2017/03/30-05

THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA

RESOLUTION OF THE BOARD OF DIRECTORS

RE: Updating Statutory Presumptions in the *Rehabilitation Services & Claims Manual*, Volume II

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act,* RSBC 1996, Chapter 492 and amendments thereto ("*Act*"), the Board of Directors ("BOD") must set and revise as necessary the policies of the BOD, including policies respecting compensation, assessment, rehabilitation and occupational health and safety;

AND WHEREAS:

Sections 6.1 and 6.2 of the *Act* provide rebuttable presumptions establishing work causation;

AND WHEREAS:

Policy item #97.20, *Presumptions*, of the *Rehabilitation Services & Claims Manual,* Volume II (*"RS&CM"*), provides guidance regarding the presumptions provided in the *Act*;

AND WHEREAS:

The list of presumptions set out in policy item #97.20, *Presumptions*, of the *RS&CM* is incomplete and has been identified as an issue requiring review;

AND WHEREAS:

The Policy, Regulation and Research Division has undertaken stakeholder consultation with the Policy and Practice Consultative Committee on this issue, and has advised the BOD on the results of the consultation;

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THE BOARD OF DIRECTORS RESOLVES THAT:

1. Amendments to policy items in Chapter 4 and Chapter 12 of the *RS&CM,* as set out in Appendix A of this Resolution, are approved.

2. The addition of policy item #26.22, *Additional Presumptions in the Workers Compensation Act* of the *RS&CM*, as set out in Appendix A of this Resolution, is approved.

3. Consequential amendments as set out in Appendix B of this Resolution, are approved.

4. This Resolution is effective May 1, 2017.

5. This Resolution constitutes a policy decision of the Board of Directors.

DATED at Richmond, British Columbia, March 30, 2017.

By the Workers' Compensation Board

JOHN BECKETT, CRSP, CPHR, MBA, ICD.D
CHAIR, BOARD OF DIRECTORS

APPENDIX A

UPDATING STATUTORY PRESUMPTIONS
***REHABILITATION SERVICES & CLAIMS MANUAL*, VOLUME II**

Additions in Bold, Deletions Struckthrough

CHAPTER 4

#26.00 THE DESIGNATION OR RECOGNITION OF AN OCCUPATIONAL DISEASE

Section 1 of the *Act* defines "occupational disease" as

> ~~any disease mentioned in Schedule B, and any other disease which the Board, by regulation of general application or by order dealing with a specific case, may designate or recognize as an occupational disease, and "disease" includes disablement resulting from exposure to contamination (emphasis added).~~
>
> **(a) a disease mentioned in Schedule B,**
>
> **(b) a disease the Board may designate or recognize by regulation of general application,**
>
> **(c) a disease the Board may designate or recognize by order dealing with a specific case, and**
>
> **(d) the disease referred to in section 6.1(1.1) or (7) or a disease prescribed by regulation for the purposes of section 6.1(2), but only in respect of a worker to whom the presumption in any of those provisions applies, unless the disease is otherwise described by this definition,**
>
> **and "disease" includes disablement resulting from exposure to contamination.**

There are a great many diseases to which the general public are subject, many of which can be considered ordinary diseases of life. Available medical and scientific understanding about the causes of disease and about the role that employment may play covers a wide range from very good to very poor. Not every disease contracted by every worker is compensable. Deciding when they are is key to the operation of the *Act* and to adjudicating individual disease claims. It is within this context that decisions must be made as to the compensability of diseases, suffered by workers who are covered by the *Act*.

To assist in adjudicating the merits of occupational disease claims, to facilitate efficiency and consistency in the decision-making process and to establish an institutional memory (with the additional benefit of providing the working community with confirmation that the Board is aware that a disease may arise as

a result of employment activities), the *Act* provides a means by which the Board may designate or recognize a disease as an "occupational disease".

There are levels of designation or recognition based on the available medical and scientific evidence and on the Board's experience in dealing with these diseases. The manner in which a disease is designated or recognized is primarily based on the strength of medical and scientific knowledge about the role employment may have in its causation. The following are the various ways in which an occupational disease may be designated or recognized.

#26.20 Establishing Work Causation

The fundamental requirement for a disease to be compensable under section 6(1) of the *Act* is that the disease suffered by the worker is "due to the nature of any employment in which the worker was employed whether under one or more employments".

