

# **WORK SAFE. FOR LIFE.**

WORKERS' COMPENSATION BOARD OF NOVA SCOTIA

## **Program Policy Background Paper: Pre-Existing Conditions**

**September 26, 2016**

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## 1. INTRODUCTION

The Workers' Compensation Board (the WCB) consults with stakeholders before creating new policies or revising existing policies. These policy topics are chosen from a policy agenda that is set through consultation with stakeholders and approved by the Board of Directors. In 2011, the WCB consulted with stakeholders to determine the policy agenda for the coming years. Through this consultation, a number of policy issues were identified where the development of new and/or revisions to existing policies will improve consistency in decision making and/or assist the WCB in achieving its corporate/ system goals. Since 2011, work has been completed on several items from the agenda with the next topic being the development of a new policy regarding workers with pre-existing medical conditions.

Pre-existing conditions include any physical or psychological conditions that existed prior to a workplace injury that are confirmed by objective medical evidence. There is currently no standalone WCB policy in place to guide the adjudication of claims involving these conditions. Through the policy agenda consultation it was recognized that clear guidelines outlining how causation is determined for compensable injuries involving pre-existing conditions, as well as the on-going management of claims impacted by a pre-existing condition would be beneficial.

The intent of the proposed policy discussed in this paper is to provide clarity and consistency in the adjudication and management of claims involving a pre-existing condition. A policy on pre-existing conditions would provide guidance for decision makers in terms of initial entitlement, and would also provide guidance on determining work-relatedness of the ongoing impairment where there is evidence of a pre-existing condition, and both the compensable injury and the pre-existing condition are contributing to ongoing impairment.

It is anticipated that the introduction of this new policy will have no cost implications for the system given that the WCB currently provides benefits to workers with a pre-existing condition. The *Workers' Compensation Act* (the *Act*) is clear that workers may be compensated for injuries that are caused in part by work related factors, and in part by non-compensable factors. This is true for workers in all industries who are covered by the *Act*. As noted above, the objective of the policy is to provide clarity and consistency in adjudication practices, not an expansion of benefits for workers.

In spring 2016, the WCB Board of Directors approved a two stage policy consultation on this topic. The first stage of the consultation took place in June 2016 and involved a working group composed of key stakeholders including injured workers, labour and employer groups who provided a well informed discussion about the issues surrounding this topic, (See Appendix E for list of working group participants). The input received informed the development of the proposed "Pre-Existing Conditions" policy outlined in this paper.

This paper initiates the second stage of the consultation, and the WCB welcomes feedback on both this paper and the attached draft policy. The Board of Directors will consider the feedback received during this stage and will determine whether revisions are required to the draft program policy before finalizing the policy.

The consultation period concludes on January 09, 2017. Please review the background paper and draft policy, and provide your written feedback by January 09, 2017 to:

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DEADLINE FOR COMMENTS: January 09, 2017

## **2. BACKGROUND**

### What is a Pre-Existing Condition?

A pre-existing condition is any condition that existed prior to a work-related injury, and may include injuries, diseases, degenerative conditions, and psychological conditions. The existence of the condition is confirmed by objective medical evidence, including but not limited to: chart notes, diagnostic testing, or specialist reports.

Pre-existing conditions include, but are not limited to:

- Conditions that have produced periods of impairment/ disease requiring health care;
- Underlying or asymptomatic conditions which only become manifest after a workplace injury occurs, and;
- Work related permanent impairments for which the WCB has provided benefits.

### Current practice – Legislative and Policy Framework

Like any other claim for compensation, when a worker with pre-existing condition makes a claim for compensation, the WCB must first determine if they have suffered a compensable injury. Any claim for compensation must meet the entitlement criteria set out Section 10(1) and 10(5) of the *Act* and *Policy 1.3.7 General Entitlement - Arising out of and in the Course of Employment*, whether or not the worker has a pre-existing condition.

For an injury to be work related it must generally:

- 1) Happen while working, and
- 2) Be caused by a risk related to work.

A health problem that is not related to work may be worsened by work. If this happens, the worsening of the health problem may be considered a work injury.

All decisions are made on the real merits and justice of the claim, based on the facts of the case. The *Act* is clear that where the evidence for and against the issue in a claim is approximately equal in weight, the benefit of the doubt must be given to the worker.

Currently, at the initial stage of claim adjudication in claims involving pre-existing conditions, the WCB typically considers the impact to be a temporary worsening of the pre-existing condition. As the claim progresses, if it is determined that the worker has a permanent worsening of their

pre-existing condition, the worker will be assessed for a permanent impairment and benefits will be apportioned as per *Policy 3.9.11R1 Apportionment of Benefits*.

In summary, once the decision maker establishes the injury was work-related, the claim will be considered for compensation. This is the case even when a pre-existing condition may have been impacted by, or part of, the compensable injury. In other words, the existence of a pre-existing condition is not grounds to deny a claim.

### Inter-Jurisdictional Information

Most jurisdictions in Canada have a legislative framework similar to Nova Scotia's. For example, in all jurisdictions (except Quebec<sup>1</sup>) compensation is payable if a worker is injured, or dies, as a result of an accident that arose out of and in the course of employment.

From a policy perspective all jurisdictions except Nova Scotia, Newfoundland and Labrador, and Quebec have dedicated policies dealing with the adjudication of claims where there is a pre-existing condition in addition to the compensable injury. The three jurisdictions without a specific policy consider claims with a pre-existing condition through their existing policies and legislation, but without the clear guidelines provided by a standalone policy.

