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Update 2004 - 5

TO: HOLDERS OF THE *REHABILITATION SERVICES & CLAIMS MANUAL – VOLUME II*

This update of the *Rehabilitation Services & Claims Manual* contains amendments to the *Manual* implemented since update 2004 - 4.

This amendment includes:

- Table of Contents
- policy item #96.20, *Board Officers*
- policy item #96.30, *Board Officers in Disability Awards*
- policy item #115.30, *Experience Rating*

A summary of the amendments is attached and the amended pages are included as part of the package.

If you have any questions regarding subscription information for updates to the *Rehabilitation Services & Claims Manual*, please call WCB Customer Service at 1-866-271-4879.

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Vice President
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Attachments

Rehabilitation Services & Claims Manual, Volume II

SUMMARY OF AMENDMENTS – Update 2004 - 5

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Chapter 12	Pages 21 to 28	Policy items #96.20 and #96.30.
Chapter 17	Pages 15 to 16	Policy item #115.30. Housekeeping change re item numbering reference to Chapter 11.

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- (d) The *Rehabilitation Services & Claims Manual* Volume I and Volume II, except statements under the headings “Background” and “Practice” and explanatory material at the end of each Item appearing in the new manual format;
- (e) The *Classification and Rate List*, as approved annually by the Board of Directors;
- (f) *Workers’ Compensation Reporter* Decisions No. 1 –423 not retired prior to February 11, 2003; and
- (g) Policy decisions of the former Governors and the former Panel of Administrators still in effect immediately before February 11, 2003.

After February 11, 2003, the policies of the Board of Directors consist of the documents listed above, amendments to policy in the four policy manuals, any new or replacement manuals issued by the Board of Directors, any documents published by the Board that are adopted by the Board of Directors as policies of the Board of Directors, and all decisions of the Board of Directors declared to be policy decisions.

In the event of a conflict between policy in a manual identified in (a), (b), (c), or (d) above, and policy in *Workers’ Compensation Reporter* Decisions No. 1-423, policy in the manual is paramount.

In the event of any other conflict between policies of the Board of Directors:

- (a) if the policies were approved by the Board of Directors on the same date, the policy most consistent with the *Act* or Regulations is paramount.
- (b) if the policies were approved on different dates, the most recently approved policy is paramount.

The policies of the Board of Directors are published in print. The policies may also be published through an accessible electronic medium or in some other fashion that allows the public easy access to the policies of the Board of Directors.

The Chair of the Board of Directors supervises the publication of the *Workers’ Compensation Reporter*. It will include decisions of the Board of Directors and selected decisions of WCAT. It may also include key decisions of the Courts on matters affecting the interpretation and administration of the *Act* or other matters of interest to the community.

WCAT decisions do not become policy of the Board of Directors by virtue of having been published in the *Workers’ Compensation Reporter*. WCAT decisions are published in the *Reporter* to provide guidance on the interpretation of the *Act*, the Regulations and Board policies, practices and procedures.

EFFECTIVE DATE: March 3, 2003 (as to deletion of references to how policy is to be applied)
APPLICATION: Not applicable.

#96.20 Board Officers

A Board officer determines whether compensation is payable. They will decide, for instance, whether a worker was employed in an industry under Part 1 of the *Act*, whether a personal injury was suffered arising out of and in the course of employment, or whether the worker is suffering from an occupational disease which is due to the nature of the employment.

Following acceptance of a claim, the Board officer determines the amount and duration of compensation to be paid for temporary disability.

In a case of death, the Board officer decides whether the death is compensable and whether the members of the worker's family are dependants and entitled to compensation.

The term "compensation" includes, among other things, health care benefits, transportation and subsistence.

The Board officer determines when temporary total disability or temporary partial disability benefits are concluded, and whether an actual or potential permanent disability is accepted on the claim. These decisions are generally made on the basis of information supplied by a treating physician, qualified practitioner, consulting specialist and/or the injured worker. Treating physicians and qualified practitioners are required to send periodic reports to the Board outlining the worker's condition and restrictions.

A decision is provided to the worker, setting out whether an actual or potential permanent disability is accepted on the claim.