There are two approaches to establishing work causation**: presumptions under the *Act* and non-scheduled recognition and onus of proof.**

#26.22 Additional Presumptions in the Workers Compensation Act

The *Act* provides the following additional presumptions:

- **Firefighters' occupational disease or personal injury presumption (see section 6.1 of the *Act)*; and**
- **Communicable disease presumption (see section 6.2 of the *Act).***

*#~~26.22~~**26.23** Non-Scheduled Recognition and Onus of Proof*

In some cases a worker may suffer an occupational disease not listed in Schedule B. In other cases a worker may suffer from an occupational disease listed in Schedule B but was not employed in the process or industry described opposite to it in the Schedule. In some cases a worker may suffer a disease not previously designated or recognized by the Board as an occupational disease. Here, the decision on whether the disease is due to the nature of any employment in which the worker was employed, is determined on the merits and justice of the claim without the benefit of any presumption. The same is true if for any other reason the requirements of section 6(3) are not met.

For this purpose the Board will conduct a detailed investigation of the worker's circumstances including information about the worker, their diagnosed condition, and their workplace activities. The Board is seeking to gather evidence that tends to establish that there is a causative connection between the work and the disease. The Board will also seek out or may be presented with evidence which tends to show there is no causative connection. The gathering and weighing of evidence generally is covered in policy items #97.00 through #97.60. The Board is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the Board should consider what other evidence might be obtained, and must take the initiative in seeking further evidence. After that has been done, if, on weighing the available evidence, there is then a preponderance in favour of one view over the other, that is the conclusion that must be reached. Although the nature of the evidence to be obtained and the weight to be attached to it is entirely in the hands of the Board, to be sufficiently complete the Board should obtain evidence from both the worker and the employer, particularly if the Board is concerned about the accuracy of some of the evidence obtained.

Since workers' compensation in British Columbia operates on an inquiry basis rather than on an adversarial basis, there is no onus on the worker to prove his or her case. All that is needed is for the worker to describe his or her personal experience of the disease and the reasons why they suspect the disease has an occupational basis. It is then the responsibility of the Board to research the available scientific literature and carry out any other investigations into the origin of the worker's condition which may be necessary. There is nothing to prevent the worker, their representative, or physician from conducting their own research and investigations, and indeed, this may be helpful to the Board. However, the worker will not be prejudiced by his or her own failure or inability to find the evidence to support the claim. Information resulting from research and investigations conducted by the employer may also be helpful to the Board.

As stated in policy item #97.10, a worker is also assisted in establishing a relationship between the disease and the work by section 99 of the *Act* that provides:

(1) The Board may consider all questions of fact and law arising in a case, but the Board is not bound by legal precedent.
(2) The Board must make its decision based upon the merits and justice of the case, but in so doing the Board must apply a policy of the board of directors that is applicable in that case.
(3) If the Board is making a decision respecting the compensation or rehabilitation of a worker and the evidence supporting different

findings on an issue is evenly weighted in that case, the Board must resolve that issue in a manner that favours the worker.

Therefore if the weight of the evidence suggesting the disease was caused by the employment is roughly equally balanced with evidence suggesting non-employment causes, the issue of causation will be resolved in favour of the worker. This provision does not come into play where the evidence is not evenly weighted on an issue.

If the Board has no or insufficient positive evidence before it that tends to establish that the disease is due to the nature of the worker's employment, the Board's only possible decision is to deny the claim.

EFFECTIVE DATE:	June 1, 2009 – Delete references to Board officers.
HISTORY:	March 3, 2003 – New wording of section 99
APPLICATION:	Applies on or after June 1, 2009

APPENDIX A

UPDATING STATUTORY PRESUMPTIONS
***REHABILITATION SERVICES & CLAIMS MANUAL*, VOLUME II**

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CHAPTER 12

#97.20 Presumptions

There are ~~three~~ statutory presumptions in favour of workers or dependants ~~which have~~ already ~~been~~ discussed in earlier chapters. These are as follows:

(1) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it shall be presumed that it arose out of the employment. (24)

(2) If the worker at or immediately before the date of disablement was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease shall be deemed to have been due to the nature of that employment unless the contrary is proved. (25)

(3) Where a deceased worker was, at the date of death, under the age of 70 years and suffering from an occupational disease of a type that impairs the capacity or function of the lungs, and where the death was caused by some ailment or impairment of the lungs or heart of non-traumatic origin, it shall be conclusively presumed that the death resulted from the occupational disease. (26)