While each policy is unique, they primarily focus on the questions of how the worsening of the pre-existing condition is related to work, how it is affecting recovery, and when it is no longer causally linked to the compensable injury. The goal of safe and timely return to work is the same as for a compensable injury that does not involve a pre-existing condition, focusing on returning a worker to their "pre-accident state."

### Financial Impact

The purpose of the policy development work is not to expand/reduce the legislative entitlement to compensation but rather provide direction to decision-makers regarding how to assess the impact, if any, a pre-existing condition has on the claim after the initial entitlement decision has been made. Therefore, the WCB believes that this policy development work will not change the number of claims filed and/or accepted. Rather it will provide greater transparency regarding the impact of on-going entitlement decisions.

## **3. ISSUES RAISED BY STAKEHOLDERS**

The Stage 1 Working Group on Pre-Existing Conditions met on June 27, 2016. At a high level, the feedback/input provided by the working group included:

a) *Requirement for a dedicated pre-existing conditions policy.*

The WCB does not currently have a policy that specifically outlines what factors must be considered when adjudicating entitlement where a worker has a pre-existing medical condition that may be contributing to their overall injury or disability.

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<sup>1</sup> The requirement in the Quebec *Act* (in particular in the definition of "employment injury" and S. 20) is slightly different in that compensation is payable if a worker suffers an injury "arising out of or in the course of employment".

Pre-existing conditions are frequent and becoming more common with an aging workforce who may have more complications in their medical history, including age related conditions. Pre-existing psychological conditions are also becoming more common, and can impact the duration of claims.

While the requirement to accept claims with a pre-existing component is clear, what is not clear is what decision makers need to consider in terms of evidence, definitions, or ongoing case management. Because of this, most other Canadian jurisdictions have a pre-existing conditions policy and it is generally felt that Nova Scotia will also benefit by having a clear policy on this topic.

b) Objective medical evidence/ diagnosis.

The definition of “objective medical evidence” was discussed in detail by the working group. It is the opinion of the WCB that this refers to documentation including, but not limited to: physician reports, MRIs, x-rays, blood tests, and psychological tests. This is reflected in the draft policy.

Objective medical evidence of the existence of a pre-existing condition is required to confirm that the condition exists, and as part of this it is expected that the objective medical evidence would lead to a diagnosis. Currently there is a lack of consistency surrounding the type of information that is required to confirm the existence of a pre-existing condition, and how it is affecting the compensable injury. Other jurisdictions require that a causal relationship be confirmed by medical information. The proposed policy expands upon this concept to ensure clarity and consistency. The policy is not intended to restrict entitlement compared to current practice; the purpose is simply to make it clearer and more transparent for staff and stakeholders as to how these claims will be reviewed.

c) Initial Entitlement.

WCB decision makers determine initial entitlement according to the *Act* and *Policy 1.3.7 General Entitlement – Arising out of and in the Course of Employment*. Additional policies that are relevant and applicable to the claim may also be considered where appropriate. When it is established that the worker’s injury arose out of and in the course of their employment, the claim is allowed even where there is evidence of a pre-existing condition. In other words, the existence of a pre-existing condition is not grounds for a claim to be denied. The proposed policy clarifies this requirement.

d) On-going entitlement.

Policy is required to clarify how the relationship between the pre-existing condition and the compensable injury is causally linked throughout the life of the claim. This is important when considered with the requirement that a worker be returned to their “pre-accident state.” There is no requirement to treat the pre-existing condition after it reaches the point where it is no longer affecting the compensable injury. The proposed policy requires the use of objective medical evidence, and ensures decision makers rely on medical opinions in cases where there is a lack of clarity.

e) Temporary vs permanent worsening.

Currently it is not always clear when the WCB stops compensating for the temporary worsening of a pre-existing condition. The WCB is not responsible for the natural progression of a pre-existing condition. This means that the WCB has fulfilled its responsibilities when either the temporary worsening of the pre-existing condition has

returned to its usual state, or the permanent worsening of the pre-existing condition has been treated, and the effect on the injured worker's loss of earnings is established. In other words, the WCB's responsibility ends when the worker has either been returned to their pre-injury state or a permanent worsening has been compensated. This is a well-established principle in other jurisdictions.

f) *Alignment with definition of "pre-existing condition" in Policy 3.9.11R1 - Apportionment of Benefits.*

The definition in Policy 3.9.11R1 requires that a pre-existing condition be non-compensable. This definition is specific to the apportionment of claims, and not to claim entitlement. For the purposes of a pre-existing conditions policy, both compensable and non-compensable pre-existing conditions must be considered in order for adjudication to be fair and consistent.

g) *Consider moving from the American Medical Association Guides (AMA Guides) 4<sup>th</sup> Edition to the AMA Guides 6<sup>th</sup> Edition.*

Multiple WCB Policies refer to the AMA Guides 4<sup>th</sup> Edition and the guides are used for adjudication of all injury types. Stakeholders suggested that the AMA Guides 6<sup>th</sup> Edition should be used instead, reasoning that it provides a better definition of injuries. Moving to the AMA Guides 6<sup>th</sup> Edition would be a very significant change for the WCB and would require changes to multiple policies. This feedback is outside of the scope of this policy consultation process, but will be given consideration as a topic in the next Policy Issue Identification Process.

h) *Impact on Recovery.*

A pre-existing condition may delay the worker from recovering from a compensable injury or from maximizing their treatment. In these situations, decision makers need clarity around how to determine the appropriate level of treatment for the pre-existing condition to facilitate the recovery from the compensable injury.

