

DISCUSSION PAPER

1. TITLE AND DATE

Section 39 (1)(e) – Relief of Costs for a Pre-Existing Disease, Condition or Disability

2. ISSUE

With the exception of a consequential policy change in 2002, policies in the *Rehabilitation Services & Claims Manual*, Volume II (“*RS&CM*”) related to section 39(1)(e) have not been reviewed since they were created. At issue is a proposal to consolidate and update the policies on cost relief for employers in cases where a worker’s compensable disability is enhanced as a result of a pre-existing disease, condition or disability.

The result would provide one consolidated source of policy, reflect the current system of adjudication, and standardize longstanding practice that is more appropriately placed in policy. It would also facilitate the retirement of Decision No. 271 from policy status, which should be done in response to the larger project designed to retire volumes 1 – 6 of the *Workers’ Compensation Reporter* (“*Old Reporter*”).

3. BACKGROUND

A. OVERVIEW

Claims costs affect an employer in two ways:

- 1) The actual claims costs on any claims of workers of an employer are charged to the rate group to which the employer belongs. Through its assessment rate, the employer will then pay a proportion (based on payroll) of the total claims costs incurred on all claims paid to workers of all the employers in that rate group.
- 2) The individual employer’s experience rating will take into consideration all claims costs of its workers. Starting with the base assessment rate for its rate group, the employer’s experience rating increases or decreases its net rate to reflect its actual claims cost experience, compared to that of all other firms within the employer’s rate group.

There are certain provisions in the *Workers Compensation Act* (“*Act*”) that result in exceptions to the above rules. The employer’s experience rating may be relieved of claims costs on a particular claim. In addition, an employer’s rate group may also be relieved.

B. LAW

Section 39(1) of the *Act* authorizes the Workers' Compensation Board ("WCB") to collect assessments for the accident fund from independent operators and employers. Section 39(1)(e) directs the WCB to ensure that enough money is collected to maintain a reserve of funds to pay for the portion of a worker's disability that is enhanced as a result of the worker having a pre-existing disease, condition or disability.

Section 42 of the *Act* directs the WCB to vary assessment rates according to different kinds of employment, relative levels of hazard, or costs of compensation incurred among employers across various types of industry. It also permits the adoption of an experience rating system for that purpose.

C. POLICY

Policy on cost relief for a compensable disability that is enhanced as a result of a pre-existing disease, condition or disability is found in three sources:

- Decision No. 271, *Re Subsection 37(1)(e)*¹ – *Charging of Costs for Enhanced Disabilities*, 4 W.C.R. 10 ("Decision No. 271"),
- the *RS&CM*, and
- Panel of Administrators' Resolution No. 1998/04/23-03 *re: Section 39(1)(e)* ("Panel Resolution").

(i) Decision No. 271

In 1991, decisions published in the *Old Reporter* were adopted as policy of the Workers' Compensation Board. Over the years, the *Old Reporter* has become outdated and most of the decisions have since been retired from policy status. One of the four *Old Reporter* decisions remaining to be retired is Decision No. 271. It continues to hold the same status as policies contained in the *RS&CM*.

Decision No. 271 was issued on March 14, 1978. It has been largely incorporated into the *RS&CM*, with the exception of the following three matters:

1. The "purpose and rationale statement" in Decision No. 271 provides that section 39(1)(e) of the *Act* is fundamentally rehabilitative in nature. Of secondary importance is the actual relief from a certain amount of the cost of any given claim.
2. Decision No. 271 contains the following statement, which has been the subject of a number of disputes and appeals. Known as the "but for statement", it provides that application of section 39(1)(e) "does not depend upon whether the compensable injury would not have occurred but for the existence of a pre-existing condition or

¹ The general revision of statutes of British Columbia in 1979 resulted in a renumbering of the sections of the *Act*, changing section 37 to section 39, but the content remained the same.

disease, but with whether the disability resulting from the [compensable] injury has been enhanced because of that pre-existing condition or disease”.²

3. Decision No. 271 states that once the decision is made on whether to apply section 39(1)(e), the employer will be notified and will be given an opportunity to appeal.

(ii) RS&CM

Policy items #114.40 to #114.50 of the *RS&CM* provide guidance in determining which claim costs will be assigned to the reserve fund under section 39(1)(e).

Policy item #114.40B, *Enhancement of Disability by Reason of Pre-Existing Disease, Condition or Disability*, provides that section 39(1)(e) is applied most frequently in cases of permanent disability, but if a worker is temporarily disabled for a minimum period of 10 weeks³ and the disability has been protracted by reason of a pre-existing disease, condition or disability, the section is also applied. Two questions are considered to evaluate 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?

This policy goes on to state that how much disability stems from the injury and how much from the enhancement of the pre-existing 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. It also provides that 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.

Policy item #114.41, *Relationship Between Sections 5(5) and 39(1)(e)*, emphasizes that while section 5(5) of the *Act* may limit the amount of compensation granted to an injured worker, section 39(1)(e) cannot. Section 39(1)(e) does not affect worker entitlement. Relief is available to the employer's rate group if 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. The pre-existing disease, condition or disability does not have to be in the same part of the worker's body.

Policy item #114.43, *Procedure Governing Applications under Section 39(1)(e)* puts the onus on the WCB to consider the application of section 39(1)(e) on a claim. An employer

² At page 13.

³ Claims initiated prior to September 28, 2002 are considered under policy item #114.40A, and require the claimant to be temporarily disabled for at least 13 weeks following the injury before consideration of section 39(1)(e)'s applicability is given.

does not need to make a specific request. 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.

