

Tinnitus

5. To establish entitlement to a permanent impairment rating for tinnitus caused by NIHL, the following circumstances must apply:
 - 5.1 There is an acceptable claim for occupational NIHL; and
 - 5.2 There is a clear and adequate medically documented history of two or more years of continuous tinnitus.
6. Claims for tinnitus caused by occupational factors other than NIHL will be adjudicated as per Policy 1.3.7R—General Entitlement—Arising out of and in the Course of Employment.
7. To determine an impairment rating for tinnitus, the WCB shall use the AMA Guides.

APPLICATION

This Policy applies to decisions made on or after ~~January 1, 2015~~ **November 3, 2017**.

This Policy replaces Policy 1.2.5ARAR1, approved by the Board on ~~March 16, 2000~~ **October 31, 2014**.

REFERENCES

Workers' Compensation Act (Chapter 10, Acts of 1994-95), (as amended), Sections 2(v), 10, 12, 102.
Policy 1.2.6RR1.