Where a pre-existing condition causes the worker to be unable to commence, or continue, medical treatment for the compensable injury, case workers must consider the application of *Policy 1.3.2R Interruption of Medical Treatment – Circumstances Beyond Worker's Control*.

i) *Employer cost relief.*

The concept of employer cost relief is outside of the scope of this policy. However, it should be noted that if it is determined that a worker has suffered a recurrence of injury, the injury costs are charged to the previous claim. Additionally, the WCB considers the apportionment of benefits for workers whose injuries are caused in part by work and in part by non-compensable causes, per *Policy 3.9.11R1 Apportionment of Benefits*.

j) *Aging and pre-existing conditions.*

The effect of age on an injury would be considered as part of the objective medical evidence. A claim cannot be denied simply because a worker is aging.

k) *Recurrences.*

The proposed policy is specific to new injuries impacted by pre-existing conditions. In cases where the pre-existing condition is a previous compensable injury, the WCB must first determine if this is a new injury or whether it is a recurrence under *Policy 1.3.8 Recurrence of a Compensable Injury*.

l) Legal standard surrounding the connection between the pre-existing condition and the compensable injury.

Current practice at the WCB is for there to be a causal connection between the pre-existing condition and the compensable injury. Previous legal decisions in Nova Scotia have clarified that if “but for” the compensable injury or if it is “as likely as not” that the pre-existing condition is impacted in any way, or is impacting the compensable condition in any way, a claim will be considered for compensation.

m) Treating pre-existing psychological and physical injuries differently.

Other jurisdictions do not treat pre-existing psychological and physical injuries differently. To do so would be applying a higher legal standard to a psychological condition. This approach could be discriminatory and would be at risk of being found unconstitutional.

n) Pre-existing conditions policy should reflect Policy 1.1.1R Back Injuries.

This has been done and is reflected in the draft policy.

o) Causation test should to be outlined in policy and include: thin skull/ crumbling skull, “but for,” and significant contributing factor.

This is considered in the proposed policy.

p) Scientific proof is not necessary to establish causation.

This is reflected in the proposed policy.

q) Addressing specific conditions in policy.

The intent of the proposed policy is to provide clarity and consistency in the adjudication all of pre-existing conditions. Guidelines for adjudicating specific injuries is outside of the scope of this consultation.

r) WCB case management issues.

Policy development is not the appropriate avenue for this discussion, but the concerns have been noted and shared. The working group identified a number of issues related to case management. These issues do not relate directly to policy development but all concerns have been noted and shared with our operational teams.

The WCB thanks the Working Group members for their contribution to this process and has considered their input in the development of the draft program policy.

#### **4. PROPOSED PROGRAM POLICY APPROACH**

The WCB proposes a new Pre-Existing Conditions policy be implemented that will identify and communicate the factors/criteria the WCB considers in determining whether a worker’s compensable injury has worsened their pre-existing condition, (See Appendix 2 for DRAFT policy). The following is a high-level overview of the proposed policy.

##### ***Preamble***

The Preamble section of the proposed program policy establishes the purpose of the policy and provides context for the policy statements that follow. This policy is intended to establish that



entitlement will not be denied due to the existence of a pre-existing condition. Additionally, the purpose of the policy is to identify the basic requirements that must be met to be eligible for compensation, and also to provide direction to decision-makers regarding how to assess the impact, if any, of a pre-existing condition after an initial entitlement decision has been made.

## ***Definitions***

The WCB has defined several terms in this policy.

First, “pre-existing condition” is defined as: A physical or psychological disease or disability which existed prior to the compensable injury.

The proposed definition differs slightly from that in *Policy 3.9.11R1 – Apportionment of Benefits*. For the purposes of a pre-existing conditions policy, both compensable and non-compensable pre-existing conditions must be considered in order for adjudication to be done fairly and consistently.

Second, “impairment” is defined as the loss of, loss of use of, or derangement of any body part, system, or function. This definition is consistent with *Policy 3.9.11R1 – Apportionment of Benefits*.

Third, “disability” is defined as the decreased capacity or loss of ability of an individual to meet personal, social or occupational demands. This definition is consistent with *Policy 3.9.11R1 – Apportionment of Benefits*.

Fourth, “objective medical evidence” is defined as documentation from physicians’ reports and chart notes including, but not limited to: diagnostic test results, blood tests, specialist reports, and psychological tests. This definition is consistent with practice at the WCB, and in other jurisdictions.

Fifth, “compensable injury” is defined as a personal injury by accident arising out of and in the course of employment. This definition is consistent with *Policy 3.9.11R1 – Apportionment of Benefits*.

Sixth, “degenerative” is defined as characterized by progressive, often irreversible, deterioration. This definition is consistent with *Policy 3.9.11R1 – Apportionment of Benefits*.

Seventh, “worsening” is defined as the clinical effect of a compensable injury on a pre-existing disease or disability resulting in either a temporary or permanent increase in the impairment and/or loss of earnings capacity resulting from the pre-existing disease or disability. This definition is consistent with how the WCB defines “aggravation”, “acceleration”, or “activation” in *Policy 3.9.11R1 – Apportionment of Benefits*.

