

DISCUSSION PAPER

1. TITLE

Draft 2007 – 2009 Compensation, Occupational Disease and Assessments Policy Priorities Workplan

2. ISSUE

At issue is the draft 2007 – 2009 policy priorities workplan for stakeholder review and comment.

3. OVERVIEW

3.1 2006 Workplan Overview

As of the end of October 2006, the Worker and Employer Policy Department of the Policy and Research Division (“PRD”) completed the following projects related to compensation, occupational disease and assessments:

- Interest on Survivor Benefits
- Retroactivity Limits on Employer Registration Effective Dates
- Medical Review Panel Orders-in-Council
- Average Earnings and Worker Expenses
- Recurrence of Disability
- Incorporated Farmers
- Deduction of Probable Income Taxes from Earnings
- Housekeeping Changes to Various Policies in the *Rehabilitation Services & Claims Manual* and the *Assessment Manual*

The Asthma and Dermatitis policy project is scheduled for referral to the Board of Directors in November 2006. The Workplace Status project is also scheduled for referral to the Board of Directors in January 2007 for decision.

Considerable work has also been undertaken on the following projects which are scheduled for approval to release for consultation in early 2007:

- Re-write of Chapter 3, Compensation for Personal Injury
- Tendinitis, Tenosynovitis and Bursitis
- Contractor Liability

3.2 2007 – 2009 Workplan Priorities

TAB A of this paper contains the draft 2007 – 2009 compensation and occupational disease workplan. TAB B contains the draft assessment workplan.

The 2007 key priorities for the Worker and Employer Policy Department of the PRD include the following:

- completion of the Chapter 3 re-write;
- status determinations;
- policy changes that may arise as a result of the Claims Management Solutions (“CMS”) project;
- loss of earnings assessment policy review;
- experience rating and fatal claims; and
- the re-write of Chapter 10, Medical Assistance.

It is expected that as in prior years, issues will arise during the year that will require immediate attention and will result in a shifting of work priorities. In addition, it is anticipated that additional section 251 issues may be received from the Workers’ Compensation Appeal Tribunal Chair that will result in a shifting of priorities in order to meet the legislated 90-day timeframe for response.

4. CONSULTATION

Stakeholders are invited to provide feedback on the draft workplans, and any additional comments that may be relevant to the issue.

Stakeholder comments will be accepted until December 4, 2006. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

By mail: Susan Hynes
Director, Worker and Employer Policy Department
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By fax: 604 279-7599

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WorkSafeBC’s governing body, the Board of Directors, will consider the opinions expressed by stakeholders before it adopts the proposed workplan.

Please note that all comments become part of the Policy and Research Division’s database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.

TAB A

Policy and Research Division

2007 – 2009 Policy Priorities

Compensation and Occupational Disease Policy Workplan

1. Compensation for Personal Injury, Re-write of Chapter 3 of the *Rehabilitation Services & Claims Manual (“RS&CM”) – 2007*

This project involves a review of the 90 policies contained in Chapter 3. The basic provision governing a worker's right to compensation for personal injury is section 5(1) of the *Workers Compensation Act* (“*Act*”). This section provides that where, in an industry within the scope of the *Act*, personal injury or death arising out of and in the course of employment is caused to a worker, compensation as provided by the *Act* shall be paid by WorkSafeBC. Chapter 3 of the *RS&CM* sets out the policies which assist decision-makers in determining whether an injury arose out of and in the course of employment.

Chapter 3 policies have developed over time, many from the old *Workers’ Compensation Reporter* (“*WCR*”) decisions and as a result contain a significant number of outdated references and examples. Section 5 and the Chapter 3 policies are also the most commonly appealed issues.

The re-write of the Chapter 3 policies consists of clarifying the policies, removing outdated examples and references and placing the policies into the new policy document format. This project also includes a review of policy item #7.10 on Volunteer Firefighters.

Significant work was undertaken on this project in 2006. Internal consultation occurred from June until mid-September. Stakeholder consultation on the proposed policy changes is scheduled to commence in early 2007.

2. Claims Management Solutions (“CMS”) Project – 2007/2008

Aligned with WorkSafeBC’s strategic plan, the CMS project is designed to refocus core claims-related business to increase the efficiency of adjudication, improve delivery of claims services, and enhance systems and financial control. The aim of CMS is to facilitate improved timeliness of claims-handling and payments, and earlier identification of workers requiring return-to-work assistance.

It is anticipated that policy issues will be identified during the development of the CMS project which will require policy guidance and policy development in order to ensure the effective implementation of the project.

