

PRACTICE DIRECTIVE #67

RELIEF OF COSTS: DETERMINING THE AMOUNT

Effective Date: February 1, 2004

BACKGROUND

Section 39(1)(e) of the *Act* 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 policy (see below) provides factors to be considered in determining when the section is applied but limited guidance for determining the amount that should be relieved.

The table that is described in this Practice Directive has been used since its introduction in 1995 concurrent with the establishment of the Historical Relief of Cost Project. The Review Division and Board officers requested a Practice Directive be issued so as to make the table and the associated guidelines known to stakeholders as well as decision makers.

PURPOSE

This practice directive is intended to provide guidance in determining the **amount** of relief to grant when considering section 39(1)(e) of the *Act* both for temporary disability benefits and permanent disability awards. It does not replace practice directives #7, 16, 29, 42 or 62.

POLICY

The *Rehabilitation Services and Claims Manual*, Volume II, Policy item #114.40B *Enhancement of Disability by Reason of Pre-existing Disease, Condition or Disability* states, in part:

Two questions are considered when evaluating the application of 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.

(Emphasis added) 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.

EFFECTIVE DATE

This method of calculating the amount of cost relief granted has been used since the Historical Relief of Costs Project of 1995.¹ Although this directive takes effect February 1, 2004, the earlier use of the table and guidelines was and continues to be appropriate.

ADJUDICATIVE GUIDELINES

1. The consideration of relief of costs under section 39(1)(e) is applicable in cases when:
 - There has been in excess of 10 weeks of temporary total and/or temporary partial disability benefits paid. It is granted from a specific date.

¹ In 1995, the Senior Executive Committee of the Board established the Section 39(1)(e) Historical Relief of Costs Project to deal with the application of section 39(1)(e) to temporary wage loss costs on claims between 1978 and 1993. The decision of the Panel of Administrators, number 98/04-23-03, April 23, 1998, Section 39(1)(e), brought closure to the project by prescribing the parameters within which the claim files would be dealt with.

- A permanent disability award has been assessed. No minimum period of temporary disability is required.
2. Factors to be considered when determining whether cost relief applies, and, to what extent, include:
 - Is there evidence of a pre-existing condition, disease or disability?
 - How significant is the pre-existing condition, disease or disability?
 - What was the severity of the accident, incident or exposure initiating the claim?
 - Has the pre-existing condition, disease or disability enhanced (made greater in extent) the compensable disability?
 - What is the "normal" recovery period for this type of injury/occupational disease?
 3. The Board officer first determines **whether** the worker has a pre-existing disease, condition or disability in the area of injury or elsewhere. The Form 6, Form 7 and Form 8 may note prior problems. The medical reports should be carefully reviewed for information that would indicate the presence of any of these. Evidence may include prior treatment and surgeries, fractures, dislocations, tears, depression, obesity, diabetes, degenerative conditions such as degenerative disc disease, chondromalacia, prior WCB claims, and prior motor vehicle accidents. An absence of evidence of a pre-existing condition, disease or disability means section 39(1)(e) does not apply.
 4. Where there is evidence of a pre-existing condition, disease or disability, the Board officer next determines its medical significance, whether minor, moderate or major, by reviewing the medical evidence and obtaining an opinion from a Board medical advisor where applicable.
 5. The Board officer also determines the **severity** of the accident, incident or exposure by a review of the factual evidence, such as:
 - i. The mechanics, significance and severity of the incident (was there a fall, blow, twist, lift: weights and forces involved);
 - ii. Body position (kneeling, sitting, bending, degree of awkwardness, ergonomic factors);
 - iii. Environmental conditions (slippery/uneven terrain, proximity to chemical in exposure claims); and
 - iv. The extent of disability normally expected to result from an accident, incident or exposure similar to that of the worker.

The severity of the incident is described as minor, moderate or major using the following definitions:

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

6. The following table was developed by the Ontario Workers' Compensation Board (now WSIB, Workplace Safety & Insurance Board) and demonstrates a method for determining the amount of cost relief by considering the medical significance of the pre-existing condition, disease or disability and the severity of the accident, incident or exposure resulting in an injury/occupational disease. This may be used as a tool to assist in weighing varying degrees of pre-existing factors and accident/incident severity.

Medical Significance of Pre-existing Condition	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%

This method will not apply on all claims. There may be circumstances where the evidence points to a different percentage being relieved. It is more likely the table would be used where the distinction between the effects of the pre-existing condition/disease/disability and the compensable injury are not easily made. For example: where the evidence and medical opinion indicate the worker would have recovered from the compensable injury by a certain date had it not been for a pre-existing condition, it may be appropriate to grant 100% cost relief from that date forward and not use the table.

The amount of cost relief for temporary disability benefits is applied on the basis of a percentage up to 100%; relief is granted on permanent disability awards` as a percentage of less than 100%.

The Board officer makes a final determination on the amount of cost relieved based on the evidence available. Sources of evidence may include:

- the historical evidence on file including submissions from consultants;
- the medical evidence including medical opinions from the Board Medical Advisor and outside medical practitioners. The Board Medical Advisor's opinion is just one piece of evidence to consider and not the final word on the application of relief of costs.
- decisions made by Board officers and appellate bodies.

7. Send the appropriate decision letter.

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