(4)(a) Where a worker who is or has been a firefighter has contracted a disease set out in the *Act* or prescribed by the *Firefighters' Occupational Disease Regulation*, the disease must be presumed to be due to the nature of the worker's employment as a firefighter, unless the contrary is proved. (26a)

(4)(b) Where a worker is disabled as a result of a heart disease and was employed as a firefighter at or immediately before the date of disablement from the heart disease, the heart disease must be presumed to be due to the nature of the worker's employment as a firefighter, unless the contrary is proved. (26b)

(4)(c) Where a worker is disabled as a result of a heart injury and was employed as a firefighter at or immediately before the date

of disablement from the heart injury, the heart injury must be presumed to have arisen out of and in the course of the worker's employment as a firefighter, unless the contrary is proved. (26c)

(5) Where a worker who is an applicant as defined in the *Emergency Intervention Disclosure Act*, has obtained a testing order under that Act, and has contracted a communicable disease prescribed by the *Emergency Intervention Disclosure Regulation*, it must be presumed the communicable disease is due to the nature of the worker's employment, unless there is evidence to the contrary. (26d)

The *Act* contains no general presumption either in favour of the worker or against the claim.

Notes:

(26a) **S.6.1; See policy item #26.22 and *Firefighters' Occupational Disease Regulation*, B.C. Reg. 125/2009.**

(26b) **S. 6.1(7); See policy item #26.22.**

(26c) **S.6.1(8); See policy item #26.22.**

(26d) **S.6.2; See policy item #26.22, *Emergency Intervention Disclosure Act*, S.B.C. 2012, c. 19 and *Emergency Intervention Disclosure Regulation*, B.C. Reg. 33/2013.**

APPENDIX B

CONSEQUENTIAL CHANGES

***REHABILITATION SERVICES & CLAIMS MANUAL*, VOLUME II**

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CHAPTER 4

#26.21 Schedule B Presumption

Section 6(3) provides:

> If the worker at or immediately before the date of the disablement was employed in a process or industry mentioned in the second column of Schedule B, and the disease contracted is the disease in the first column of the schedule set opposite to the description of the process, the disease is deemed to have been due to the nature of that employment unless the contrary is proved

The primary significance of Schedule B is with its use as a means of establishing work causation.

The fundamental purpose of Schedule B is to avoid the repeated effort of producing and analyzing medical and other evidence of work-relatedness for a disease where research has caused the Board to conclude that such disease is specific to a particular process, agent or condition of employment (see policy item #26.01). Once included in Schedule B, it is presumed in individual cases that fit the disease and process/industry description that the cause was work-related. A claim covered by Schedule B can be accepted even though no specific evidence of work relationship is produced. A review of the available medical and scientific evidence would establish a likely relationship between the disease and the employment. The listing in the Schedule avoids the effort of producing the evidence in every case. Where the research does not clearly relate the disease to particular employments, the disease is not listed in Schedule B and the issue of work-relatedness must be determined on a case-by-case basis (see policy item #~~26.22~~**26.23**).

If at the time a worker becomes disabled by a disease listed in Schedule B, or if immediately before such date, such worker was employed in the process or industry described in the second column of the Schedule opposite to such disease, the worker is entitled to a presumption that the disease was caused by their employment, “unless the contrary is proved”. This presumption applies whether the disease manifests itself while the worker is at work, at home, while away on holidays, or elsewhere. The words “immediately before” used in section 6(3) are intended to deal with those situations where someone has been employed in the process or industry described in the Schedule, and has left that employment a very short time prior to the onset of the disease.

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If a worker becomes disabled by a disease listed in Schedule B but at the relevant time had not been employed in the process or industry described in the Schedule, the claim may still be an acceptable one, however no presumption in favour of work-relatedness would apply. In this event establishing work causation follows the approach covered in policy item #~~26.22~~**26.23.**

Inclusion of the words "unless the contrary is proved" in section 6(3) means that the presumption is rebuttable. Even though the decision-maker need not consider whether working in the described process or industry is likely to have played a causative role in giving rise to the disease, they must still consider whether there is evidence which rebuts or refutes the presumption of work-relatedness.