2a. Commutations – 2007

This issue was identified as part of the CMS project and pertains to policy item #45.30, *Types of Commutations Permitted*. The *Act* permits WorkSafeBC to commute all or part of a worker’s permanent disability award and retirement benefit to a lump sum. Policy sets out four commutation methods available to workers: full or partial commutation of the award for a period of time (“Term” commutations); or full or partial commutation of the award for the duration of the award (“Life” commutations). Workers rarely choose either of the Term commutation methods. At issue is whether they should be deleted from policy.

Significant work has been undertaken on this project and it is scheduled to be presented to the Board of Directors in November 2006 for approval to proceed with consultation.

3. Loss of Earnings Assessments – 2007

At issue is a review of policy item #40.00, *Loss of Earning Assessments* in Chapter 6 of the *RS&CM*. This policy establishes criteria for determining when the combined effect of a worker's occupation and disability is "so exceptional" that an award based upon the worker's loss of function is not appropriate.

This project will involve a review of a number of issues identified by WorkSafeBC staff, the Workers Compensation Appeal Tribunal ("WCAT") and external stakeholders. The aim of this review is to ensure that the policy provides appropriate guidance to WorkSafeBC and WCAT decision-makers, workers and employers through this very complex adjudication.

4. Medical Assistance, Re-write of Chapter 10 of the *RS&CM* – 2007/2008

This project involves a review of the 87 policies contained in Chapter 10. The re-write of the Chapter 10 policies consists of putting the policies into the new format and addressing various issues that have been raised, such as:

- Other Health Care Providers – Re-writing policy to reflect changes to health care services provided to workers, such as physiotherapy, acupuncture and massage therapy.
- The Prescription of Narcotics and Other Drugs of Addiction – Review of the current policy to ensure that it reflects the latest medical and scientific information.
- The Provision of Hearing Aids – Reviewing current policy that provides that "the Board will provide such hearing aids as is reasonable and necessary to achieve optimum satisfaction for the worker."
- Reviewing of discretionary allowances and benefits provided to injured workers, such as:
 - (i) Those provided to seriously injured workers;
 - (ii) Those regarding travel expenses and subsistence, related to workers' receipt of health care; and;
 - (iii) Those related to childcare and homemaker services.

Work commenced on this project in 2006. It is anticipated that consultation will occur in the fall of 2007.

5. Principals' Earnings – 2007

Long-term average earnings for the principal of a limited company are normally determined using the principal's personal tax return, which shows the amount the principal has paid to him or herself out of the company. Those earnings are also used as the basis for collecting assessment premiums from the limited company.

However, policy provides that "where the principal receives nominal or no wages for the work done the Board will estimate what it considers to be a reasonable wage for that work." This means that a principal who does not draw any earnings from his or her company can still receive compensation based on an estimate of the value of the principal's work, despite the fact that the limited company has not paid assessment premiums for that work. A review of the policy has been requested in order to consider whether this statement should remain in the policy.

This issue was originally identified as part of a larger project on Average Earnings for Self-Employed Persons. The Board of Directors has already made policy changes based on two other issues identified as part of that project: Average Earnings and Equipment Expenses (decided in July 2005) and Average Earnings and Worker Expenses (decided in June 2006). This is the third and final issue to be considered as part of that project.

6. Chronic Pain – Review of Policy Items #22.35 and #39.02 – 2007

The policies with respect to chronic pain have been in effect since January 1, 2003. A review of these policies is proposed in order to evaluate their effectiveness and to improve consistency in the adjudication and management of chronic pain.

7. Preventive Measures and Exposures – 2007

A review of this policy is required to clarify WorkSafeBC's responsibility for preventive and/or curative measures in the event of an exposure or possible exposure to a disease or contaminant such as HIV/AIDS and Hepatitis C where the exposure is not associated with a concurrent personal injury.

Work commenced on this issue in 2006. It is anticipated that consultation will occur in early 2007.

8. Sexual Assault and Sexual Harassment – 2007

Current policy is silent on the issue of sexual assault and harassment. A definition of these terms and guidance in policy on the adjudication of these types of claims is sought.

9. Tendinitis, Tenosynovitis and Bursitis – 2007

When Schedule B was amended in March 2000 with respect to the descriptions of tendinitis and bursitis, it had the unintended consequence of 'delisting' certain specific types of tendonitis/bursitis that affect certain anatomical structures. Issues have been raised on appeal that conditions such as Achilles tendinitis or elbow bursitis have "not been recognized by the WCB as an occupational disease because they are not listed in Schedule B or in policy item #26.03 which sets out those diseases recognized by regulation of general application". It is proposed that the list of diseases in policy item #26.03 be expanded to include "tendonitis or tenosynovitis" and "bursitis" in general to eliminate any uncertainty.

