

PRACTICE DIRECTIVE #38B

RECURRENCES

Amended: October 16, 2002
Effective Date: October 16, 2002

A. BACKGROUND

On June 30, 2002, the *Workers Compensation Act* (the “Act”), was amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. As a result, the Panel of Administrators approved amendments to the Board's policies. The amendments change the rules for calculating compensation benefits.

On October 16, 2002, further amendments were made to the transition rules outlined in Chapter 1 of the *Rehabilitation Services and Claims Manual* (“RSCM”), Vol. I and II.

For convenience, the law and policy as they read immediately before June 30, 2002, are called the “former provisions”. The law and policy as they read after June 30, 2002, are called the “current provisions”.

B. PURPOSE

This Directive provides guidance to Board officers in identifying the situations to which the transition rule in section 35.1(8) of the *Act* applies.

This Directive applies to recurrences of temporary disability and recurrences of permanent disability. Board officers should refer to Practice Directive #38A, *Effective Dates and Transition Rules*, for the appropriate transition rule.

C. EFFECTIVE DATE

This Directive is effective October 16, 2002 and applies to all adjudication decisions made on or after October 16, 2002. It replaces Practice Directives #38, which was issued on June 30, 2002 and amended on August 13, 2002.

D. LAW

The transition rule in section 35.1(8) of the *Act* states:

“If a worker has, on or after the transition date, a recurrence of a disability that results from an injury that occurred before the transition date, the Board must determine compensation for the recurrence based on this Act, as amended by the Workers Compensation Amendment Act, 2002.”

E. POLICY

(a) Temporary Disability

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The Rehabilitation Services and Claims Manual (“RSCM”), Vol. I and II, Policy item #1.00, *Introduction*, states that a recurrence includes:

“...any additional period of temporary disability where no permanent disability award was previously provided in respect of the compensable injury or disease.”

The policy also provides an example of a recurrence:

“A worker totally recovers from a temporary disability resulting in the termination of wage-loss payments. Subsequently, there is a recurrence of the disability and the claim is re-opened for compensation.”

(b) Permanent Disability

RSCM Policy item #1.00 also includes within the scope of a recurrence:

- *“any additional period of temporary disability where a permanent disability award was previously provided in respect of the compensable injury or disease; and,*
- *any permanent changes in the degree of a worker’s permanent disability.”*

The policy also provides an example of a recurrence:

“A worker is in receipt of a permanent disability award and the disability subsequently worsens. The claim is re-opened to provide compensation for a new period of temporary disability and/or an increase in entitlement for the permanent disability award.”

F. RECURRENCES

Section 35.1(8) applies to all claims with a date of injury before June 30, 2002, where there is a *recurrence of disability* after June 30, 2002. In the majority of cases, a claim is reopened because of a recurrence of disability, and as such, the reopening is subject to the current provisions.

The policy states *“...any additional period of temporary disability...”*. However, the example discusses the situation where a worker *“totally recovers”*.

It is recognized that by “finalling” a claim, the Board officer has made an administrative determination that the worker is no longer temporarily disabled. (In most cases, this means that the worker is fit to return to full pre-injury duties.) However, in certain cases, the claim will remain under the former provisions, despite a reopening of that claim. The following are some examples.

G. EXAMPLES

SURGERY

If the worker has outstanding (scheduled) surgery at the time his or her claim is finalled, the claim will remain under the former provisions when the claim is reopened for the surgery. As long as the surgery had been scheduled as of the time the claim was finalled, it would not matter if the surgery could not be *performed* immediately due to the length of surgical waitlists.

If a second surgery is required to remove hardware (pins, plates, staples, etc.) or sutures inserted during the original surgery, the second surgery is reasonably foreseeable in the immediate future. As such, a future reopening of the claim on account of the second surgery would remain subject to the former provisions.

RETURN-TO-WORK

For example, an employer might accommodate the worker in full-time selective light or modified employment in spite of objective signs of disablement with respect to his or her pre-injury job demands. For administrative purposes, the Board officer finalled the claim because the worker did not experience any further “economic” disablement.

If a worker is no longer able to continue with full-time modified work, or the modified work is no longer available, Board officers must determine whether a worker’s inability to work is a continuation of the original condition, notwithstanding that the claim may have been finalled. Criteria to consider may include objective medical evidence indicating that the worker remains unable to perform the regular/appropriate available alternate duties.

Another example where a claim might have been finalled is where a worker was scheduled to perform a graduated return-to-work program, after which the worker would have been deemed fit for full duties. In these cases, Board officers must exercise caution in prematurely finaling a claim, as the original return-to-work date may have been based on an estimate. Also, where a return-to-work is unsuccessful within a very short period of time, a reopening would not likely be deemed a recurrence of disability, but simply a continuation of the existing disability. Board officers may therefore choose to monitor the durability of a return-to-work prior to finaling the claim.

VOCATIONAL REHABILITATION

If a worker’s disability reaches plateau on or after June 30, 2002 and the claim is referred to Vocational Rehabilitation Services (“VRS”), the former provisions continue to apply.

However, if a claim is later reopened for temporary disability benefits, because the worker is not able to continue with the vocational rehabilitation (“VR”) plan due to a recurrence of disability, the current provisions apply.

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If a claim is reopened for surgery while the worker is undertaking VR assistance, and the surgery was scheduled at the time the claim was finalised and had been referred to VR, the reopening would remain under the former provisions. However, if the surgery was not scheduled as of the time the claim was finalised, the reopening would be subject to the current provisions.

If a claim is reopened because new medical evidence indicates that, with the benefit of hindsight, the worker's disability had not, in actuality, reached plateau, a reopening would be subject to the former provisions. In these circumstances, the worker's claim has been, in effect, finalised in error and thus, the reopening is not due to a recurrence of disability. A Medical Advisor's opinion would likely be required to substantiate that the worker's disability had not reached plateau.

ADMINISTRATIVE ERRORS

If it were later discovered that a claim was finalised as a result of an administrative error, a reopening of the claim would remain subject to the former provisions, as there has not been a recurrence of disability. Examples include typographical and data entry errors.

HEALTH CARE ONLY CLAIMS

If less than 12 weeks have elapsed between the last treatment and the date of the temporary disability, this would not constitute a recurrence. In the absence of evidence to the contrary, the reopening would be treated as a continuation of the original claim, and the former provisions would apply.

If 12 or more weeks have elapsed between the last treatment and the date of the temporary disability, in the absence of evidence to the contrary, it is presumed that the reopening is a recurrence. As such, the current provisions would apply.