Policy item #115.30, *Experience Rating*⁴ lists the types of claims costs that are excluded from an employer's experience rating calculation under section 42. One of these is claims costs assigned to the fund created by section 39(1)(e). It is in an employer's direct interest to have the claims costs related to the enhancement of a compensable disability from a pre-existing disease, condition or disability relieved under section 39(1)(e), as this will reduce the claims costs on which the employer's experience rating is based, and may relieve the employer's rate group as well.

(iii) Panel Resolution

The Panel Resolution sets out three policies not found elsewhere in published policy.

(a) Pre-Decision No. 271

The Panel Resolution provides that consideration of cost relief for wage loss payments concluded before March 15, 1978, and permanent disability awards awarded before that date, is limited to those for which an employer had already applied for relief of claims costs before March 15, 1978 and for which the WCB had not yet made a decision.

(b) Historical Relief of Costs Project

Decision No. 271 mandated the automatic consideration of granting cost relief under section 39(1)(e) on claims exceeding 13 weeks of disability. In practice, however, this was commonly omitted or employers were not generally notified of the decision. In later years, when knowledge of these omissions came to the attention of the employer community, many employers applied for relief of costs with respect to their "historical claims". Pursuant to section 39(1)(e) and other published policy, the WCB was required to adjudicate these applications. By late 1993, the number of requests was significantly impacting the workload of WCB Officers.

As a result, the Senior Executive Committee ("SEC") directed that commencing January 1, 1994, staff would issue a section 39(1)(e) decision on all claims where wage loss benefits exceeded 13 weeks in duration.⁵ In addition, the 1998 Panel Resolution established the Historical Relief of Costs Project ("Historical Project") to deal with the application of section 39(1)(e) on all claims where wage loss payments concluded, or a pension was awarded, after March 15, 1978 and on or before December 31, 1993, and on which the WCB had not yet considered, or received a request to consider, the application of section 39(1)(e). Notices were sent to all affected employers, who then had 180 days to request in writing that section 39(1)(e) consideration be given to their claims. The final

⁴ This policy mirrors *Assessment Manual* policy item AP1-42-2, *Experience Rating Cost Inclusions/Exclusions*.

⁵ As per policy item #114.40B, this period changed to 10 weeks effective September 28, 2002.

date for requesting relief of costs on the “historical” claims under the Historical Project was October 15, 1998.

(c) Same Employer

The Panel Resolution clarified that where the date of the injury or disease for which cost relief is being sought is prior to July 1, 1998, relief of costs is not granted if the pre-existing disease, condition or disability has resulted from work with the same employer who is applying for the relief of costs.

Where the date of the injury or disease for which cost relief is being sought is on or after July 1, 1998, relief of costs may be considered regardless of whether the pre-existing disease, condition or disability resulted from work with the same employer who is applying for the relief of costs.

The “date of the disease” for the purposes of this section of the Panel Resolution is the date that the first claim document is registered at the WCB.

4. DISCUSSION

This discussion paper considers the following issues in turn:

- Part A – Consolidating Policy
- Part B – Updating Policy
- Part C – Housekeeping Matters

PART A – CONSOLIDATING POLICY

1. RETIRING DECISION NO. 271

Of the three matters in Decision No. 271 that have not been superseded by policy in the *RS&CM*, the first two discussed here must be addressed before Decision No. 271 can be retired. The third, while incorporated into practice, would be better placed in policy.

(a) The Purpose and Rationale Statement in Decision No. 271

Appellate bodies have interpreted section 39(1)(e) as ‘fundamentally a rehabilitation measure’,⁶ but have also requested that the WCB’s governing body confirm this approach.

The 1966 Royal Commission Report⁷ provides evidence that the legislative intent for creating the reserve fund under section 39(1)(e) was to encourage employers to employ workers who have an impairment of some kind.

Decision No. 271 discusses the purpose and rationale for section 39(1)(e). It states:

This provision [section 39(1)(e)] is fundamentally a rehabilitation measure, giving reassurance to potential employers of workers with pre-existing conditions, disease or disabilities that, in employing those workers, they take no inordinate risks in respect of possible future injuries. Of secondary importance is the actual relief from a certain amount of the cost of any given claim, especially where the employer in question is assessed on the basis of an experience rating.⁸

The purpose and rationale statement found in Decision No. 271 remains a good resource for historical and background information and provides decision-makers and workplace parties with an understanding of the intent of section 39(1)(e). As a result, it would be useful to incorporate the purpose and rationale statement in an introductory statement to policy item #114.40B.

(b) Ambiguity in the “But for” Statement in Decision No. 271

At the start of a claim, a WCB officer determines whether an injury or occupational disease arose out of and in the course of employment. If so, the claim is accepted.

If the worker is permanently disabled, or has been temporarily disabled for a minimum period of 10 weeks, the WCB officer then determines whether cost relief under section 39(1)(e) is applicable. This requires the WCB officer to decide whether the disability resulting from the injury or occupational disease was enhanced as a result of a pre-existing disease, condition or disability. If so, a relief of some of the claim’s costs is granted.

⁶ See, for example, Appeal Division decision #98-0833.

⁷ Mr. Justice Tysoe, *Commission of Inquiry Workmen’s Compensation Act: Report of the Commissioners*, 1966.

⁸ At page 11.

In some relief of costs considerations, the issue of whether the type of injury or occupational disease would have occurred but for a pre-existing disease, condition or disability arises.

Decision 271 contains the following passage, which has been the subject of some debate:

It should also be borne in mind that the application of this subsection [39(1)(e)] does not depend upon whether the injury would not have occurred but for the existence of a pre-existing condition or disease, but with whether the disability resulting from the injury has been enhanced because of that pre-existing condition or disease.

