

DISCUSSION PAPER

1. TITLE

Chapter 3 – Compensation for Personal Injury

2. ISSUE

The policies in Chapter 3 of the *Rehabilitation Services and Claims Manual*, Volume II (“*RS&CM*”) provide direction primarily on the determination of whether a worker’s personal injury or death arises out of and in the course of the employment and is therefore compensable. The policies contained in Chapter 3 were identified for review and revision for three primary reasons:

- Decisions rendered by WorkSafeBC (“WCB”) staff with respect to the Chapter 3 policies are the most common source of reviews and appeals in the workers’ compensation system;¹
- Issues have been raised over time by various WCB staff, stakeholders, and in Workers’ Compensation Appeal Tribunal (“WCAT”) decisions on specific policies; and
- the policies have not been comprehensively reviewed, and due to discrete policy changes over the years, are lacking internal consistency in terms of content, formatting and style, which will only worsen with further piecemeal amendments.

3. BACKGROUND

3.1 Law

The *Workers Compensation Act* (the “*Act*”) includes several key initial entitlement provisions, relating to personal injuries, which are discussed in Chapter 3:

- a worker is entitled to compensation for personal injury or death arising out of and in the course of the employment;²
- compensation may not be payable to a worker where the worker’s injury is attributable solely to the serious and wilful misconduct of the worker, unless the injury results in death or serious or permanent disablement;³

¹ One quarter of all issues addressed in reviews and appeals are related to Chapter 3 policies.

² Section 5(1).

³ Section 5(3).

- there is a presumption in favour of compensation if a worker's injury is caused by accident that either arose out of the employment or occurred in the course of the employment;⁴
- a worker is entitled to compensation for mental stress that does not result from an otherwise compensable personal injury, if the mental stress is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker's employment, which is properly diagnosed and not caused by employment or labour relations issues;⁵ and
- WCB may replace or repair artificial appliances, eyeglasses, dentures and hearing aids, even if there is no other objective sign of a personal injury.⁶

3.2 Current Policy

Current policy item #14.00, *Arising Out of and In the Course of Employment*, is the principal policy in Chapter 3, setting out the basic decision-making principles for adjudicating the section 5(1) test of the *Act* for whether a personal injury or death arises out of and in the course of the employment.

The rest of the current introductory policy items (#12.00 – #14.20) distinguish personal injuries from diseases, and define mental stress and accident.

The focus of the majority of the policies in Chapter 3 is on injury causation – whether the injury is caused by something natural in the worker's body as opposed to a feature of the worker's employment (current policy items #15.00 – #15.60) – or whether a contributing factor to the injury or death is considered significantly related to the employment as to form part of the employment, as in the cases of:

- unauthorized activities (policy items #16.00 – #16.60);
- hazards arising from nature (policy items #17.00 – #17A.20);
- traveling to and from work (policy items #18.00 – #18.42);
- facilities provided by the employer (policy items #19.00 – #19.41);
- extra-employment activities (policy items #20.00 – #20.50); and
- personal acts (policy items #21.00 – #21.40).

Current policy items #22.00 – #22.35 are designed to assist decision-makers in determining which consequences of an accepted personal injury claim will also be compensable.

⁴ Section 5(4).

⁵ Section 5.1.

⁶ Section 21(8).

Current policy items #23.00 – #23.70 are designed to assist decision-makers in determining whether to award compensation for the replacement or repair of artificial appliances, eyeglasses, dentures and hearing aids, even in the absence of a personal injury.

Current policy item #24.00 provides guidance on adjudicating claims under the *Government Employees Compensation Act* (“GECA”).

4. DISCUSSION

The aim of the re-write of Chapter 3 is two-fold:

- to facilitate consistent adjudication by clarifying the “arising out of and in the course of the employment” test for entitlement, and the process for weighing the evidence in order to make a determination; and
- to resolve a number of specific issues that have been identified as problematic with certain policies.

After completing a comprehensive review of the policies, appellate-level decisions, the approaches taken in other Canadian jurisdictions and in American jurisprudence, as well as consulting with subject matter experts within the WCB, a set of revised policies for Chapter 3 was drafted, attached as Appendix A.