Eighth, the “thin skull” and “crumbling skull” doctrines<sup>2</sup> are well –established legal principals. The “thin skull” principal recognizes that the WCBNS takes the worker as you find him/her and that entitlement is not denied because a worker has a pre-existing condition that makes them more susceptible to injury even if the injury is more severe than expected or takes longer to recover due to the pre-existing condition. Additionally, “crumbling skull” recognizes that while a

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<sup>2</sup> Athey v. Leonati [1996] 3 S.C.R. 458

work-related injury exists, the pre-existing condition and its effects were inherent in the worker at the time the work-related injury occurred. Entitlement exists to the worker for the effects of the work-related injury but not the effects of the pre-existing condition, which the worker would have experienced anyway.

### ***Policy Statement***

This section of the program policy states that the WCB will consider claims for compensation under the *Act* when the condition arises out of and in the course of employment, including claims that include a pre-existing condition. It is clear here that work-relatedness is established when determining initial entitlement and will continue to be evaluated throughout the life of a claim.

This section also states that the “thin skull” and “crumbling skull” doctrines are components of decision-making at the WCB. Additionally, the WCB makes its decisions based on the merits and justice of each case, giving the benefit of the doubt to the worker.

The policy is focused on 5 main areas that are clearly defined within the policy statement. These are:

1. Initial entitlement
2. Determining causality
3. Determining the work-relatedness of ongoing impairment
4. Medical opinion
5. Permanent impairment

Each area is discussed in detail within the program policy.

### ***Application and references***

These are standard sections in WCB program policies and determine when and to what the program policy will apply, as well as the sections of the *Act* that give the WCB the authority for the content of the policy.

“Application” directs that the program policy will apply to all new claims filed on or after XXXX.

“Reference” states the sections of the *Act* from which the WCB gains its authority to make program policy as well as the sections specific to the content of the policy. It also states additional WCB program policies that should be considered when applying the program policy.

## **5. PROVIDING YOUR COMMENTS**

We are interested to hear your comments on this proposed program policy and the information presented in this paper. In particular, we encourage you to consider whether there **are any recommended changes or additional topics you would like to see addressed in the proposed “Pre-Existing Conditions” program policy.** Comments received will assist the WCB in ensuring all the issues are considered in the development of this program policy.

You can provide comments in 2 ways:

1. By e-mail: Send comments to Caroline Read at [caroline.read@wcb.gov.ns.ca](mailto:caroline.read@wcb.gov.ns.ca); or
2. In writing to:

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The deadline for comments is January 09, 2017

## Appendix A - Draft Program Policy Pre-Existing Conditions

Effective Date: XXXXXX  
Date Issued: XXXXXXXX  
Date Approved by Board of Directors: XXXXXX

**Topic: Pre-Existing Conditions**  
Section: Entitlement  
Subsection:

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### Preamble

Entitlement for a personal injury by accident arising out of and in the course of employment will not be denied due to the existence of a pre-existing condition. Once initial entitlement is established, the decision-maker considers the impact, if any, of pre-existing conditions on the worker's ongoing impairment.

The purpose of this policy is to: 1) identify the basic requirements that must be met to be eligible to receive compensation benefits and services for compensable injuries that include a pre-existing condition; and 2) provide direction to decision-makers regarding how to assess the impact, if any, of a pre-existing condition after an initial entitlement decision has been made.

### DEFINITIONS

"pre-existing condition" means a physical or psychological disease or disability which existed prior to the compensable injury;

"impairment" means the loss of, loss of use of, or derangement of any body part, system or function;

"disability" means the decreased capacity or loss of ability of an individual to meet personal, social or occupational demands;

"objective medical evidence" means documentation from physicians' reports and chart notes including, but not limited to: diagnostic test results, blood tests, specialist reports, and psychological tests;

"compensable injury" means a personal injury by accident arising out of and in the course of employment;

"degenerative" means characterized by progressive, often irreversible, deterioration;

"worsening" means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in either a temporary or permanent increase in the impairment and/or loss of earnings capacity resulting from the pre-existing disease or disability;

"thin skull" principal means taking the worker as you find him/her and entitlement is not denied because a worker has a pre-existing condition that makes him/her more susceptible to injury.

“crumbling skull” principal means recognizing that while a work-related injury exists, the pre-existing condition and its effects were inherent in the worker at the time the work-related injury occurred and compensation is due to for the effects of the work-related injury but not the effects of the pre-existing condition, which the worker would have experienced anyway.

## **POLICY STATEMENT**

The WCB will consider claims for compensation under the Nova Scotia Workers’ Compensation Act when the condition arises out of and in the course of employment, including claims that include a pre-existing condition.

Work-relatedness is established when determining initial entitlement. Decision-makers continue to evaluate the work-relatedness of a worker’s ongoing impairment throughout the life of a claim. The “thin skull” and “crumbling skull” doctrines are well-established legal principles that are components of decision-making at the WCB.

The WCB makes its decisions based on the merits and justice of each case. When the evidence for and against an issue related to a worker’s claim is evenly balanced, the worker must be given the benefit of the doubt.

### **Initial entitlement**

The decision-maker first determines entitlement in the claim based on the general entitlement criteria set out in the policy and legislation. Consistent with the “thin skull” doctrine, the fact that a worker may have a pre-existing condition that could increase susceptibility to injury/disease is not considered during the initial determination of entitlement in a claim. In such cases, workers are compensated for the work-related injury/disease and the claim is not denied due to the existence of a pre-existing condition.