A number of former Appeal Division panels have considered this passage, and two differing interpretations have emerged:

- The first interpretation⁹ is that cost relief will be considered where the compensable disability is enhanced, regardless of whether the pre-existing disease, condition or disability was a major factor in causing the compensable injury and disability. This approach is consistent with the notion that section 39(1)(e) is “fundamentally a rehabilitation measure” and may be reconciled with the wording of the subsection.
- The second interpretation¹⁰ is that cost relief is precluded in situations where the particular type of injury would not have occurred but for the pre-existing disease, condition or disability. Under this interpretation, considering cost relief in these circumstances would question initial causation of the injury and the acceptance of the claim. This approach has some support in the wording of section 39(1)(e), but is not easily reconcilable with the notion that the provision is “fundamentally a rehabilitation measure”.

An example will help explain the difference in interpretations: a bone is severely weakened by osteoporosis and is fractured after a very minor incident at work. It could be argued that the particular type of injury would not have occurred but for the pre-existing osteoporosis. In this situation under the first interpretation, after 10 weeks of wage loss compensation, cost relief could be considered. Under the second approach, relief of costs is simply precluded.

Arguably, the issue created by the “but for” statement is addressed by policy item #114.41, which states that cost relief is available when the compensable disability that is “accepted under the claim is worse because of a pre-existing disease, condition or disability than it otherwise would be”. The policy states fully that relief of costs can still apply where the pre-existing disease, condition or disability is in a different part of the worker’s body.

It appears that the first interpretation has been adopted in recent decisions of the Workers’ Compensation Appeal Tribunal (“WCAT”). Furthermore, longstanding practice has always emphasized that the argument that “but for the pre-existing disease, condition or disability

⁹ For an example of the application of this approach, see AD #97-0986, AD #98-0833, or AD #00-0193.

¹⁰ For an example of the application of this approach, see AD #94-1061 or AD #00-0193.

no injury or disability would have occurred” is an irrelevant consideration with respect to the application of section 39(1)(e). This refers to the causation issue, which is already adjudicated under section 5 of the *Act*. Once it is decided that there was a compensable injury or disease, the question to then answer is whether the disability resulting from it was enhanced as a result of the pre-existing disease, condition or disability.

It is apparent, however, that while Decision No. 271 remains in effect, disputes regarding the interpretation of the “but for” passage will continue. These disputes have not been resolved by policy item #114.41.

To resolve this issue, a statement could be included in policy to clarify whether relief of costs can be considered where a particular type of injury would not have occurred without the pre-existing disease, condition or disability.

(c) Notification

Decision No. 271 directs that once a section 39(1)(e) decision has been made, the employer will be notified and will be given an opportunity to appeal. The Historical Project addressed this requirement for all wage loss claims paid or permanent disability awards granted after March 15, 1978 and on or before December 31, 1993. Effective January 1, 1994, staff were directed by the SEC to issue a section 39(1)(e) decision on all claims meeting the basic qualifying criteria,¹¹ and subsequently a computer-generated business process was implemented to meet this requirement.

Policy item #114.43 does not reflect this business practice. Rather, it provides that the employer will be notified of the applicability of section 39(1)(e) on a claim if a decision is made to apply the subsection or if the employer requested relief.

To remedy this situation, policy item #114.43 could be amended to provide that employers are notified of all cost relief decisions where 10 weeks of disability have been paid or a permanent disability award has been granted, regardless of whether the employer requested relief or the relief is denied. On the other hand, the issue of notification is primarily a procedural matter which may more appropriately be addressed in practice rather than policy. Under this approach, the WCB’s responsibility to initiate consideration of the applicability of section 39(1)(e) on a claim would be retained in policy.

2. THE PANEL RESOLUTION

To foster accessibility and transparency, the three policies set out in the Panel Resolution could be incorporated into the *RS&CM*.

(a) Pre-Decision No. 271

Any applications for cost relief made prior to March 15, 1978 will have long since been determined. However, a statement referring to the policy set out in the Panel Resolution

¹¹ The 10 weeks of disability have been paid, or a permanent disability award has been granted.

on cost relief consideration in the period before Decision No. 271 may remain a useful resource for historical and background information.

(b) *The Historical Project*

The Panel Resolution setting the parameters for the Historical Project is not referenced in the *RS&CM* and new staff may not be aware that they cannot consider cost relief for claims where wage loss payment concluded, or a permanent disability award was granted, on or before December 31, 1993. For example, the Review Division received a request to review a decision by a WCB Officer on a cost relief application for a 1980 claim. As wage loss benefits ended on the claim in the 1980s, this claim fell under the Historical Project parameters. However, because the employer had not applied by the October 15, 1998 deadline, the WCB officer should not have issued a decision.

To prevent a recurrence of this type of error, and to consolidate multiple sources of policy, a statement could be added to the *RS&CM* to inform WCB officers that applications cannot be made, and that decisions should not be rendered, on cost relief applications where wage loss ended and/or a permanent disability award was established before January 1, 1994.

(c) *Same Employer*

To ensure consistent practice is followed, and that stakeholders and decision-makers can find policy in one location, the policies set out in the Panel Resolution on cost relief for claims in which the pre-existing disease, condition or disability arises from an earlier compensable injury or disease with the same employer, should be incorporated into the *RS&CM*.

3. OTHER JURISDICTIONS

(a) *Purpose and Rationale*

Three Canadian jurisdictions state directly in their policy that part of their purpose in providing cost relief is to encourage employers to hire disabled or injured workers.¹²

(b) *“But For” and the Issue of Causation*

Seven Canadian jurisdictions consider cost relief for pre-existing conditions or disabilities that *caused, contributed to, or were an underlying factor* in the compensable accident.¹³

It is worth noting that a number of jurisdictions grant 100% cost relief for certain situations, primarily where the pre-existing condition has caused the compensable injury¹⁴ or the wearing of a prosthetic device caused the accident.¹⁵

¹² Newfoundland & Labrador, Ontario, Saskatchewan.

