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Update 2007 – 3

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

This update of the *Rehabilitation Services & Claims Manual* contains amendments to the *Manual* implemented since update 2007 – 2.

The following amendments are **effective August 1, 2007**:

- Policy item #114.40, *Enhancement of Disability by Reason of Pre-Existing Disease, Condition or Disability*
- Policy item #114.41, *Relationship Between 5(5) and 39(1)(e)*
- Policy item #114.43, *Procedure Governing Applications under Section 39(1)(e)*
- Policy item #114.50, *Section 39(1)(d), 39(1)(e) and Federal Government Claims*

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 WorkSafeBC Customer Service at the following:

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Attachments

Rehabilitation Services & Claims Manual, Volume I

SUMMARY OF AMENDMENTS – Update 2007 – 3

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After January 1, 1993, the dollar amount will be adjusted on January 1 of each year. The Consumer Price Index ratio determined under Section 25 of the *Workers Compensation Act* for January 1 and the previous July 1 will be used (see #51.00).

#114.12 Serious Breach of Duty of Care of Another Employer Must Have Caused or Substantially Contributed to Injury

“Duty of care” has the same meaning as it does in the law of tort. It is therefore relevant to consider what conclusions a court of common law would come to if a claim for damages for personal injury were brought by the claimant against the other employer. The basic question considered is whether there was a failure to take reasonable care. The mere fact that the employer may have violated the Occupational Safety and Health Regulations is not sufficient since they often impose strict liability.

The doctrine of vicarious liability has no application to Section 10(8), and a transfer of costs is only available where the breach of duty of care consisted of acts or omissions by management personnel who can be identified as the employer, and not to cases where the breach of duty consists only of the act or omissions of other workers.

If there has been a breach of duty of care by the employer, the next question to be considered is whether it was a “serious” one. The word “serious” refers to the culpability of the employer’s behaviour rather than the consequences of that behaviour. Regard will be had to the probability of injury resulting from the breach and the predictable gravity of the likely consequences of such an injury.

The fact that the claimant was negligent does not necessarily mean that the employer’s breach of duty did not cause or substantially contribute to the injury. Lapses of attention are a normal part of ordinary human behaviour that should be foreseen and guarded against.

#114.13 Discretion of the Board

The Board has a discretion where the requirements set out in #114.10-12 are satisfied to transfer all or part of the cost of a claim. In exercising this discretion, the Board takes no account of any contributory negligence by the claimant.

#114.20 Depletion or Extinction of Industries or Classes

Section 39(1)(b) requires the Board to “provide a reserve in aid of industries or classes which may become depleted or extinguished; . . .”

Employers may apply to have the costs of a claim transferred from their class to that fund. This provision is very rarely used.

#114.30 Disasters or Other Circumstances which Unfairly Burden a Class

Section 39(1)(d) requires the Board to provide a reserve to meet the loss arising from a disaster or other circumstances which the Board considers would unfairly burden the employers in a class.

Costs will not be charged to the fund created by Section 39(1)(d) because there is an unfair burden on an individual employer. The unfair burden must be on a class or subclass of employers.

Each deposit account employer forms a class by itself. This does not automatically mean that a burden on the individual is a burden on the class. The relief available to deposit accounts under Section 39(1)(d) is limited to the same sorts of situations as for other employers.

#114.40 Enhancement of Disability by Reason of Pre-Existing Disease, Condition or Disability

Section 39(1)(e) requires the Board to “provide and maintain a reserve for payment of that portion of the disability enhanced by reason of a pre-existing disease, condition or disability.”

The section is applied most frequently in cases where a pension award has been made. There are, however, claims where temporary total or temporary partial disability can be said to have been protracted by reason of a pre-existing disease, condition or disability. In such cases, no consideration will be given to the application of Section 39(1)(e) until the claimant has been temporarily disabled for a minimum period of 13 weeks following the injury. All of the costs of a claim cannot be charged under Section 39(1)(e).

Since the section specifically refers to the enhancement of “disability”, it has no application in fatal cases or in cases where only health care benefits are payable.