If an actual or potential permanent disability is accepted on the claim, the Board officer will refer the file to the Disability Awards Department for assessment. As part of the referral, the Board officer will prepare a memo, clearly setting out the status of the claim and confirmation of what permanent conditions have been accepted.

If the Board officer determines that there is no actual or potential permanent disability, the worker may request a review of the decision.

EFFECTIVE DATE: July 2, 2004
APPLICATION: Applies to all decisions, including appellate decisions, made on or after July 2, 2004.

#96.21 *Preliminary Determinations*

A preliminary determination on a claim will be made, to provide temporary financial relief to the worker until the Board receives the information necessary to make a decision on the validity of the claim, when the following conditions are present:

1. The worker appears to be currently disabled from work.
2. On the available evidence, it appears probable that the worker is suffering from a compensable injury or occupational disease, or at least it appears that the evidence is evenly weighted.
3. There is some significant delay in obtaining evidence necessary to arrive at a conclusion on the validity of the claim, and the Board officer is unable to avoid that delay.
4. The worker is not causing the delay.
5. The delay appears to be causing an interruption of income for the worker. For example, the case is not one in which the worker is still being paid by the employer or another source.
6. The claim is not a third party one. (19)
7. An application for compensation has been received.

The above criteria apply whether or not the claim is protested by the employer.

When a preliminary determination is made, the following rules will apply:

1. Wage-loss benefits will be commenced, with an explanation to the worker, employer and attending physician.
2. Payments of wage-loss benefits under the preliminary determination will commence as of the date when the Board officer makes the determination. Arrears of wage-loss benefits for any time period prior to that date will not be paid until a decision on the validity of the claim is made, except that the Board officer may pay such arrears on a preliminary determination to the extent that this may be necessary to avoid hardship.
3. The Board officer will proceed to obtain the evidence necessary to reach a decision on the claim as soon as possible.

4. Health care benefit bills will not be paid under a preliminary determination. Where a preliminary determination has been made on a claim and there has been a request for surgery, it will be handled in the same manner as with other claims that have yet to be formally adjudicated. In such cases, the patient and physician should proceed privately, pending a decision on the claim. This principle also applies with respect to other medical referrals, with the exception of a consultation with a specialist that may be paid on an investigation basis.
5. Where a preliminary determination has been made on a claim and wage loss payments have commenced, and subsequently a decision is made to disallow the claim, then:
 - (a) no recovery of the payments will be made in the absence of fraud or misrepresentation;
 - (b) the employer's sector or rate group will be relieved of the cost of any unrecovered payments pursuant to policy item #113.10.

The above rules governing preliminary determinations apply to applications to reopen a previous claim as well as applications commencing new claims.

A preliminary determination made in accordance with this policy is not a "decision" for the purposes of section 96(5). Rather, it is a Board administrative action that is intended to provide temporary financial relief to the worker until the Board receives the information required in order to make a decision on the validity of a claim. However, once the Board receives the required information and makes a decision, that decision is subject to the provisions of section 96(5).

EFFECTIVE DATE: March 3, 2003
APPLICATION: To all preliminary determinations made on or after the effective date.

#96.22 Suspension of Claim

Where a report is submitted to the Board simply for the record, and where the worker did not receive medical treatment or was not disabled from work, or no other costs were incurred, no adjudication is necessary and the file will simply be marked "nothing to consider".

Where information necessary to the adjudication of a claim can only be provided by the worker, and the worker ignores a request for that information, refuses to provide it or hampers the investigation, the claim may be suspended (see policy item #93.26 regarding a worker's obligation to provide information).

Where a claim file is opened, and it is later established that the claim will be fully administered and paid by another Board under the terms of the Interjurisdictional Agreement, the British Columbia file will be placed in suspense. (20)

Wage-loss benefits may also be suspended in the following situations:

- (1) where the worker leaves the province without notifying the Board or receiving prior consent from the Board; (21)
- (2) where the worker is being paid full salary by the Federal Government; (22)
- (3) where the worker refuses to accept the cheques;
- (4) where a worker moves and the worker's whereabouts are unknown.

Where a claim has been suspended, all parties are notified of this fact and of the reasons for it. This includes any party from whom an account has been received. When the information required has been received or any other ground which gave rise to the suspension has been removed, the suspension will be lifted. In that event, the parties involved will again be notified.