¹³ Prince Edward Island, Yukon, Northwest Territories/Nunavut, Ontario, Saskatchewan, Manitoba, Alberta.

¹⁴ Northwest Territories/Nunavut, Ontario, Saskatchewan, Manitoba, Newfoundland & Labrador.

Manitoba is the only jurisdiction with policy that relates cost relief to time loss payments: where time loss is greater than 12 weeks, the employer will receive cost relief of 50% of the entire cost of the claim.

(c) Same Employer

In the Yukon and Newfoundland & Labrador, cost relief is available where the disability is a consequence of a prior work-related disability.¹⁶ In contrast, Manitoba specifically *denies* cost relief for a pre-existing condition if it relates to a previous accident with the same employer.

4. OPTIONS AND IMPLICATIONS

A. DECISION NO. 271

Option #1 – Maintain Status Quo

Decision No. 271 would not be retired and would continue to hold policy status. Policy would continue to distinguish notification to an employer of the applicability of section 39(1)(e) on a claim based on whether the relief is granted or whether the employer requested the relief.

Implications

- Multiple sources of policy would continue to cause confusion and complexity in the workers' compensation system.
- The BOD's position on the purpose and rationale behind section 39(1)(e) would not be clarified as requested by appellate bodies.
- Ambiguity between Decision No. 271 and the policies related to cost relief in the *RS&CM* would continue to exist.
- Uncertainties and inconsistencies with respect to the "but for" statement in the body of decisions that apply the policies would remain unresolved.
- Policy would not reflect practice regarding the notification of employers of their section 39(1)(e) decisions.

Option #2 – Retire the Decision and Consolidate Policy in the RS&CM

Policy would incorporate the purpose and rationale statement from Decision No. 271 and would address the following issues.

¹⁵ Northwest Territories/Nunavut, Ontario, Manitoba.

¹⁶ *NB – this is the *only* type of pre-existing condition for which Newfoundland & Labrador will grant relief.

- (a) Whether cost relief may be considered for the enhanced portion of a disability resulting from an injury that would not have occurred but for a pre-existing disease, condition or disability are addressed under Option a-i or a-ii (as outlined below).
- (b) Reconciling the WCB's policy and business practice with regard to notifying employers of considerations of cost relief are addressed under Option b-i or b-ii (as outlined below).

Common Implications

- Decision No. 271 would be retired, thereby reducing multiple sources of policy, and reducing complexity and confusion in the workers' compensation system.
- Clarification requested by appellate bodies would be addressed.
- Policy would reflect the original legislative intent for creating section 39(1)(e) and would give decision-makers a written source to justify their decisions.
- Policy on the purpose and rationale would be consistent with that of other Canadian jurisdictions.

(a) "But For" and the Issue of Causation

Option a-i – Adopt the first Appeal Division interpretation, that cost relief may be considered where a particular type of injury would not have occurred in the absence of a pre-existing disease, condition or disability

Implications

- Policy would be most consistent with the notion that section 39(1)(e) is fundamentally a rehabilitation measure.
- Policy would be consistent with longstanding practice and recent decisions of the WCAT.
- Policy would be consistent with other Canadian jurisdictions.

Option a-ii – Adopt the second Appeal Division interpretation, that cost relief may be provided only in relation to the enhancement of a disability and is precluded where a particular type of injury would not have occurred in the absence of a pre-existing disease, condition or disability

Implications

- Any apparent risk of blurring the distinction between the question of a worker's entitlement to compensation and the question of cost relief to an employer would be diminished.

- Precluding cost relief on this basis would not be easily reconciled with the notion that section 39(1)(e) is fundamentally a rehabilitation measure.
- An employer may be unfairly burdened with the costs of a claim that would have been less serious or significant but for a pre-existing disease, condition or disability.

(b) Notification

***Option b-i* – Amend policy to provide that employers are notified of all cost relief decisions where 10 weeks of temporary disability have been paid or a permanent disability award has been granted**

Implications

- Policy would clarify that employers are to be notified of their cost relief eligibility in all cases where the qualifying criteria¹⁷ are met, regardless of whether the employer requested relief or the relief is denied.
- Policy would be more comprehensive.
- The implications of the Historical Project on WCB policy would be consolidated in one place.

***Option b-ii* – Procedural matters related to notification of employers of cost relief decisions would be removed from policy**

The WCB’s 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, would remain in policy. Practice issues regarding how employers are notified of cost relief decisions would be removed.

Implications

- Removal of practice from policy improves operational flexibility.

B. THE PANEL RESOLUTION

***Option #1* – Maintain Status Quo**

The three policies set out in the Panel Resolution would continue to hold policy status, but would not be included in the *RS&CM*.

¹⁷ 10 weeks of disability have been paid or a permanent disability award has been granted.

Implications

- Key dates (January 1, 1994¹⁸ and July 1, 1998¹⁹) would be absent from the *RS&CM*, which could result in decisions being inappropriately adjudicated, contrary to policy.
- Multiple sources of policy would continue to cause confusion and complexity in the workers' compensation system.

Option #2 – Incorporate the Panel Resolution into the *RS&CM*

Incorporate and update the concepts contained in the three policies set out in the Panel Resolution in the *RS&CM*.

Implications

- Complexity and confusion in the workers' compensation system would be reduced by eliminating multiple sources of policy.
- Historical and background information regarding cost relief policy would be maintained in the *RS&CM*. This may prevent inappropriate adjudications from recurring by including references to the policy on cost relief consideration for claims ending prior to March 15, 1978, and to the Historical Project; as well as providing clear instructions that considerations of cost relief are not to be made where wage loss ended and/or a permanent disability award was established before January 1, 1994.
- The WCB's policy on considering cost relief for claims in which the pre-existing disease, condition or disability arises from an earlier compensable injury or disease with the same employer would be readily available to stakeholders and decision-makers in one easily accessible location.