A summary of the changes is set out in the Table of Concordance, which maps out where current policy is found in the proposed revisions, and is attached as Appendix B.

4.1 Significant Proposed Amendments

The majority of policy items in Chapter 3 only require minor to moderate revisions: to put them into the new *RS&CM* policy format, update language, remove outdated examples, and make limited clarifications. The following proposed policies include more moderate to significant review and revision, including combining some of the current policies under common headings in some instances.

a) Proposed Item C3-14.00, *Arising Out of and In the Course of the Employment*

Current policy item #14.00, *Arising Out of and in the Course of Employment*, sets out the basic decision-making principles for adjudicating the *Act’s* initial entitlement test for whether personal injury or death arises out of and in the course of the employment. It was identified as requiring review to clarify:

- the meanings of the two components of the employment connection test: “arising out of” and “in the course of”;

- the application of the indicators listed as guidance for deciding whether an injury should be classified as one arising out of and in the course of the employment; and
- how “causative significance”, medical evidence, and “the balance of probabilities” should be addressed in policy.

The proposed policy clearly states that Item C3-14.00 is the principal policy for determining a worker’s entitlement to compensation for personal injury or death under the *Act*. The proposed policy articulates the two components of the entitlement test and provides direction on the types of evidence to be considered in applying that test.

The primacy of Item C3-14.00 has been emphasized throughout the proposed Chapter.

b) Proposed Item C3-15.00, *Injuries Following Natural Body Motions at Work*

Current policy item #15.20, *Injuries Following Motions at Work*, addresses situations where a worker’s injury appears to result from a “natural” body motion, such as bending over to pick up a piece of paper. If a job requires a particular motion, and that motion results in injury, it is an indication that the injury arose out of the employment and is compensable. If an injury results from some motion of the human body that is not required as part of the job, but just happens to be undertaken at work, it is an indication that the injury did not arise out of the employment and is not compensable.

Current policy item #15.20 was identified as requiring review. It has been inconsistently interpreted and applied due to confusion regarding the requirements that must be met in order for a motion performed at work to be considered work-related. Clarification was identified as necessary, for determining the work-relatedness of “minor” work activities or motions, where it is asserted that an injury occurred as a result.

The proposed policy incorporates a revised framework for determining entitlement for injuries following natural body motions. The proposed policy reflects the revisions to the principal policy of Chapter 3 (proposed Item C3-14.00), by clarifying the requirements of “sufficient employment connection” and “causative significance” for injuries involving natural body motions at work.

c) Proposed Item C3-16.00, *Pre-Existing Conditions or Diseases*

Current policy item #15.00, *Natural Causes*, was identified as requiring review to clarify the meaning of the term “natural causes”.

Current policy item #15.30, *Recurring Temporary Disabilities*, was also identified as requiring review. It provides guidance in relation to cases where a worker is

subject to recurring disabilities of a temporary nature, whether at work or elsewhere. Clarification was identified as necessary to determine whether this policy and its principles are restricted solely to “recurring temporary disabilities”, or whether it could also be used for injuries that result from “non-recurring” temporary conditions such as fainting at work.

The proposed Item C3-16.00 replaces the phrase “pre-existing conditions or diseases” for “natural causes”, which was identified as a confusing term. Furthermore, the term “pre-existing conditions or diseases” is considered more easily defined and less subjective, from a medical point of view.

The proposed Item C3-16.00 also removes the concept of “recurring” to clarify that the principles of current policy item #15.30 may be used for both recurring and non-recurring pre-existing, non-deteriorating conditions.

d) Proposed Item C3-17.00, *Deviations from Employment*

Current policy items #16.00 – #16.60 on unauthorized activities includes a variety of non-employment activities that may contribute to a worker’s personal injury or death, for example, engaging in horseplay or being intoxicated, while at work. The proposed policy merges them into a single policy with the more accurately descriptive title, “Deviations from Employment”.

Current policy item #16.10, *Intoxication or Other Substance Impairment*, was identified as requiring review. It provides guidance in relation to cases where the worker has engaged in the consumption of alcohol or another intoxicating substance. It has been the subject of strong criticism by the appellate bodies for not reflecting society’s values towards intoxication and concerns for safety, and for being too lenient in allowing compensation.⁷

Current policy item #16.30, *Assaults*, was identified as requiring review to clarify whether compensation should be payable for assaults sustained by employees outside of work hours and away from the employer’s premises, where the reason for the assault is directly related to the employee’s work.