#96.30 Board Officers in Disability Awards

Where the Board officer has accepted an actual or potential permanent disability, Board officers in Disability Awards then decide the extent of the disability and calculate the worker's permanent disability award entitlement. Board officers in Disability Awards must accept the final decision of the Board officer as to what conditions are accepted under the claim. The Board officer is required to outline the decision in a memo when referring the claim to the Disability Awards Department.

In cases of minor disabilities, the Board officer in Disability Awards may calculate the award without the benefit of a medical examination if this is considered unnecessary having regard to the medical evidence already on the claim. Except for those cases, the normal practice is for a section 23(1) assessment to be conducted for disability awards purposes by a Disability Awards Medical Advisor or an authorized External Service Provider (see policy item #39.01).

Although the evaluation is not the only medical evidence that the Board officer in Disability Awards may use, it will usually be the primary input.

The decision-making procedure for assessing entitlement to a permanent disability award for psychological impairment is discussed in policy item #39.01.

In those cases where the worker has a section 23(1) assessment, the Board officer in Disability Awards is required to notify the worker indicating the results of the evaluation and the conclusions reached regarding the question of permanent disability award entitlement.

The final decision on the assessment of a permanent disability award under section 23(3) is made by the Disability Awards Committee which consists of one senior representative from the Disability Awards, Medical, and Vocational Rehabilitation Services Departments.

Requests for the commutation of permanent disability awards are adjudicated in the first instance by Board officers in Disability Awards. Before making a decision, they may ask the Vocational Rehabilitation Consultant to contact the worker and obtain the necessary information.

EFFECTIVE DATE: July 2, 2004
APPLICATION: Applies to all decisions, including appellate decisions, made on or after July 2, 2004.

#97.00 EVIDENCE

Under the old English system, which was an adversary system of workers' compensation, there was a burden of proof imposed on the worker, but that is not the correct practice here. The Board officer must not start with any presumption against the worker, but neither must there be any presumption in the worker's favour. The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the Adjudicator should consider what other evidence might be obtained, and must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached. But if it appears upon the weighing of the evidence that the disputed possibilities are evenly balanced then the rule comes into play which requires that the issue be resolved in accordance with that possibility which is favourable to the worker.

Although there is no burden of proof on the worker, the *Act* contains prerequisites for benefits. Compensation will not be paid simply because, for example, a telephone call is received from someone claiming to be a worker, who has been hurt, and was disabled for a certain number of days. Some basic evidence must be submitted by the worker to show that there is a proper claim. The extent of that basic evidence necessary, and the weight to be attached to it, is entirely in the hands of the Adjudicator.

It is therefore not uncommon to see that a claim will be denied when a worker, away from employment, begins to feel some pain and discomfort in the lower back, and seeking to find a reason for this condition, thinks back to the work being done over a period of time and concludes that the problem must have resulted from something which occurred on a certain day when certain heavy work was being performed. The question then arises whether there was anything other than the worker's hindsight which would allow the Adjudicator to conclude that the work done some weeks or months previously had causative significance. It is at this point that investigation takes place and the evidence is weighed. If there is nothing objective to indicate any activity at work was potentially causative of the condition complained of, at or near the time alleged by the worker, it can fairly be said that the claim has not been established. The worker has simply failed to present those fundamental facts which bring the provisions of the *Act* into play.

#97.10 Evidence Evenly Weighted

Complaints are sometimes received at the Board that a worker has not been given the benefit of the doubt. Usually, these complaints relate to a situation in which the worker has a disability, but the issue is whether it is one arising out of or in the course of employment. The essence of the complaint is often that if there is some possibility that the injury arose out of the employment, the worker should be given the benefit of the doubt. For the Board to take that view, however, would be inconsistent with the terms of the *Act*. Where it appears from the evidence that two conclusions are possible, but that one is more likely than the other, the Board must decide the matter in accordance with that possibility that is more likely.