### **Determining Causality**

During adjudication or at any time throughout the management of an accepted claim, the WCB may find evidence of a pre-existing condition.

When objective medical evidence supports that the pre-existing condition was impacted by the compensable accident, the WCB provides medical aid and benefits that are necessary to treat the compensable injury, including the worsening of the pre-existing condition by the compensable workplace injury.

The WCB is not responsible for the natural progression of the pre-existing condition in the future. As such, the WCB has fulfilled its responsibilities when:

- The temporary worsening of the pre-existing condition has returned to its pre-accident state; or,
- The permanent worsening of the pre-existing condition has been treated, and the effect on the injured worker’s loss of earnings is established.

If a pre-existing injury is identified, but it has not been impacted by the workplace injury, nor does it prolong treatment or rehabilitation, the WCB manages the claim without taking into account the pre-existing condition.

### **Determining work-relatedness of ongoing impairment**

Once the existence of a pre-existing condition has been established, ongoing work-relatedness is determined by considering the relationship, if any, between the pre-existing condition, the work-related injury/disease, and the worker's impairment, based on objective medical evidence. In cases where the pre-existing condition is not contributing to the ongoing impairment but is prolonging the recovery from the work-related injury/disease, benefits continue as long as the ongoing impairment is work-related, even if recovery takes longer due to the pre-existing condition. In cases where the pre-existing condition causes the worker to be unable to commence or continue medical treatment for the compensable injuries, *Policy 1.3.2R – Interruption of Medical Treatment – Circumstances Beyond Worker's Control* will be applied.

Where the objective medical evidence demonstrates that a pre-existing condition has been worsened as a result of a work-related injury/disease, benefits continue until the worker recovers from the worsening of the pre-existing condition.

The relationship between the pre-existing condition and the compensable injury should be established throughout the life of the claim at appropriate case management and recovery milestones.

### **Medical Opinion**

If, in the opinion of the decision-maker, the existing objective medical evidence does not clearly demonstrate whether the ongoing impairment is work-related, the decision-maker should seek a medical opinion to assist in making this determination. Medical opinions should be sought throughout the life of the claim at any point where the causal link is reviewed.

### **Permanent impairment**

In cases where it appears the worker has an impairment that continues to exist after maximum medical recovery (MMR) is reached, caused by both the work-related injury/disease and a pre-existing condition, the permanent medical impairment is determined.

The work-related injury/disease does not need to be the sole cause of the impairment for the degree of the work-related permanent impairment to be assessed. Where a pre-existing condition is contributing to the worker's permanent impairment, the permanent impairment may be adjusted to reflect the impact of the pre-existing condition using *Policy 3.9.11R1 – Apportionment of Benefits*.

## **APPLICATION**

This policy applies to all decisions made on or after XXXXXXXX pursuant to the *Nova Scotia Workers' Compensation Act*.

## **REFERENCES**

Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 10(1) and 10(5)  
Policy 1.3.2R Interruption of Medical Treatment – Circumstances Beyond Worker's Control  
Policy 1.3.7 General Entitlement – Arising out of and in the Course of Employment  
Policy 2.9.11R1 Apportionment of Benefits

## Appendix B - Policy 1.3.2R



# POLICY

**NUMBER: 1.3.2R**

Effective Date: January 9, 2003

**Topic: Interruption of Medical Treatment – Circumstances Beyond Worker's Control**

Date Issued: January 27, 2003

Section: Entitlement

Date Approved by Board of Directors: January 9, 2003

Subsection: General

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### POLICY STATEMENT

1. Where a worker is unable to commence, or continue, medical treatment required with respect to the compensable injury for reasons which, in the opinion of the Board, are genuinely beyond the worker's control, compensation benefits will:
  - 1.1. continue to be paid for that period which the worker, in the opinion of the Board, would have been eligible to receive compensation benefits while undergoing treatment, had the treatment not been delayed or interrupted; or,
  - 1.2. be temporarily suspended and reinstated when the worker is once again able to commence or resume medical treatment,whichever appears to be in the best interests of the worker.
2. Where benefits are suspended, the worker will be provided a minimum two weeks written notice prior to suspension.
3. Policy statement 1 and 2 do not apply where the circumstance preventing the worker from commencing or continuing medical treatment is pregnancy. The Board shall continue to pay compensation benefits in circumstances where the effects of the compensable injury prevent the worker from returning to her employment but the worker's pregnancy, or health conditions related to pregnancy, present a valid medical reason for refusing or discontinuing medical treatment required with respect to the compensable injury.
  - 3.1. Notwithstanding the above, compensation benefits will not be paid to a worker in respect of those periods of time where her pregnancy or conditions related to the pregnancy, are themselves of a nature which prevent the worker from returning to her employment.
  - 3.2. The Board will normally require a medical opinion or certificate to confirm a pregnant worker's medical condition.



## **GUIDELINES**

A minimum of two weeks notice is provided to the worker in order to allow an opportunity to secure coverage through an alternative illness coverage plan (if any) normally available to the worker.

## **APPLICATION**

This Policy applies to all decisions made on or after January 9<sup>th</sup>, 2003.