Work commenced on this issue in 2006. It is anticipated that consultation will occur in early 2007.

10. Notification of Decisions – 2007

Policy regarding when a WorkSafeBC officer is required to provide written notification of a decision is set out in policy item #99.20. Written notification is currently provided where a decision is adverse to the worker or an employer has protested a decision to allow a claim. Where a claim is allowed and there is no protest from the employer, current policy provides that no written decision is required.

A recent WCAT decision noted that communication of a decision is an integral component of the decision-making process. The WCAT panel determined that a decision is not "made" until it is recorded in the claim and communicated in some form to the affected party.

At issue is whether a decision has to be documented and/or communicated to the affected parties in some form before it can be considered to have been "made" for the purposes of the reconsideration and appeal provisions of the *Act*.

A secondary issue raised with respect to this policy is the distinction between the terms "reject" and "disallow". The distinction between the two terms has created some confusion among officers and has led to incorrect coding of claims.

11. Return to Work Strategy – 2007

As part of the Board of Directors ("BOD") Health and Safety Initiative in 2005, a number of questions were posed to worker and employer stakeholders regarding return to work and duty to accommodate. This project will examine the findings of the BOD Health and Safety Initiative with respect to return to work and duty to accommodate. In addition, the BOD has asked for work to be undertaken on whether financial/rate reduction incentives could be incorporated into any future return to work or duty to accommodate strategy.

12. Reopenings Over Three Years – 2007

Section 32(1) of the *Act* provides that where there is a recurrence of a temporary disability after a lapse of three years following the occurrence of the injury, WorkSafeBC may calculate the compensation as if the recurrence was the happening of the injury. A review of policy item #70.20 is required to ensure it is consistent with the wording of section 32(1) of the *Act*.

13. Effective Date/Policy Application Terminology – 2007

At issue is the development of a general policy to clarify for readers of the *RS&CM* the intent of the effective date and application statements of policies.

14. Worker Employed Less than 12 months – 2007

Section 33.3 of the *Act* states that for workers employed less than 12 months immediately preceding the date of injury, the determination of the amount of average earnings must be based on the gross earnings of a person of similar status employed in the same type and classification of employment by the same employer or if no person is so employed, by an employer in the same region.

Policy item #67.50 provides that WorkSafeBC will contact the injury employer to determine what the average earnings are or would be of a person of similar status employed in the same type and classification of employment. Where this information is not available, WorkSafeBC may use relevant information from an employer or employers in the region on the average earnings of a person of similar status.

Differing approaches to establishing a worker's average earnings have been applied by WorkSafeBC and WCAT decision-makers. A review of the policy has been requested to clarify the process for gathering earnings information in these situations.

15. On Call Workers – 2007

Current policy does not specifically set out how to establish short-term average earnings for workers who are regularly employed on an on-call basis for more than one employer, such as film workers. In these situations, an issue has arisen regarding whether it is more appropriate to establish average earnings with reference to earnings on the date of injury or whether earnings based on the three month period immediately preceding the worker's date of injury is more reflective of a worker's average earnings.

16. Disfigurement Awards – 2007

Section 23(5) of the *Act* provides:

Where the worker has suffered a serious and permanent disfigurement which the board considers is capable of impairing the worker's earning capacity, a lump sum in compensation may be paid, although the amount the worker was earning before the injury has not been diminished.

Policy item #43.20 sets out calculations to be completed in order to assess a worker's level of disability. A review of the calculations is required to ensure that it is accurate.

17. Tinnitus – 2007/2008

Policy item #31.00, *Hearing Loss*, provides that tinnitus alone is not considered a condition for which a permanent disability award can be granted. However, tinnitus in combination with a permanent degree of hearing loss may have an impact on a worker's employability and affect the amount of the resulting award.

At issue is a review of the current medical and scientific literature related to this condition to determine whether the current policy is appropriate.

18. Workers Injured While Participating in Return to Work Programs – 2007/2008

At issue are questions regarding workers' compensation coverage for individuals injured while participating in non-WorkSafeBC return to work programs. Current policy does not specifically address whether these individuals would be considered workers and thereby entitled to compensation. An additional issue is how to calculate an individual's average earnings in situations where the injury occurs in the course of a return to work program sponsored by an insurance provider.