The proposed Item C3-17.00, considers the causative significance of a worker’s conduct in the occurrence of his or her injury or death and whether the worker’s conduct was such a substantial deviation from the reasonable expectations of employment as to take the worker out of the course of the employment. It stipulates that an insubstantial deviation does not prevent an injury or death from being considered to have arisen out of and in the course of the employment.

⁷ See, for example, Appeal Division Decision No. 00-0206 and WCAT Decision No. 2005-00031ad.

The proposed policy includes three noteworthy changes:

(i) Emergency Actions⁸

The proposed policy provides that a worker's injury or death may be compensable if the employer would have considered the worker to have been acting to protect the employer's interests during an emergency. For example, a worker assists a customer who has fallen, and in the process, strains his or her back.

(ii) Alcohol Consumption⁹

The proposed policy would allow a worker's injury or death to be compensable if the employer permitted the worker to drink, as part of the job, though not if the worker went beyond the pursuit of the employer's interests to engage in a social event. It would also provide that if alcohol consumption were an unauthorized activity while on the job and the causative significance of the alcohol consumption were predominant in the resulting injury or death, while the employment factors were neutral, this would not favour coverage.

(iii) Assaults on the Worker¹⁰

Where an assault is clearly related to the employment, the proposed policy would allow an assailant's attack on a worker to bring the worker into the course of the employment, and therefore enable a worker's injury or death to be compensable, even if it were the result of an assault that occurred away from the workplace and outside of working hours.

e) Proposed Item C3-19.00, *Work-Related Travel*

Current policy items #18.00 – #18.42 address the issue of a worker's entitlement to compensation where the worker's injury or death occurs in the course of travel that is somehow connected to the worker's employment. The basic principle has always been that travel undertaken by a worker as a regular commute is not compensable. On the other hand, where travel is an inherent part of a worker's job, it will be compensable.

Current policy item #18.32, *Irregular Starting Points*, was identified as requiring review. It is clear that workers who first report to an employer's assembly area and then go to different work locations do not have workers' compensation coverage for their travel from home to the employer's assembly area, but do have coverage for their travel from the employer's assembly area to their first

⁸ Found in proposed Item C3-17.00, Section C, For Employer's Benefit.

⁹ Found in proposed Item C3-17.00, Section D, Part of Job.

¹⁰ Found in proposed Item C3-17.00, Section F, Activity of the Employer, a Fellow Employee, or the Worker, ii. Assault.

worksite. Clarification of the extent of coverage was identified as necessary, for workers do not first report to an employer's assembly area at all, but rather are dispatched each day directly from home.

Current policy item #18.40, *Travelling Employees*, was identified as requiring review to clarify the definition of "traveling employee".

The proposed Item C3-19.00 establishes four categories of work-related travel: Regular Commute, Journeys to a Remote Worksite, Traveling Employees, and Business Trips.

Travel undertaken by a worker as a regular commute is not compensable. Exceptions may be made where an injury or death results:

- On the employer's premises; for example, because the employer has failed to provide a safe means of access or egress from the worksite; or
- From following the instructions of the employer; for example, because the worker is required to make a special trip to the worksite to attend to an emergency.

Travel undertaken by a worker to a remote worksite may be compensable, because the journey is not simply a routine matter of driving to and from work on a regular commute. Where limited transportation options are available, an injury or death may be compensable if:

- there is a lack of available labour in the employer's area to meet the employer's needs;
- the employer has extended its network of hiring arrangements to distant places, and
- payment of travel time or expenses form part of the employment contract, in order to induce the worker to undertake the journey to the remote location.

For traveling employees, travel is an inherent part of the job. The proposed policy defines traveling employees as workers who:

- typically travel to more than one work location in the course of a normal work day as part of their employment duties; for example, taxi drivers or emergency response personnel; or
- have a normal, regular or fixed place of employment, and are directed by the employer to temporarily work somewhere else; for example, sales representatives or persons attending off-site business meetings.