## **REFERENCES**

Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 37(1)

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Executive Corporate Secretary

## Appendix C - Policy 1.3.7



# POLICY

**NUMBER: 1.3.7**

Effective Date: September 17, 2009

**Topic: General Entitlement –  
Arising out of and in  
the Course of  
Employment**

Date Issued: September 24, 2009

Section: Entitlement

Date Approved by Board of Directors: September 17, 2009

Subsection: General

### PREAMBLE

The purpose of this program policy is to: 1) identify the basic requirements that must be met to be eligible to receive compensation benefits and services; and 2) describe the typical questions, general principles and sections of the *Workers' Compensation Act* (the "Act") the *Workers' Compensation Board* (the "WCB") considers in determining if a personal injury by accident "arose out of and in the course of employment".

### DEFINITIONS

"accident", as defined in Section 2 (ae) of the Act, includes

- (i) a wilful and intentional act, not being the act of the worker claiming compensation,
  - (ii) a chance event occasioned by a physical or natural cause, or
  - (iii) disablement, including occupational disease, arising out of and in the course of employment,
- but does not include stress other than an acute reaction to a traumatic event.

### POLICY STATEMENT

#### 1. Real merits and justice of the case

Section 186 of the *Act* requires the WCB to base each general entitlement decision on the individual merits and justice of the case. The general principles and questions considered by the WCB, as outlined in this program policy, do not exclusively determine if an accident

arose out of and in the course of employment. Rather, they provide the WCB with a framework for gathering and considering evidence to guide general entitlement decision-making.

## **2. Basic eligibility requirements**

To be eligible to receive compensation benefits and services a worker must:

- a) be a worker as defined by Section 2 (ae) of the *Act*;
- b) meet the requirements for filing a claim for compensation in Section 83 of the *Act*;
- c) be caused a personal injury by accident arising out of and in the course of employment as required by Section 10 of the *Act*; and
- d) depending on the facts of the claim, meet any other applicable Sections of the *Act*.

## **3. Determining if an accident arose out of and in the course of employment**

The WCB generally considers the following principles and questions in determining if a personal injury by accident arose out of and in the course of employment.

### **a) Description of “arising out of” employment**

The words “arising out of employment” refer to the origin of the cause of the injury. For an accident, and resulting injury, to be considered to have arisen out of employment there must be a causal connection between the worker’s employment and the injury they received.

Generally, this means the accident and resulting injury must be caused by some risk related to the employment. The risk may be directly, or incidentally, related to the employment; and the injury may be the result of a single incident, or develop over a period of time. An injury, however, is not necessarily compensable simply because it happened, or symptoms occurred, at the workplace.

### **b) Description of “in the course of” employment**

Generally, an accident, and resulting injury, is considered to have arisen in the course of employment when it occurs under the following circumstances:

- i. at a time that is consistent with when the worker typically performs the employment, or at a time when the worker has been asked to perform activities for the employment;
- ii. at a place that is consistent with the employment or the employer’s premises; and
- iii. while performing an activity directly, or incidentally, related to the employment.

The time and place of an accident, however, are not strictly limited to the normal hours of employment or the employer's premises; the forgoing are intended to be general principles.

**c) Questions considered - "arising out of and in the course of employment"**

In gathering evidence to determine if an accident, and resulting injury, arose out of and in the course of employment the WCB considers a series of questions that may include, but is not limited to, the following:

- i. Was the activity part of the job, or a job requirement?
- ii. Did the accident occur when the worker was in the process of doing something for the benefit of the employer?
- iii. Did the injury occur while the worker was doing something at the instruction of the employer?
- iv. Did the injury occur while the worker was using equipment or materials supplied by the employer?
- v. Was the injury caused by some activity of the employer or another worker?
- vi. Was the worker being paid or receiving some consideration for the activity from the employer at the time of the accident?
- vii. Was the worker on the employer's premises at the time of the accident?
- viii. Was the worker traveling for employment purposes at the time of the accident?
- ix. Did the workers' employment expose them to a greater risk of injury than they would have been exposed to as a member of the general public?
- x. Was the injury caused by an exposure in the workplace, or as part of the employment activities?

The WCB then:

- i. considers the evidence gathered throughout the claim adjudication process;
- ii. weighs the evidence;
- iii. applies the statutory presumption in Section 10(4) and the benefit of the doubt provision in Section 187 of the *Act* where circumstances warrant; and

determines whether an accident arose out of and in the course of employment.

#### **4. Aggravation, activation, acceleration of pre-existing disease or disability and injuries due to other causes**

As stated in Section 10(5) of the *Act*, where the WCB has determined a personal injury by accident has arisen out of and in the course of employment and resulted in a loss of earnings or permanent impairment that was either due:

- a) in part to the injury and in part to causes other than the injury; or
- b) to an aggravation, activation, or acceleration of a disease or disability existing prior to the injury;

compensation is payable for the proportion of the loss of earnings or permanent impairment that may be reasonably attributable to the injury.

Where Section 10(5) of the *Act* is applicable, the WCB apportions benefits in accordance with *Policy 3.9.11R - Apportionment of Benefits*.

#### **5. Serious and willful misconduct**

Section 10(3) of the *Act* provides that where a personal injury is attributable wholly or primarily to the serious and willful misconduct of the worker, the WCB shall not pay compensation to the worker unless the personal injury:

- a) results in death or serious and permanent impairment; or
- b) is likely, in the opinion of the Board, to result in serious and permanent impairment.