19. Compensation for Bronchogenic Carcinoma (Lung Cancer) in Asbestos Exposed Workers – 2007/2008

Schedule B item #4(a) provides a presumption of work causation in favour of a worker who has developed a primary site lung cancer which is associated with either asbestosis or bilateral diffuse pleural thickening, or fibrosis measuring a specified size.

At issue is whether these descriptions are current and supportable based on the most current medical science. Another issue is whether WorkSafeBC should consider the recognition of primary site lung cancers in workers who have had significant exposures to asbestos in British Columbia, but who do not display radiographic evidence of benign asbestos-related pleural or lung disease. This second issue has arisen out of recent studies and reports including the "Report by the Industrial Injuries Advisory Council" (United Kingdom) dated July 2005.

In October 2006, the Research Secretariat released a request for proposals ("RFP") for systematic review of available literature on Bronchogenic Carcinoma (Lung Cancer) in Asbestos Exposed Workers. The results of this review will form the basis for a comprehensive analysis and development of WorkSafeBC policy options that could be applied in the adjudication of lung cancer claims.

20. Whole Body Vibration – Policy Item #26.50 of the RS&CM – 2007/2008

Worker and Employer Services requires policy direction regarding the possible relationship between occupational exposure to Whole Body Vibration ("WBV") and back injuries/disorders. There are conflicting views in the medical literature as to whether there is a causal link between WBV and certain back disorders.

Policy item #26.50 provides that disability can occur due to the natural aging process. Where degeneration is a kind that affects the population at large due to multi-factoral causes, it is difficult for WorkSafeBC to measure or determine whether the occupation had any significant effect in advancing the pace of the degeneration compared with other occupations.

For a disability to be compensable, evidence must establish that the work activity brought about a disability that would probably not otherwise have occurred, or that the work activity significantly advanced the development of a disability that probably would not otherwise have occurred until later.

In October 2006, the Research Secretariat released an RFP for systematic review of available literature on Back Disorders in Workers Exposed to Whole Body Vibration. The results of this review will form the basis for a comprehensive analysis and development of WorkSafeBC policy options that could be applied in the adjudication of WBV claims.

21. Wage-Loss Benefits, Re-write of Chapter 5 of the RS&CM – 2008/2009

This project will involve review of the Chapter 5 policies. It will include a review of the policies related to the termination of benefits. Section 31.1 of the *Act* directs the termination of periodic payments where a worker ceases to have the disability for which the periodic payment is to be made. Policy item #35.30, *Duration of Temporary Disability Benefits*, references section 31.1 and provides that in all cases, benefits will be terminated under sections 29(1) and 30(1) where, notwithstanding the existence of a temporary total or temporary partial impairment, the worker is suffering no loss of earnings as a result of the work injury. Specific policy reviews to ensure consistency with section 31.1 of the *Act* will include:

- Policy item #34.32 – *Strikes and Other Lay-Off on Day Following Injury;*
- Policy item #34.51 – *Other Factors Prevent Return to Employment; and*
- Policy item #34.52 – *Workers Undergoing Educational or Training Program.*

22. Average Earnings, Chapter 9 of the RS&CM – 2008/2009

This project is part of the overall plan to redevelop the *RS&CM*, Volume II on a chapter by chapter basis. This project will involve a review of the Chapter 9 policies on average earnings.

23. Permanent Disability Awards, Chapter 6, RS&CM – 2008/2009

This project is part of the overall plan to redevelop the *RS&CM*, Volume II on a chapter by chapter basis. A review of permanent disability awards and the associated practices and procedures is proposed.

24. Permanent Disability Evaluation Schedule (“PDES”) – 2008

At issue is the ongoing review of the percentages listed on the PDES to ensure that the PDES remains current with emerging medical and scientific knowledge. This issue is complex and will require additional research and analysis.

25. Osteoarthritis of the First Meta-Carpal Joint in Physiotherapists – Policy Item #26.02 – 2008

Policy item #26.02 addresses the recognition of an occupational disease under section 6(4.2) of the *Act* as a “disease that is peculiar to or characteristic of a particular process, trade or occupation”. To date, only one disease has been recognized in this manner – osteoarthritis of the first carpo-metacarpal joint in physiotherapists who perform deep friction massage.

Policy item #26.02 states that this recognition is limited to factual situations substantially the same as those applied to the worker in *WCR* Decision No. 231, dated February 9, 1977. No further guidance is provided by the policy item.

WCR Decision No. 231 is one of three remaining *WCR* Decisions that have yet to be retired from official policy status. The general reference in policy item #26.02 to *WCR* Decision No. 231 is problematic, as accessibility to old *WCR* Decisions is limited. The old *WCR* has not been published in over ten years, nor is it available electronically.