Under the terms of section 99(3), the Board is required to decide an issue in accordance with the possibility which is favourable to the worker where it appears that “the evidence supporting different findings on an issue is evenly weighted in that case”. This applies only where there is evidence of roughly equal weight for and against the claim. It does not come into play where the evidence indicates that one possibility is more likely than the other. (23)

While an absence of positive data does not necessarily mean that a condition is not related to a person’s employment, it may mean that there is a lack of evidence that any such relationship exists. The Board, as a quasi-judicial body, must make its decisions according to the evidence or lack of evidence received, not in accordance with speculations unsupported by evidence. Section 99(3) of the *Act* applies when “the evidence supporting different findings on an issue is evenly weighted in that case.” However, if the Board has no evidence before it that a particular condition can result from a worker’s employment, there is no doubt on the issue; the Board’s only possible decision is to deny the claim. If one speculates as to the cause of a condition of unknown origin, one might attribute it to the person’s work or to any other cause, and one speculated cause is no doubt just as tenable as any other. However, the Board can only be concerned with possibilities for which there is evidential support and only when the evidence is evenly weighted does section 99(3) apply.

EFFECTIVE DATE: March 3, 2003 (as to new wording of section 99)
APPLICATION: Not applicable.

#97.20 Presumptions

There are three statutory presumptions in favour of workers or dependants which have already been discussed in earlier chapters. These are as follows:

- (1) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment,

payroll with the ratio between the total claim costs and assessable payroll of the employer's class. Subject to maximums, discounts are assigned for favourable ratios and surcharges for unfavourable ratios. The discount or surcharge takes the form of a percentage increase or decrease in the usual assessment rate. Details of ER can be found in the policy in Item AP1-42-1 of the *Assessment Manual*.

As a general rule, all acceptable claims coded to a particular employer are counted for experience rating purposes. It makes no difference whether the injury was or was not the employer's fault. There are, however, some types of claim costs which are excluded from consideration. These are:

1. Costs recovered by way of a third party action (see policy item #111.25).
2. Investigation and/or compensation costs paid out prior to the disallow of a claim or reversal of a decision by a Board officer, the Review Division, the Workers' Compensation Appeal Tribunal or Medical Review Panel (see policy item #113.10).
3. Costs transferred to the class of another employer under section 10(8) (see policy item #114.10).
4. Costs assigned to the funds created by section 39(1)(d) and (e) (see policy item #114.30 and policy item #114.40).
5. Occupational disease claims which on average require exposure for, or involve latency periods of, two or more years before manifesting into a disability. The diseases presently excluded on this ground are:

Non-traumatic hearing loss, excluding hearing loss resulting from other injuries

Silicosis

Asbestosis

Other diagnosed pneumoconioses, for example, anthracosis and siderosis

Pneumoconioses not specifically diagnosed

Heart disease

Cancer

Hand-arm vibration syndrome, vinyl chloride induced Raynaud's phenomenon, disablement from vibrations

6. Until September 27, 2002, costs after 13 weeks where section 5(3) applies (see policy item #16.60). Effective September 28, 2002, costs after 10 weeks where section 5(3) applies (see policy item #16.60).
7. Costs from accidents substantially due to personal illness, e.g. epilepsy (see policy item #15.30).
8. Injuries during a retraining program sponsored by the Vocational Rehabilitation Department (see policy item C11-88.40, policy item C11-88.50).
9. The situations covered by policy item #115.31 and policy item #115.32 below.

The decision whether a claim falls within one of the exclusions will usually be made by an officer in the Compensation Services Division. In the case of third party actions (Exclusion 1), a Board solicitor makes the decision.

EFFECTIVE DATE: March 18, 2003 (as to the use of the terms discount and surcharge and to reflect numerical reference to the policy in Item AP1-42-1 in the *Assessment Manual*)

APPLICATION: Not applicable.

#115.31 Injuries or Aggravations Occurring in the Course of Treatment or Rehabilitation

Where there is an aggravation of an injury or a subsequent injury arising out of treatment for the primary injury, and the aggravation or subsequent injury is acceptable on the claim, compensation costs resulting from this secondary problem will be charged in the usual way. Exclusion from the employer's experience rating will only occur where:

1. the original injury was one that would not have been expected to result in death or permanent disability, and
2. the aggravation or subsequent injury occurred beyond the operations of the employer, and if the worker required transportation to a hospital or other place of medical treatment, after the employer had fulfilled the obligations under section 21(3) (see policy item #82.40), and
3. the aggravation or subsequent injury resulted in permanent disability or death.