Two questions are considered when evaluating the application of Section 39(1)(e):

1. Was there a pre-existing disease, condition or disability and, if so, to what extent?
2. How severe was the incident initiating the claim in question?

Obviously, if a worker suffers an injury and there is no evidence of any pre-existing disease, condition or disability, the subsection is inapplicable. Similarly, where there is confirmation of a pre-existing disease, condition or disability of a minor degree, but the incident which precipitated the instant claim was of a severe nature, the section may be considered but will normally not be applicable. However, the section will clearly be applicable to those situations where a worker suffered a relatively minor injury at the time the instant claim was initiated, but there is evidence that the recovery period was prolonged, or a permanent disability was enhanced, by reason of a pre-existing disease, condition or disability. The fact that a disability has been prolonged or enhanced by other factors than a pre-existing condition is not a ground for relief under Section 39(1)(e).

How much disability stems from the injury and how much from the enhancement of the disease, condition or disability and, therefore, to what extent costs should be charged under Section 39(1)(e) can never be more than an estimate and will always be difficult to determine. In cases of continuing wage-loss and health care benefits, it will be appropriate for the Claims Adjudicator to determine that all of the costs of these benefits after a particular point in time should be charged under Section 39(1)(e). In some instances, it may be appropriate for the Claims Adjudicator to charge such costs on a percentage, rather than a time basis. In respect of permanent partial or permanent total disabilities, it will be necessary for the Disability Awards Officer or Adjudicator in Disability Awards, using her or his own best judgment and having reference to the advice of the Disability Awards Medical Advisor, to establish a percentage applicable to the pre-existing condition and to charge the relevant costs accordingly.

APPLICATION: For all initial section 39(1)(e) cost relief decisions made on or after August 1, 2007, refer to policy item #114.40 of Volume II of this *Manual*, regardless of the date of the compensable injury.

#114.41 Relationship Between Sections 5(5) and 39(1)(e)

It is important to distinguish between the provisions of Section 5(5) discussed in #44.00 and Section 39(1)(e). Section 5(5) deals with the situation where a disability resulting from a work injury is superimposed on a pre-existing disability in the same part of the body and increases that disability. (As outlined in #44.31, Section 5(5) can also apply if a pension is being assessed on a loss of earnings basis under Section 23(3) of the *Workers Compensation Act* and the disability is deemed to be partly the result of a disability in another part of the body.) It may result in a reduction in the amount of compensation paid to the claimant. Section 39(1)(e) is concerned only with the class to which the costs of the claim are to be charged and cannot affect the entitlement of the claimant. It can apply in cases where Section 5(5) does not apply and the whole of the claimant's disability results from the injury or, if Section 5(5) does apply, to the portion of

disability for which the Board is responsible. It provides relief for the class of the claimant's employer when the disability or portion of disability accepted under the claim is worse because of a pre-existing disease, condition or disability than it otherwise would be. That condition might well be in a different part of the claimant's body.

APPLICATION: For all initial section 39(1)(e) cost relief decisions made on or after August 1, 2007, refer to policy item #114.41 of Volume II of this *Manual*, regardless of the date of the compensable injury.

#114.42 Application of Section 39(1)(e) to Occupational Diseases

Section 39(1)(e) will not be applied to occupational disease claims simply because the disease results from exposure in several different employments. That situation is dealt with in #113.20. However, there may be cases where the disability caused by an occupational disease was enhanced by a pre-existing condition. Section 39(1)(e) can be applied in such cases if the criteria outlined in #114.40 are met.

#114.43 Procedure Governing Applications under Section 39(1)(e)

The Board has the responsibility to initiate consideration with or without a specific request or application by an employer, and to decide upon the applicability of the subsection on a claim. If a decision is made to apply this subsection, the employer will be notified. If relief has been requested, the employer will be advised if it has been denied. If there is a disagreement with such a decision, the employer may request a review by the Review Division.

EFFECTIVE DATE: March 3, 2003 (as to reference to review)

APPLICATION: For all initial section 39(1)(e) cost relief decisions made on or after August 1, 2007, refer to policy item #114.40 of Volume II of this *Manual*, regardless of the date of the compensable injury.