At issue is a review of the scientific and medical literature related to this condition to determine whether the current recognition is current and supportable. This project will also facilitate the retirement of *WCR* Decisions.

26. Claims Procedures, Chapter 12 of the RS&CM – 2009

This project is part of the overall plan to redevelop the *RS&CM*, Volume II on a chapter by chapter basis. The project includes the following:

- Rewrite Chapter 12 into new policy format;
- Remove all procedural requirements;
- Update Freedom of Information and Protection of Privacy policies; and
- Develop general assignment of authority policy.

27. Non-Reporting/Mis-Reporting of Claims – Ongoing Project

The project will consider possible policy approaches to addressing non-reporting and mis-reporting of claims by employers and workers.

TAB B

Policy and Research Division

2007 – 2009 Policy Priorities

Assessments Workplan

1. Workplace Status (Independent Operators) – AP1-1-1 through AP1-1-7 – 2007

The determination of the status of a person by the Assessment Department is complex and subjective. This decision has impacts on both Compensation and Prevention decision-making.

Policy currently does not contain a comprehensive test to determine whether the person is a worker, employer or independent operator. This project involves the following issues:

- a) clarification of the criteria to distinguish between workers and independent operators (i.e., self-employed individuals); and
- b) a review of the status of "labour contractor", a term found in WorkSafeBC policy, but not contained in the *Act*.

Significant work has been done on this project and it is expected to proceed to the Board of Directors for decision in January 2007.

2. Contractor Liability – 2007

Currently, clearance letters are provided by the Assessment Department to advise firms and individuals of possible section 51 liabilities if another registered individual or firm is hired for subcontracted work. For the most part, these letters are retroactive in application, as most registered firms make payments in respect of past periods of time.

As part of the "customer service" improvements associated with the Assessment Operating Strategy project, the Assessment Department is adopting a pre-clearance program for existing registered employers and independent operators (prime contractors and subcontractors) with a history of good standing in reporting payroll and remitting premiums.

In developing the pre-clearance program, the Assessment Department identified the need for policy to set out the obligations of contractors to pay any outstanding assessment premiums owed by their subcontractors. It was also considered that policy should set out the function of clearance letters and the importance of the clearance date.

Work has begun on this project and it is anticipated that consultation will commence in early 2007.

3. Experience Rating and Fatal Claims – 2007

This project will consider the current way in which fatal claims' costs are treated within the experience rating system, and whether there are alternate options that would provide incentives for employers to prevent such claims either within the experience rating system or outside of it.

4. The Classification System and Assessment Rate Policies – 2007

At issue is whether the current references in Policy AP1-37-1, *The Classification System*, to rate setting are more appropriately maintained in Policy AP1-39-1, *Assessment Rates*.

5. Effective Date of Account Cancellation – 2007

The general rule for account cancellation is that an account should be cancelled when the firm ceases to be an employer or ceases to employ workers. The effective date of cancellation is the date the employer ceased operating the business.

It is not unusual for an employer to cease operating the business or cease to be an employer without informing WorkSafeBC. In these situations, there is no one date that is readily identifiable as the date operations ceased.

A review of Policy AP1-38-1 is required to clarify the effective date for account cancellations.

6. Multiple Classification and Special Hazards – 2007

Usually when an employer registers with WorkSafeBC, the employer is assigned to a single classification unit based on the industrial activity of the business. Where an employer is involved in more than one industrial activity, WorkSafeBC considers the criteria set out in the multiple classification policy to determine whether the additional industrial activity is assigned to the original classification unit or whether a separate classification unit is appropriate.

The multiple classification policy also includes a list of special hazard operations which may attract higher assessment rates. In the case of a special hazard operation, the Board classifies and treats special hazard operations as separate industrial activities, regardless of whether they meet the multiple classification criteria.

This project will review the list of special hazard operations to consider whether it requires modification and whether the special hazard policy should be maintained.

7. Section 4 of the Act and the Fishing Industry Regulations – 2007/2008

The Assessment Department is undertaking a review of the fishing industry both in terms of status determination and assessments obligations. It is anticipated that following this review, a review of the *Fishing Industry Regulations* may be required in order to clarify assessment obligations.

8. Employer Compliance with Reporting & Remitting Requirements – Ongoing

A number of concerns have been raised regarding employer non-compliance with the reporting and remittance requirements of the *Act*. The Priorities and Governance Committee of the Board of Directors has directed the PRD and the Finance Division to evaluate the existing law and policy and determine whether there are items that are not being applied, or policies that can be developed, to assist in addressing this issue.