#### **6. Presumption**

As required in Section 10(4) of the *Act*, if it is determined that the accident arose out of employment, it is presumed the accident arose in the course of employment, unless there is evidence to the contrary. Alternatively, if it is determined that the accident arose in the course of employment, it is presumed the accident arose out of the employment, unless there is evidence to the contrary.

#### **7. Benefit of the Doubt**

Section 187 of the *Act* establishes that a worker is not required to provide proof on a civil standard (on a balance of probabilities) in support of a claim for compensation. Rather, a worker must establish, through the provision of evidence, that it is as likely as not that a personal injury arose out of and in the course of employment. Where there is doubt on an issue respecting a worker's claim for compensation, and it is as likely as not that the accident arose out of and in the course of employment, the issue will be resolved in the worker's favour.

## **8. APPLICATION**

This program policy applies to new claims for compensation made on or after September 17, 2009.

## **9. REFERENCES**

Workers' Compensation *Act* (Chapter 10, Acts of 1994-95), Sections 2 (a), 2(n), 2(ae), 10, 82, 83, 183, 186, and 187.

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Executive Corporate Secretary

## Appendix D - Policy 3.9.11R1



# POLICY

**NUMBER: 3.9.11R1**

Effective Date: April 10, 2008

**Topic: Apportionment of Benefits**

Date Issued: April 22, 2008

**Section: Short-Term and Long-Term Benefits**

Date Approved by Board of Directors: April 10, 2008

**Subsection: General**

### PREAMBLE

Where a personal injury by accident arising out of and in the course of employment results in loss of earnings or permanent impairment due (a) in part to the injury and in part to causes other than the injury; or (b) to an aggravation, acceleration, or activation of a disease or disability existing prior to the injury, the WCB is directed by Section 10(5) of the *Workers' Compensation Act* ("the Act") to pay compensation for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury.

The WCB has adopted the following Policy with respect to the effect of Section 10(5) on the amounts of compensation benefits payable.

### DEFINITIONS

For the purpose of the Policy, the following definitions shall apply:

"aggravation", "acceleration", or "activation" means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in a permanent increase in the impairment and/or loss of earnings capacity resulting from the pre-existing disease or disability;

"cause other than injury" means any aspect of the physical condition of an individual worker which, due to its nature or severity, could be reasonably expected to have a significant impact on the duration and/or the degree of a worker's loss of earnings or permanent impairment resulting from a compensable injury

"compensable injury" means a personal injury by accident arising out of and in the course of employment;

“degenerative” means characterized by progressive, often irreversible, deterioration;

“disability” means the decreased capacity or loss of ability of an individual to meet personal, social or occupational demands;

“disease” means the specific pathophysiologic process involved, which gives rise to the worker’s signs and symptoms and their progression;

“exacerbation” means the clinical effect of a compensable injury on a pre-existing disease or disability resulting in a temporary increase in the impairment and/or loss of earnings capacity resulting from the pre-existing disease or disability;

“impairment” means the loss of, loss of use of, or derangement of any body part, system or function;

“non-compensable factor” means any condition unrelated to a compensable injury which may affect recovery and/or the extent of impairment/loss of earnings. A non-compensable factor may exist prior to a compensable injury or it may develop post-injury. This includes causes other than the injury and pre-existing diseases or disabilities;

“permanent impairment” means impairment associated with a permanent medical impairment and/or a pain-related impairment;

“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;

“pain-related impairment” means impairment associated with chronic pain.

“pre-existing disease or disability” means a non-compensable disease or disability which existed prior to the compensable injury.

## **POLICY STATEMENT**

### **1. Temporary Earnings Replacement Benefit (TERB)**

#### **1.1 Where:**

- (a) the compensable injury causes an exacerbation or aggravation, acceleration or activation of a pre-existing disease or disability; or
- (b) the loss of earnings is due in part to the compensable injury and in part to a non-compensable factor which developed post-injury,

the WCB will assume full responsibility for TERB without apportionment as long as



there are medical findings to substantiate that the compensable injury is contributing to some degree to the loss of earnings, even if a non-compensable factor(s) is prolonging recovery and/or loss of earnings.

- 1.2 Where a worker is unable to commence or continue medical treatment for a compensable injury due to a non-compensable factor, the WCB will apply Policy 1.3.2R (Interruption of Medical Treatment – Circumstances Beyond Worker's Control).

## **2. Medical Aid**

- 2.1 Medical aid required as a result of the compensable injury will not be subject to apportionment.

## **3. Vocational Rehabilitation**

- 3.1 Where the WCB determines that no proportion of a worker's permanent impairment can be attributed to a compensable injury, vocational rehabilitation services will not be offered to the worker.

- 3.2 Where:

- (a) the compensable injury causes an aggravation, acceleration or activation of a pre-existing disease or disability; or
- (b) the anticipated permanent impairment is due in part to the compensable injury and in part to a non-compensable factor(s) which developed post-injury,

and medical evidence indicates that a proportion of the anticipated long-term loss of earnings can be attributed to the compensable injury, vocational rehabilitation services will be provided to the worker in accordance with normal guidelines, without apportionment.

## **4. Permanent Impairment**

- 4.1 Where a non-compensable factor(s) is contributing to the worker's permanent impairment, the permanent impairment may be adjusted to reflect the impact of this non-compensable factor(s). Permanent impairment benefits will only be paid for the

permanent impairment resulting from the compensable injury.