¹⁸ Section 39(1)(e) decisions were to be issued on all claims where wage loss benefits exceeded 13 weeks (now 10) in duration from this date forward.

¹⁹ Cost relief could be considered for claims in which the pre-existing disease, condition or disability arose from an earlier compensable injury or disease with the same employer from this date forward.

PART B – UPDATING POLICY

1. DEFINITIONS

Existing policy in the *RS&CM* does not define the key terms used in section 39(1)(e) considerations. Clarification of the following terms would assist decision-makers.

(a) Pre-existing Condition

A request has been made for policy to set out the minimum requirement for establishing that a worker has a “pre-existing condition”. Policy could adopt the most relevant combination of factors as approved by medical and compensation services subject matter experts, taking into consideration the terms used in other Canadian jurisdictions.

These might include:

- The state of the body (normal or abnormal) prior to an alleged incident or the apparent onset of a disease state;²⁰
- A medical condition present before the occurrence of a workplace injury;²¹
- An underlying or asymptomatic condition that is only apparent after the accident;²² or
- A condition based on a confirmed diagnosis or medical judgment that existed before the current work-related injury.²³

Support for these interpretations is found in the WCAT Decision No. 2004-01001: a pre-existing condition does not have to be symptomatic prior to the current injury, nor does there have to be a history of medical treatment or disability related to the pre-existing condition, for it to be considered for the purposes of relief of costs under section 39(1)(e).

(b) Enhanced

Section 39(1)(e) creates a reserve for the portion of a disability that is enhanced by reason of a pre-existing disease, condition or disability, but it does not explain what is meant by the term “enhanced”.

Policy does not provide a definition of “enhanced”. However, in policy item #114.40B, the term is used in the sense of prolonging recovery or worsening a permanent disability. In policy item #114.41, it is referred to as a worsening of a compensable disability.

In practice, when determining if a disability has been enhanced by reason of a pre-existing disease, condition or disability, the following two questions are considered:

- whether the time of recovery from a compensable disability has been prolonged by reason of a pre-existing disease, condition or disability; and

²⁰ A 1974 memo from a former Director of Medical Services.

²¹ New Brunswick – using a modified version of Taber’s Cyclopedic Medical Dictionary.

²² Ontario, Northwest Territories/Nunavut.

²³ Alberta, Prince Edward Island.

- whether the compensable disability was made worse in extent by reason of a pre-existing disease, condition or disability.

WCB officers do not always consider the second type of enhancement in temporary disability situations (whether the compensable disability was made worse in extent by reason of the pre-existing disease, condition or disability). Policy could be improved by clarifying for decision-makers the two ways in which a disability may be considered “enhanced”.

2. EVALUATION QUESTIONS

Policy item #114.40B considers two questions to evaluate 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?

It has been observed that the policy is ambiguous because it does not connect the severity of the pre-existing disease, condition or disability to the enhancement of the compensable disability.²⁴ This situation could be resolved by adding a third question to the policy: “Did the pre-existing disease, condition or disability play a role in the enhancement of the worker’s disability, and if so, to what extent?”

3. THE GRID

Policy item #114.40B provides that the determination of the extent of relief to be granted under section 39(1)(e) can never be more than an estimate and will always be difficult to determine.

To assist decision-makers, a grid is used in practice to demonstrate a method for determining the amount of relief that should be given to an employer, both for temporary disability benefits and permanent disability awards.²⁵ As illustrated below, the grid plots the medical significance of a pre-existing disease, condition or disability against the severity of the accident, incident or exposure resulting in the compensable injury/occupational disease.

²⁴ See, for example, Review Division Decisions No. 4883 and 10253.

²⁵ The grid is modeled after one developed by the Ontario Workplace Safety Insurance Board (“WSIB”).

Medical Significance of Pre-existing Disease, Condition or Disability	Severity of Accident, Incident or Exposure	Percentage of Cost Transfer
Minor	Minor Moderate Major	50% 25% 0%
Moderate	Minor Moderate Major	75% 50% 25%
Major	Minor Moderate Major	90-100% 75% 50%

In an effort to standardize the practice across the WCB, it is suggested that this grid would be more appropriately placed in policy, with the proviso that it is intended to be used as a tool, and will not apply to every situation. There may be circumstances where the evidence points to a different percentage being relieved, and decision-makers always have the discretion to award cost relief on whatever percentage basis they deem appropriate to a claim under consideration. It is more likely the grid would be used where the distinction between the effects of the pre-existing disease, condition or disability and the compensable injury/disease are not easily made.

In practice, the “medical significance” in the grid is determined by a review of the medical evidence and, where applicable, obtaining an opinion from a Board Medical Advisor. Ontario’s WSIB assesses the medical significance of a condition in terms of the extent that it makes the worker liable to develop a disability of greater severity than a normal person, without requiring an associated pre-accident disability. It may be helpful to include both of these statements in policy.

“Severity of the accident, incident or exposure” is generally determined by a review of the factual evidence, which would include the mechanics of the injury, body positioning, and environmental considerations. It also uses the following definitions of “minor”, “moderate” and “major”:

- Minor – expected to cause non-disabling or minor disabling injury
- Moderate – expected to cause disabling injury
- Major – expected to cause serious disability or probable permanent disability

Policy would also be updated to include these clarifications.

Like the evaluation questions in policy item #114.40B discussed above, the grid does not account for the fact that cost relief is only available where the pre-existing disease, condition or disability enhances the compensable disability. To ensure this element is maintained, an introductory statement could be added to remind decision-makers that the grid should only be used after it has been determined that the pre-existing disease, condition or disability enhanced the compensable disability.