The standard of proof to be applied in determining whether the presumption has been rebutted is proof on a balance of probabilities. This is the same basic standard of proof applicable in the workers' compensation system. If the evidence is more heavily weighted in favour of a conclusion that it was something other than the employment that caused the disease, then the contrary will be considered to have been proved and the presumption is rebutted. The gathering and weighing of evidence generally is covered in policy items #97.00 through #97.60.

Difficulties may arise in determining whether the worker was employed in the process or industry described in the second column. This often arises because of the use of such words as "excessive" or "prolonged". While the Board would like to define more precisely the amount and duration of exposure required instead of using these words, it is usually not possible. The exact amounts will often vary according to the particular circumstances of the work place and the worker, or may not be quantified with sufficient precision by the available research. However, while such words are of uncertain meaning, there is valid reason for inserting them. Individual judgment must be exercised in each case to determine their meaning, having regard to the medical and other evidence available as to what is a reasonable amount or duration of exposure.

EFFECTIVE DATE: June 1, 2004
APPLICATION: All decisions, including appellate decisions, made on or after June 1, 2004.

APPENDIX B

CONSEQUENTIAL CHANGES

***REHABILITATION SERVICES & CLAIMS MANUAL*, VOLUME II**

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#26.60 Amending Schedule B

Section 6(4.1) of the *Act* provides:

> The Board may, by regulation,
>
> (a) add to or delete from Schedule B a disease that, in the opinion of the Board, is an occupational disease,
>
> (b) add to or delete from Schedule B a process or an industry, and
>
> (c) set terms, conditions and limitations for the purposes of paragraphs (a) and (b).

This provision gives the Board substantial flexibility in its ability to add to or delete from the list of diseases designated or recognized in Schedule B, and to impose whatever terms, conditions or limitations it considers appropriate in doing so. It has the same flexibility in its ability to add to or delete from the descriptions of process or industry set out in the second column.

Claims for all of the diseases in Schedule B will be considered in respect of such disease even if the worker was not employed in the process or industry described opposite to the disease in the second column of Schedule B, but without the benefit of the presumption set out in section 6(3) of the *Act*. See policy item #~~26.22~~ **26.23**.

#27.20 ASTDs Listed in Schedule B Where No Presumption Applies

Where a worker suffers from an ASTD listed in Schedule B**,** but the worker was not employed in the process or industry described opposite to the disease in the second column of Schedule B, there is no presumption of work causation. In these cases, the Board determines on the evidence whether the occupational disease was due to the nature of the employment under section 6(1) of the *Act* (see policy item #~~26.22~~ **26.23***, Non-Scheduled Recognition and Onus of Proof*).

Even where the requirements of the second column of Schedule B are not met, Schedule B may still provide some guidance on the type of risk factors that may be considered in establishing work causation of the occupational disease in

question. However, the requirements of the second column of Schedule B are not the only matters to be considered. It is only where the presumption applies that it may be unnecessary to consider such other matters because work causation will already have been established.

The compensability of a claim for an ASTD listed in Schedule B where the presumption does not apply depends on whether or not the employment activities (the employment-related exposure to risk factors) played a significant role in producing the ASTD. The employment-related exposure need not be the sole or even the predominant cause; it simply needs to have been a significant cause.

EFFECTIVE DATE:	March 1, 2015
AUTHORITY:	Section 6(1) of the *Act.*
CROSS REFERENCES:	Policy item #27.00, *Activity-Related Soft Tissue Disorders ("ASTDs") of the Limbs;* Policy item #26.20, *Establishing Work Causation;* Policy item #~~26.22~~ **26.23**, *Non-Scheduled Recognition and Onus of Proof.*
HISTORY:	Title changed so that it includes all ASTDs listed in Schedule B where there is no presumption. Cross reference to policy item #~~26.22~~ **26.23** added because it provides general guidance on this topic. Content updated so that it applies to any ASTD where no presumption applies. June 1, 2009 – Delete references to Board officers.
APPLICATION:	This item applies to all decisions made on or after March 1, 2015.

#27.30 ASTDs Recognized by Regulation

The following ASTDs, which may be caused or aggravated by employment activities, have been designated or recognized as occupational diseases by regulation (section 1 of the *Act*):

- Bursitis (other than the forms of bursitis mentioned in item 12 of Schedule B of the *Act*);
- Carpal Tunnel Syndrome;
- Cubital Tunnel Syndrome;
- Disablement by vibrations;
- Hypothenar Hammer Syndrome;
- Plantar Fasciitis;
- Radial Tunnel Syndrome;
- Tendinopathy (other than the forms of tendinopathy mentioned in item 13 of Schedule B of the *Act*), including:
  - Epicondylopathy, lateral and medial;
  - Stenosing Tenosynovitis (Trigger Finger); and
- Thoracic Outlet Syndrome.