#114.50 Sections 39(1)(d), 39(1)(e) and Federal Government Claims

The Federal Government does not contribute to the Accident Fund, therefore no relief of costs can be made where the Federal Government is recorded as the injury employer, i.e. Class 19 Claims.

APPLICATION: For all initial section 39(1)(e) cost relief decisions made on or after August 1, 2007, refer to policy item #114.40 of Volume II of this *Manual*, regardless of the date of the compensable injury.

#115.00 PROVISIONS CHARGING INDIVIDUAL EMPLOYERS

One provision of this nature has been discussed in #94.15. Section 54(8) permits the Board to charge an employer with the costs of a claim where late in submitting a report of injury to the Board.

Other provisions of this nature are discussed below.

#115.10 Failure to Register as an Employer at the Time of Injury

Where an employer is an employer to which the Act extends compulsory coverage, failure to register with the Board as an employer will not prejudice any claim by the employees unless the provisions set out in Workers' Compensation Reporter 335 and 20:30:30 of the Assessment Policy Manual apply. However, the employer may be faced with paying the costs of the claim under Section 47(2) which provides as follows:

“An employer who refuses or neglects to make or transmit a payroll return or other statement required to be furnished by the employer under section 38(1), or who refuses or neglects to pay an assessment, or the provisional amount of an assessment, or an instalment or part of it, must, in addition to any penalty or other liability to which the employer may be subject, pay the board the full amount or capitalized value, as determined by the board, of the compensation payable in respect of any injury or occupational disease to a worker in the employer's employ which happens during the period of that default, and the payment of the amount may be enforced in the same manner as the payment of an assessment may be enforced.”

Section 38(1) provides that “Every employer must

- (a) keep at all times at some place in the Province, the location of which the employer has given notice to the board, complete and accurate particulars of the employer's payrolls;
- (b) cause to be furnished to the board
 - (i) when the employer becomes an employer within the scope of this Part; and,
 - (ii) at other times as required by a regulation of the board of general application or an order of the board limited to a specific employer, an estimate of the probable amount of the payroll of each of the employer's industries within the scope of this Part, together with any further information required by the board; and
- (c) furnish certified copies of reports of the employer's payrolls, at or after the close of each calendar year and at the other times and in the manner required by the board.”

The Board may, under Section 47(3), if satisfied that the default was excusable, relieve an employer in whole or in part from liability under Section 47(2).

The Board has decided that Section 47(2) applies to claims for fatalities.

The charge made under Section 47(2) is in addition to any ordinary assessments which the employer may be liable to pay for the period prior to the occurrence of the injury.

Item #113.30 dealt with the rules followed in charging the costs of claims where an employer is carrying on business in two or more provinces and is required to register in both. Where such an employer is not registered in this province at the time of an injury, there may be personal liability for the costs of the claim under Section 47(2) in any situation where, under the provisions of the Interjurisdictional Agreement or otherwise, the employer's class would ordinarily be charged.

#115.11 Procedure for Applying Section 47(2)

Following the acceptance of a claim, the Board officer will write to the employer and advise of the potential for liability under section 47(2). The employer will be invited to make comments as to why he or she should not be charged with the costs of the claim. A decision on the employer's liability, and whether or not to provide relief from any liability, will then be made by a committee comprised of the Board's General Counsel or delegate and the Director or Manager, Assessment Policy, of the Assessment Department. The employer may request a review by the Review Division of the decision.

The committee, when reviewing a claim for the purpose of section 47(2), will not consider arguments made by the employer which question the validity of the Board officer's decision to accept the claim. If the employer wishes to challenge that decision, he or she must exercise the right to request a review by the Review Division with respect to the acceptance of the claim.

EFFECTIVE DATE: March 3, 2003 (as to reference to review)

APPLICATION: Not applicable.