4. OTHER JURISDICTIONS

(a) Definitions

(i) Pre-existing Condition

Many other Canadian jurisdictions include a definition of “pre-existing condition” directly in their policies.²⁶

(ii) Enhanced

Virtually all the other Canadian jurisdictions will consider if the pre-existing condition or disability extends or delays the period of recovery.²⁷

Cost relief is also given (a) where the pre-existing condition itself is aggravated (or accelerated) by the accident²⁸ or (b) for the enhancement factor created by the increased overall disability resulting from the combination of a pre-existing condition with the compensable injury.²⁹

(b) Evaluation Questions

In making determinations similar to that required under section 39(1)(e), Ontario asks three questions for determining cost relief considerations:

- 1) Is there a pre-existing condition present?
- 2) Did the pre-existing condition contribute to the work-related accident? Or
- 3) Did the pre-existing condition prolong or enhance the work-related disability?

Alberta’s policy asks similar questions, but limits them to cases dealing with back injury:

- 1) Is there evidence of a pre-existing condition?
- 2) Is the evidence that the injury aggravated the pre-existing condition?
- 3) Was the disability period prolonged or due to the aggravation?
- 4) Has the total claim cost exceeded the dollar value of eight times the weekly maximum compensation rate?

(c) The Grid

Ontario, the Northwest Territories/Nunavut and Newfoundland & Labrador use a very similar grid for determining the percentage of cost relief to be granted according to the ratings assigned to the medical significance of the pre-existing condition and the severity of the accident.

²⁶ New Brunswick, Ontario, Northwest Territories/Nunavut, Alberta, Prince Edward Island.

²⁷ Yukon, Prince Edward Island, Northwest Territories/Nunavut, New Brunswick, Ontario, Saskatchewan, Manitoba, Alberta.

²⁸ New Brunswick, Ontario, Saskatchewan, Alberta.

²⁹ Northwest Territories/Nunavut, Ontario, Saskatchewan, Alberta.

5. OPTIONS AND IMPLICATIONS

A. DEFINITIONS

Option #1 – Maintain Status Quo

Policy in the *RS&CM* would not be changed.

Implications

- Decision-makers would be required to determine for themselves the meaning of “pre-existing condition”, potentially resulting in inconsistent interpretations.
- Decision-makers may continue to disregard the second consideration of enhancement: a compensable disability that is *made worse in extent* by the pre-existing disease, condition or disability.

Option #2 – Update Policy

Policy in the *RS&CM* would be updated to include a definition of “pre-existing condition”.

Policy would also clarify that in determining if a disability has been enhanced by reason of a pre-existing disease, condition or disability, both the prolongation of the recovery and the extent to which the compensable disability is made worse are considered.

Implications

- Policy would give better direction to decision-makers of the meaning of “pre-existing condition”.
- Policy may fetter the discretion of decision-makers to determine what constitutes a “pre-existing condition” if the definition is too narrow.
- Factors to be considered in determining if a disability has been enhanced by reason of pre-existing disease, condition or disability during decision-making would be more consistently addressed.
- Policy would be consistent with virtually all the other Canadian jurisdictions.

B. EVALUATION QUESTIONS

Option #1 – Maintain Status Quo

The proposed third question would not be added to policy regarding whether the pre-existing disease, condition or disability played a role in the enhancement of the worker’s disability.

Implications

- Policy would remain ambiguous.
- There would continue to be no connection in policy between the extent of the pre-existing disease, condition or disability and the enhancement of the compensable disability.

Option #2 – Add a third question to policy item #114.40B

To evaluate the application of section 39(1)(e), the following question would be incorporated into policy: Did the pre-existing disease, condition or disability play a role in the enhancement of the worker's disability, and if so, to what extent?

Implications

- Policy would be clarified to connect the severity of a pre-existing disease, condition or disability to the enhancement of the compensable disability in the questions set out for decision-makers to apply in making their determination on cost relief.
- Policy would more accurately reflect the parameters of section 39(1)(e).
- Policy would be consistent with a number of other jurisdictions.

C. THE GRID

Option #1 – Maintain Status Quo

The WCB's current practice of using a grid to compare the medical significance of a pre-existing disease, condition or disability with the severity of the accident, incident or exposure that resulted in the compensable injury or disease would not be enshrined in policy.

Implications

- Guidance that would be better provided by policy would continue to only hold the status of practice.

Option #2 – Update Policy

The grid used to compare the medical significance of a pre-existing disease, condition or disability with the severity of the accident, incident or exposure that resulted in the compensable injury or disease would be incorporated into policy.

The terms used in the grid would be clarified and policy would be expanded to state that the grid is intended to be used as only one tool, and that it should only be used after it has been determined that the pre-existing disease, condition or disability enhanced the compensable disability.

Implications

- Policy would be aligned with current WCB practice.
- Policy would be more comprehensive.
- Policy would be consistent with a number of other jurisdictions.
- Policy would be clarified to connect the severity of a pre-existing disease, condition or disability to the enhancement of the compensable disability.
- Policy would more accurately reflect the parameters of section 39(1)(e).

PART C – HOUSEKEEPING

1. INJURY

Policy items #114.40B and #114.41 make reference to cost relief being available only for an “injury”, while in fact, workers may receive compensation for personal injuries under section 5, mental stress under section 5.1 and occupational disease under section 6 of the *Act*, any of which might be enhanced by reason of a pre-existing disease, condition or disability. For this reason, policy should be updated to remind decision-makers that cost relief is available for a disability from a personal injury, mental stress or occupational disease that has been enhanced by reason of a pre-existing disease, condition or disability.