The proposed policy clarifies that workers with irregular starting points or who are assigned to travel to a temporary place of work are generally considered to be in the course of the employment from the time they leave home, and that coverage begins when the workers commence travel on the public roadway.

Where a worker goes on a business trip, an employment connection generally exists continuously throughout the trip. Exceptions may be made if the worker makes a distinct departure of a personal nature. There is an obvious overlap between employment and personal affairs when a worker is on a business trip. The proposed policy clarifies that a “distinct departure” is more than a brief and incidental diversion, such as social or recreational activities that are not incidental to the business trip.

f) Proposed Item C3-20.00, *Employer-Provided Facilities*

Current policy items #19.00 – #19.41 address the role of a worker’s use of employer-provided facilities in the worker’s personal injury or death. Current policy item #19.20, *Parking Lots*, was identified as requiring review to clarify the weight to be assigned to each of the five questions it sets out for determining whether an injury occurring in a parking lot is compensable. Adjudicators often rely on just one factor – employer-control of the parking lot – as a determinant for compensation.

The proposed Item C3-20.00 addresses the concerns raised about parking lots by stating that no single criterion is determinative and noting that while control of the parking lot by the employer weighs in favour of coverage, if control does not exist, the other factors from current policy may demonstrate an employment connection, such as whether the injury or death occurred:

- in a parking lot provided by the employer;
- because of a hazard of the parking lot;
- on a parking lot that was contiguous to the place of employment; or
- close to the start or stop of the worker’s shift.

g) Proposed Item C3-21.00, *Extra-Employment Activities*

Current policy items #20.00 – #20.50 address the issue of a worker’s entitlement to compensation when engaged in extra-employment activities. The basic principle has always been that activities undertaken by a worker outside the course of his or her employment are not compensable.

Current policy item #20.30, *Educational or Training Courses*, was previously identified as requiring review on the basis that it is too brief and does not clearly define the circumstances in which attendance at a course will be considered part of a worker’s employment. Draft policy was prepared and a full consultation undertaken in 2004. Changes to the current policy were postponed when it was decided to review Chapter 3 in its entirety.

Section C of proposed Item C3-21.00 incorporates all of the feedback received in the 2004 consultation process. It clarifies that injuries or death sustained during educational or training courses may be considered part of a worker's employment where the education or training:

- took place on the employer's premises;
- was for the benefit of the employer's business;
- was undertaken at the direction of the employer;
- involved using equipment supplied by the employer;
- was during a time period for which the worker was being paid;
- was paid for by the employer; or
- was considered by the employer to be part of the worker's job.

It also sets out three unique education and training situations in which the educational or training course is considered to be the employment itself:

- Board-recognized vocational or training programs;
- Vocational rehabilitation programs undertaken as part of a Board-approved rehabilitation plan; and
- Pre-employment training or probationary work.

A further noteworthy change on extra-employment activities is proposed in Section A, for workers who participate in competitions. The proposed policy broadens the scope of coverage to include all types of employment-related competitions, not only first aid, mine rescue or fire-fighting.

h) Proposed Item C3-22.00, *Compensable Consequences*

Current policy items #22.00 – #22.35 address the issue of which consequences of a compensable injury will also be compensable. Current policy item #22.35, *Pain and Chronic Pain*, was identified as requiring review. A review of this policy is being undertaken as part of a separate policy project dealing with the adjudication of chronic pain claims. The project is currently under development and will be consulted upon separately, if approved by the Board of Directors.

The proposed Item C3-22.00 is an introductory policy, setting out the general provisions for determining a worker's entitlement to compensation for a further injury, increased disablement, disease, or death that is a consequence of a compensable injury. In response to issues raised in appellate decisions,¹¹ the proposed policy clarifies that the WCB accepts responsibility for both the treatment that is required due to the acceleration of an already existing disability by a compensable injury and for the consequences of that treatment. The proposed policy further clarifies that a worker may be entitled to health care benefits for as long as the worker continues to experience the effects of the compensable injury.