#115.20 Significance of Employers Conduct in Producing Injury

Generally speaking, whether or not an employer was at fault is not a material factor when determining how the costs of a claim are to be charged. The rules set out in policy item #113.00 apply both when the employer's negligence or misconduct caused an injury and when the injury was due to circumstances beyond the employer's control. However, an exception is provided by section 73(2), which states as follows:

“Where an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and the

board considers that this was due substantially to the gross negligence of an employer or to the failure of an employer to adopt reasonable means for the prevention of injuries or occupational diseases or to comply with the orders or directions of the board, or with the regulations made under this Part, the board may levy and collect from that employer as a contribution to the accident fund the amount of the compensation payable in respect of the injury, death or occupational disease, not exceeding in any case \$11,160.08, and the payment of that sum may be enforced in the same manner as the payment of an assessment may be enforced.”

The Board has a discretion whether to charge an employer with the costs of a claim under this provision, but once it has decided to exercise that discretion, it has no choice but to charge the whole of the costs of the claim up to the maximum amount. It has no authority to charge a lesser amount or to relieve the employer in part.

The maximum amount is subject to Consumer Price Index adjustments, the figure set out above being applicable in the period January 1 to June 30, 1975. The amounts applicable in other periods are set out below:

July 1, 1995	– December 31, 1995	\$36,188.70
January 1, 1996	– June 30, 1996	36,297.21
July 1, 1996	– December 31, 1996	36,704.13
January 1, 1997	– June 30, 1997	36,948.28

If required, earlier figures may be obtained by contacting the Board.

The maximum in force at the date of the accident is the one that applies in any case.

As an alternative to the charge under section 73(2), penalty assessment may be levied under section 73(1). These are general provisions allowing the Board to penalize employers for infractions of Occupational Safety and Health or First Aid Regulations or for other unsafe practices which apply whether or not an injury has occurred. Levies made under any of these sections are additional to the employer’s ordinary liability to pay assessments and are credited to the Board’s general funds rather than to the employer’s class or subclass.

EFFECTIVE DATE: March 3, 2003 (as to deletion of reference to process for levies and penalties)

APPLICATION: Not applicable.

#115.30 Experience Rating

Section 42 provides as follows.

“The Board must establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be considered just; and where the Board thinks a particular industry or plant is shown to be so circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or subclass to which the industry or plant is assigned, the Board must confer or impose on that industry or plant a special rate, differential or assessment to correspond with the relative hazard or cost of compensation of that industry or plant, and for that purpose may also adopt a system of experience rating.”

The Board has adopted an experience rating plan (ER) under this section. The plan compares the ratio between an employer's claim costs and assessable payroll with the ratio between the total claim costs and assessable payroll of the employer's class. Subject to maximums, merits are assigned for favourable ratios and demerits for unfavourable ratios. The merit or demerit takes the form of a percentage increase or decrease in the usual assessment rate. Details of ER can be found in the *Assessment Policy Manual* (Policy No. 30:50:41).

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. Costs after 13 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 #88.43, policy item #88.54).
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 3, 2003 (as to references to the Review Division and the Workers' Compensation Appeal Tribunal)

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.

The application of relief is limited to the pension reserve established for a fatality or permanent disability.

Consideration is automatically given by the Board officer to excluding the costs from experience rating in these cases. No request from the employer is required. The employer will be advised of the decision in writing and of the relevant review and/or appeal rights.

EFFECTIVE DATE: March 3, 2003 (as to the deletion of references to the Review Division and the Appeal Division)

APPLICATION: Not applicable.

#115.32 Claims Involving a Permanent Disability Award and a Fatality

ER does not include the actual cost of the fatal claims experienced by an employer. Rather, it includes for each claim the average cost for all fatal claims in the year.

A worker in receipt of a permanent disability pension may die as a result of the injury or disease accepted under the claim. If pensions are payable to dependants, the cost otherwise included in ER may be reduced to the extent set out below:

1. Where the average cost of a fatal award is the same or less than that of the permanent disability award, the total cost of the fatal award is excluded.
2. Where the average cost of a fatal award is greater than that of the permanent disability award, a portion of the cost of the fatal award equal to the reserve charged to the employer for the permanent disability award is excluded.