2. DISABILITY AWARDS OFFICERS

For permanent partial or permanent total disabilities, policy item #114.40B requires Disability Awards Officers, “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”.

This has generally been interpreted to mean that the Disability Awards Officer can make the section 39(1)(e) decision with or without consulting a Board Medical Advisor, as needed. A recent Review Division decision suggested that a Disability Awards Officer must always seek the advice of a Board Medical Advisor.³⁰ This perceived requirement would be contrary to the approach taken to assessing temporary disability claims and could create a significant strain on limited Board Medical Advisor resources.

As a result, it may be useful to clarify in policy that a Disability Awards Officer may consult with a Board Medical Advisor, but that such consultation is not required.

3. CROSS-REFERENCE REQUEST

Policy item #115.30 – *Experience Rating*, provides a list of the types of claim costs that are excluded from an employer’s experience rating calculation under section 42 of the *Act*. The policy cross-references each of these claim types to another policy that provides further details on that type of claim, except for item #5, occupational diseases.

Providing a cross-reference to policy item #113.20 – *Occupational Diseases* would make this item consistent with the others listed in policy item #115.30.

³⁰ Review Division Decision No. 9769.

4. APPEAL RIGHTS VS REVIEW RIGHTS

Policy should clarify that relief of cost decisions made before March 3, 2003 are appealed directly to the WCAT and not to the Review Division in accordance with the transitional provisions in the *Workers Compensation Amendment Act (No. 2), 2002*.³¹

5. OPTIONS AND IMPLICATIONS

Option #1 – Maintain Status Quo

Policy in the *RS&CM* would not be changed.

Implications

- Policy items #114.40B and #114.41 would continue to make reference to cost relief being available only for an “injury” and as a result, cost relief may be inappropriately denied for disabilities resulting from compensable mental stress or a compensable occupational disease.
- The implication that Disability Awards Officers must always seek a Board Medical Advisor’s opinion before making a determination would be contrary to the approach taken to assessing temporary disability claims, and if enforced, could create a significant strain on limited Board Medical Advisor resources.
- Policy item #115.30 would continue to cross-reference policies to all other types of excluded claim costs except occupational diseases.
- Policy would be less helpful to decision-makers and stakeholders.
- Policy would not be updated to reflect proper appeal processes.

Option #2 – Update Policy

The following housekeeping changes would be made:

- Policy would be updated to remind decision-makers that cost relief is available for disabilities from compensable injuries, mental stress or occupational diseases that have been enhanced by reason of a pre-existing disease, condition or disability.
- Policy would be clarified that the Disability Awards Officer has the discretion to determine whether a Board Medical Advisor consultation is necessary when assessing all the relevant medical information to make a determination regarding relief of costs.
- Policy item #115.30 would cross-reference policy item #113.20.

³¹ S.B.C. 2002, c. 66, section 41(1)(a)(i).

- Policy would affirm that relief of costs decisions made before March 3, 2003 are appealed directly to the WCAT and not to the Review Division.

Implications

- Policy would more accurately reflect cost relief availability.
- Policy would clarify that a Disability Awards Officer has discretion as to when to consult a Board Medical Advisor in making a determination regarding relief of costs.
- Item 5 on Occupational Disease would be consistent with the other items listed in policy item #115.30 in cross-referencing policy on all the types of excluded claim costs.
- The process for exercising a party's right to appeal a cost relief decision would be articulated in policy.

CONSULTATION

A draft policy framework is set out in Appendix 1 incorporating all of the elements set out in Option 2 for each section of the paper, including Options 2(a)(i) and 2(b)(i) from Part A. Stakeholders are invited to provide feedback on the options provided and may provide any additional comments that may be relevant to the issue.

Stakeholder comments will be accepted until **November 1, 2004**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

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The WCB's governing body, the Board of Directors, will consider the opinions expressed by stakeholders before it adopts any amendments to the current policies. 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*.

APPENDIX 1

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

This policy is effective until September 27, 2002.

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 permanent disability 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 worker 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 Board officer 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 Board officer 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 Board officer 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.

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

~~This policy is effective September 28, 2002.~~

~~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 permanent disability 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 worker has been temporarily disabled for a minimum period of 10 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 Board officer 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 Board officer 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 Board officer 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.~~

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

Overview

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 intent of this section is to give reassurance to potential employers that, in employing workers with pre-existing diseases, conditions or disabilities, they will not incur undue costs in respect of possible future injuries that are enhanced as a result of the pre-existing diseases, conditions or disabilities.

Given the intent of section 39(1)(e), and that the wording of the section focuses on the creation of a reserve, policy has been established to guide decision-makers in the determination of whether, and to what extent, an employer is entitled to claim cost relief under section 39(1)(e).

The Board is responsible for initiating section 39(1)(e) cost relief considerations with or without a specific request or application by an employer, and to decide upon the applicability of the section on a claim. Section 39(1)(e) cost relief decisions do not impact a worker's entitlement to compensation.

Eligibility

Cost relief consideration does not occur on claims where wage loss ended and/or a permanent disability award was established on or before December 31, 1993.³²

Between January 1, 1994 and September 27, 2002, an employer was eligible for cost relief consideration under section 39(1)(e) in two situations:

- a) on all claims where there had been 13 or more weeks of temporary total and/or temporary partial disability benefits paid;
- b) a permanent disability award had been granted.

Cost relief can be considered on claims where the pre-existing disease, condition or disability arose from an earlier compensable injury or disease with the same employer, where the date of injury or disease for the injury or disease on which "relief" is sought, is on or after July 1, 1998.

³²Pursuant to the Historical Relief of Costs Project resolved by the Panel of Administrator's Resolution #98/04/23-03 on April 23, 1998.