¹¹ See, for example, WCAT Decision No. 2005-04828-RB.

i) Proposed policy item #34.55, *Subsequent Non-Compensable Incidents*

Current policy item #22.14, *Treatment Unrelated to Injury*, was identified as requiring review. It offers two alternative methods for the payment of wage-loss benefits in situations where a worker must undergo treatment for a non-compensable condition that delays recovery from the compensable injury or aggravates the compensable condition:

1. continue to pay wage-loss benefits after the occurrence of the non-compensable injury or treatment, for a period that the adjudicator estimates the worker would have taken to fully recover from the compensable injury if the non-compensable injury or treatment had not occurred; or
2. immediately terminate benefits on the occurrence of the non-compensable injury or treatment, and recommence payment of benefits when the worker's recovery is at the same stage as it was immediately before the occurrence of the non-compensable injury or treatment.

Clarification was identified as necessary, because of conflicting appellate decisions.¹²

On review, it became apparent that the current policy is not appropriately categorized as an initial entitlement issue. For this reason, the proposed policy change includes moving the policy into Chapter 5 of the *RS&CM: Wage-Loss Benefits*. The proposed policy maintains Method 1 and deletes Method 2.

A "subsequent non-compensable incident" may include:

- sustaining a non-compensable injury, condition, disease, or disability; or
- undergoing surgery, tests or other treatment for a non-compensable injury, condition, disease, or disability.

The proposed policy clarifies that when a subsequent non-compensable incident occurs while a worker is still disabled from a compensable injury, WCB will estimate when the disability resulting from the compensable injury would have ended. WCB will then continue to pay wage-loss benefits for the estimated recovery period. When the estimated date for terminating benefits arrives, if the worker is still disabled, WCB will determine whether the disability is due to the compensable injury or the subsequent non-compensable incident. Because WCB is only authorized to pay for disability that is caused by an employment-

¹² See, for example, Review Board Decision No. 2000-982895-A and Appeal Division Decision No. 99-0734.

related injury and only to the extent of that injury, if the disability is due only to the subsequent non-compensable incident, wage-loss benefits would be terminated.

4.2 Consequential Proposed Amendments

As a result of the revisions to the policies contained in Chapter 3, basic cross-referencing amendments will be required to the *RS&CM*. These are set out in a table in Appendix 'C'.

5. OPTIONS AND IMPLICATIONS

Option 1: Status quo

Policy in Chapter 3 of the *RS&CM* would remain unchanged.

Implications

- The policies would continue to lack internal consistency in terms of content, formatting and style.
- Policy would continue to be filled with examples, rather than articulating the principles on which they are based.
- Certain areas of policy would continue to be inconsistent with practice.
- Inconsistent decision-making and high overturn rates on appeal would continue for claims involving injuries following natural body motions at work.
- Policy would continue to offer two alternative methods for payment of wage-loss benefits in situations where a worker must undergo treatment for a non-compensable condition that delays recovery or aggravates the compensable condition, without distinguishing when or why one method should be chosen over the other.

Option 2: Replace current policy in Chapter 3 with the proposed amendments

Policy in Chapter 3 of the *RS&CM* would be replaced by the proposed drafts set out in Appendix 'A'.

Implications

- The policies would be more consistent in terms of content, formatting and style.
- Misleading examples would be removed from policy.

- Policy would be more consistent with practice.
- It would be clear that the proposed policy on “arising out of and in the course of the employment” is the principal policy to be used in adjudicating whether an injury or death arose out of and in the course of the employment.
- More consistent decision-making should occur for claims involving injuries that follow a natural body motion at work.
- Policy direction for adjudicating claims that involve deviations from a worker’s employment in the resulting injury or death would be clarified.
- Policy direction on work-related travel would be much clearer by setting out four distinct categories of travel, distinguishing what a “commute” is, and defining a “traveling employee”.
- Policy would be clarified that an employer’s control over a parking lot is not the only factor to consider when determining compensation for injuries or death that occur on a parking lot.
- Policy would more clearly define the circumstances in which attendance at an education or training course may be considered part of a worker’s employment.
- The method of paying wage-loss benefits in situations where a worker must undergo treatment for a non-compensable condition that delays recovery or aggravates the compensable condition would be clarified.

7. CONSULTATION

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

Stakeholder comments will be accepted until **September 7, 2007**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

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WorkSafeBC's governing body, the Board of Directors, will consider the options 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*.