4.2 To determine the impact of the non-compensable factor(s) on the permanent impairment:

(a) the WCB will gather evidence which can include, but is not limited to:

- Physician chart notes;
- Specialist reports;
- Diagnostic test results (i.e. x-ray, CT scan, MRI);
- Physiotherapy, chiropractor and occupational therapy reports;
- Accident Report;
- Information from disability insurance providers and/or the employer;
- Employment-related information.

(b) if the non-compensable factor(s) is degenerative in nature, the WCB will gather medical evidence with respect to how the condition would have progressed (up to the point of assessing permanent impairment) in the absence of the compensable injury.

4.3 Where:

(a) the compensable injury causes an aggravation, acceleration or activation of a pre-existing disease or disability; or

(b) the permanent impairment is due in part to the compensable injury and in part to a non-compensable factor(s) which developed post-injury

the WCB will determine the portion of the permanent impairment that is compensable in the following ways:

#### 4.3.1

- (a) Determine the total permanent impairment rating using the applicable permanent impairment rating schedule in accordance with Policy 3.3.2R2 (Permanent Impairment Rating Schedule).
- (b) Assign the impairment that results from the non-compensable factor(s) a permanent impairment rating and subtract this from the total permanent impairment rating to determine the portion of permanent impairment that is compensable.

#### 4.3.2

- (a) If it is not possible to apply Policy Statement 4.3.1(b), determine the degree of permanent impairment that results from the non-compensable factor(s) by applying the following definitions:

“Minor” refers to an impairment which produced no or minimal limitations on working capacity but required occasional medical care.

“Moderate” refers to an impairment which produced some limitations on working capacity and required periodic medical care.

“Major” refers to an impairment which produced significant limitations on working capacity requiring ongoing medical care.

“Severe” refers to an impairment which produced significant limitations on working capacity, requiring ongoing medical care and would certainly have resulted in total disability independent of the compensable injury.

- (b) Determine the portion of permanent impairment that is compensable by multiplying the total permanent impairment rating by the percentage from the table below which corresponds to the applicable definition:

<b>Classification of Non-Compensable Factor(s)</b>	<b>Compensable Percentage of Permanent Impairment</b>
Minor	100% (no apportionment)
Moderate	75%
Major	50%
Severe	25%

## 5. Extended Earnings Replacement Benefit (EERB)

- 5.1 Where the worker is experiencing an on-going loss of earnings as a result of the permanent impairment remaining after the compensable injury, the WCB will determine what proportion of the loss of earnings can be attributed to the compensable injury and what proportion can be attributed to a non-compensable factor(s). EERBs will only be paid for the on-going loss of earnings resulting from the compensable injury.
- 5.2 Where the WCB determines that a non-compensable factor was only a latent weakness or susceptibility and there is no evidence: (a) that it had any impact on the worker's pre-injury earning capacity; or (b) that it would have progressed to produce loss of earning capacity without the occurrence of the compensable injury, it will be considered that the entire extended loss of earnings can be attributed to the compensable injury and EERBs will be paid without apportionment under Section 10(5) of the *Act*.
- 5.3 The WCB will determine the portion of the extended loss of earnings that is compensable in the following way:
- 5.3.1 Determine the total extended loss of earnings in accordance with normal guidelines.
- 5.3.2 Determine the portion of extended loss of earnings that is compensable by multiplying the total extended loss of earnings by the percentage from the table below which corresponds to the applicable definitions for the non-compensable factor:

<b>Classification of Non-Compensable Factor(s)</b>	<b>Percentage of Extended Loss of Earnings Payable</b>
Minor *	100% (no apportionment)
Moderate *	75%
Major *	50%
Severe *	25%

\* As determined in accordance with Section 4.3.2 of this Policy

## 6. Death/Survivors' Benefits

- 6.1 If the WCB determines that a compensable injury was a factor contributing to a worker's death, death and survivors' benefits are payable in the full amounts provided for in the *Act*, without apportionment, since such benefits are not paid as compensation

for loss of earnings or permanent impairment.

**APPLICATION**

This policy replaces Policy 3.9.11R issued on September 13, 2004 and effective September 10, 2004. This Policy applies to all decisions made on or after April 10, 2008.

**REFERENCES**

Workers' Compensation Act (Chapter 10, Acts of 1994-95), Section 10(5)

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Executive Corporate Secretary

## **Appendix E - Workers' Compensation Act Sections 10(1) and 10(5)**

**10 (1)** Where, in an industry to which this Part applies, personal injury by accident arising out of and in the course of employment is caused to a worker, the Board shall pay compensation to the worker as provided by this Part.

**10 (5)** Where a personal injury by accident referred to in subsection (1) results in loss of earnings or permanent impairment (a) due in part to the injury and in part to causes other than the injury; or (b) due to an aggravation, activation or acceleration of a disease or disability existing prior to the injury, compensation is payable for the proportion of the loss of earnings or permanent impairment that may reasonably be attributed to the injury.

## **Appendix F - Stage 1 Working Group Participants**

Representatives from:

- Nova Scotia Nurses Union
- Office of the Worker Counsellor
- Pictou County Injured Workers' Association
- Nova Scotia Government Employees Union
- Office of the Employer Advisor
- Merit Contractors Association of Nova Scotia
- Retail Council of Canada
- Canadian Federation of Independent Business