As of September 28, 2002, an employer is eligible for cost relief consideration under section 39(1)(e) in two situations:

- a) on all claims where there has been 10 or more weeks of temporary total and/or temporary partial disability benefits paid;**
- b) a permanent disability award has been granted.**

No minimum period of temporary disability is required in order for cost relief to be considered on claims where there is a permanent disability, but all of the costs of a claim cannot be charged under section 39(1)(e).

When section 39(1)(e) cost relief does not apply

If a worker suffers a compensable personal injury (including mental stress or occupational disease), and there is no evidence of any pre-existing disease, condition or disability, the section is inapplicable. The fact that a disability has been enhanced by other factors than a pre-existing disease, condition or disability is not a ground for relief 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.

What is a Pre-existing disease, condition or disability?

A "pre-existing" disease, condition or disability is one that exists before the compensable injury and is established by a confirmed diagnosis or medical opinion. It does not have to be symptomatic prior to the compensable incident, nor does there have to be a history of medical treatment or disability related to the pre-existing disease, condition or disability, for it to be considered for the purposes of relief of costs under section 39(1)(e).

Evaluation process

Three 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?**
- 3. Did the pre-existing disease, condition or disability play a role in the enhancement of the worker's disability, and if so, to what extent?**

“Enhanced” means both the prolongation of recovery and the extent to which the compensable disability is made worse due to the pre-existing disease, condition or disability.

Evidence that may be considered in determining the degree of prolongation or worsening of a disability includes:

- **medical opinion regarding the “normal” recovery time for the particular type of injury**
- **medical opinion regarding the “normal” post-surgical recovery time**
- **the requirement of additional health care services (physiotherapy, hospitalization, etc.)**
- **medical evidence contained on the claim.**

All relevant factors are considered in the decision-making process.

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, cost relief under section 39(1)(e) will not normally be applicable. However, the section will clearly be applicable to those situations where a worker suffered a relatively minor disability at the time the instant claim was initiated, but there is evidence that the recovery period was prolonged, or a permanent disability was made worse in extent, by reason of a pre-existing disease, condition or disability.

Once it has been determined that a pre-existing disease, condition or disability has enhanced the compensable disability, the Board then determines the amount of cost relief to be granted to an employer.

The grid below is one tool that may be used to determine the amount of cost relief to be granted to an employer. It plots the medical significance of the pre-existing disease, condition or disability against the severity of the accident, incident or exposure resulting in the compensable disability.

Medical Significance of Pre-existing Disease, Condition or Disability	Severity of Accident, Incident or Exposure	Percentage of Cost Transfer
Minor	Minor	50%
	Moderate	25%
	Major	0%
Moderate	Minor	75%
	Moderate	50%
	Major	25%
Major	Minor	90-100%
	Moderate	75%
	Major	50%

A determination of the medical significance of the pre-existing disease, condition or disability is based on a review of the medical evidence and, where applicable, obtaining an opinion from a Board Medical Advisor.

The severity of the accident, incident or exposure is generally determined by a review of the factual evidence, including the mechanics of the injury, the activity the worker was undertaking at the time of the injury and the conditions of the worksite.

The following definitions will assist in assessing the severity of the accident, incident or exposure:

“Minor” severity is expected to cause either no disability or a minor disability.

“Moderate” severity is expected to cause a disability.

“Major” severity is expected to cause serious disability or probable permanent disability.

How much disability stems from the compensable 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 may be appropriate for the Board officer to determine that all of the costs of these benefits after a particular point in time should be charged under section 39(1)(e). Alternatively, it may also be determined that a percentage is relieved from a certain time onwards.

In respect of permanent disability awards, it is necessary for the Disability Awards officer, using his or her own best judgment and having reference to applicable medical evidence, to establish a percentage applicable to the pre-existing condition and to charge the relevant costs accordingly. It is noted that 100% cost relief cannot be granted for a permanent disability award, as this would imply that no portion of the permanent disability resulted from the work-related injury.

Communication of relief of cost decision

A decision on cost relief is made after an employer becomes eligible for cost relief consideration on a claim, and as soon as there is evidence to determine whether the compensable disability was enhanced as a result of a pre-existing disease, condition or disability.

If a decision has not already been made, a cost relief decision will be made at claim closure or after six months of wage loss has been paid, whichever comes first. Cost relief decisions may be deferred beyond the six month point of the claim, but only if the impact of the pre-existing disease, condition or disability on the compensable disability is not yet clear, or major diagnostic procedures have been scheduled that would clarify whether a pre-existing disease, condition or disability actually exists.

The Board will notify the employer of the applicability of cost relief under section 39(1)(e) to the worker's claim.

If there is a disagreement with such a decision, the employer may request a review by the Review Division. Relief of cost decisions made before March 3, 2003 are appealed directly to the WCAT and not to the Review Division.³³

³³ *Workers Compensation Amendment Act (No. 2), 2002, S.B.C. 2002, c. 66, section 41(1)(a)(i).*

#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 policy item #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 policy item #44.31 section 5(5) can also apply if a permanent disability award is being assessed on a loss of earnings basis under section 23(3) of the 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 worker.

Section 39(1)(e) is concerned only with the **rate group class** to which the costs of the claim are to be charged and cannot affect the entitlement of the worker. It can apply in cases where section 5(5) does not apply and the whole of the worker'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 **rate group class** of the worker'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 worker's body.

The fact that a compensable injury is more serious or significant than it otherwise would have been in the absence of a pre-existing disease, condition or disability does not preclude consideration of whether cost relief should be granted for the enhancement of the compensable disability that results.

~~#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:** — Not applicable.~~

#115.30 Experience Rating

Section 42 provides as follows.

The Board shall 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, 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

(see policy item #113.20)

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 C-11-88.40, 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~~ **Worker and Employer 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.