For occupational diseases recognized by regulation, there is no presumption in favour of work causation. These occupational diseases are compensable only if the evidence establishes in the particular case that the occupational disease is due to the nature of any employment in which the worker was employed (see policy item #~~26.22~~ **26.23***, Non-Scheduled Recognition and Onus of Proof*, and policy item #27.00, *Activity-Related Soft Tissue Disorders ("ASTDs") of the Limbs*).

Medical/scientific evidence indicates that some employment-related risk factors are associated with the causation of some of the ASTDs recognized as occupational diseases by regulation. As discussed in policy items #27.31 through #27.36, the Board recognizes that such employment-related risk factors are associated with causation of particular ASTDs. However, the Board also considers other employment-related and non employment-related risk factors associated with causation of ASTDs in every case where the Schedule B presumption does not apply (see policy item #27.00, *Activity-Related Soft Tissue Disorders ("ASTDs") of the Limbs*).

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EFFECTIVE DATE:	March 1, 2015
AUTHORITY:	Section 1 of the *Act.*
CROSS REFERENCES:	Policy item #~~26.22~~ **26.23**, *Non-Scheduled Recognition and Onus of Proof;* Policy item #27.00, *Activity-Related Soft Tissue Disorders ("ASTDs") of the Limbs;* Policy item #27.31, *Epicondylopathy;* Policy item #27.32, *Carpal Tunnel Syndrome;* Policy item #27.33, *Other Peripheral Nerve Entrapments and Stenosing Tenosynovitis;* Policy item #27.34, *Non-Specific Symptoms or Unspecified Non-Traumatic Diagnoses of the Limbs;* Policy item #27.35, *Hypothenar Hammer Syndrome;* Policy item #27.36, *Plantar Fasciitis*.
HISTORY:	Consequential amendment resulting from creation of new policy item #27.36, *Plantar Fasciitis*, made effective December 1, 2015. Conditions reordered alphabetically and bursitis and plantar fasciitis added to the list. Conditions listed as a subset under tendinopathy. Term epicondylopathy used in place of epicondylitis. Stenosing tenovaginitis (trigger finger) replaced with stenosing tenosynovitis based on current medical science. Introduction added regarding how the risk factors set out in policy items #27.31 through #27.35 should be weighed in determining whether a claim is accepted.
APPLICATION:	This item applies to all decisions made on or after March 1, 2015.

#29.00 RESPIRATORY DISEASES

#29.10 Acute Respiratory Reactions to Substances with Irritating or Inflammatory Properties

Schedule B lists "Acute upper respiratory inflammation, acute pharyngitis, acute laryngitis, acute tracheitis, acute bronchitis, acute pneumonitis, or acute pulmonary edema (excluding any allergic reaction, reaction to environmental tobacco smoke, or effect of an infection)" as an occupational disease. The process or industry listed opposite to it is "Where there is exposure to a high concentration of fumes, vapours, gases, mists, or dust of substances that have irritating or inflammatory properties, and the respiratory symptoms occur within 48 hours of the exposure, or within 72 hours where there is exposure to nitrogen dioxide or phosgene".

There are many agents used in industry and commerce in the province which have irritating or inflammatory properties, and which in sufficient concentrations can produce respiratory symptoms if inhaled. Symptoms associated with the inhalation of such substances can vary from mild transient symptoms (such as a

mild burning sensation affecting the eyes, nose and throat) to significant symptoms throughout the respiratory tract (such as dyspnea and respiratory distress). Significant exposure to some substances may result in persistent respiratory symptoms.

Onset of symptoms can occur within a few minutes or several hours of the exposure, depending on the substance. For the presumption in section 6(3) of the *Act* to apply, the symptoms must appear within 48 hours of the exposure, unless the exposure is to nitrogen dioxide or phosgene, in which case the onset of symptoms must occur within 72 hours.

A claim for compensation made by a worker who has developed persistent or chronic respiratory symptoms considered to be due to exposure to a substance with irritating or inflammatory properties, must be considered on its own individual merits without the benefit of a presumption in favour of work causation (unless the claim meets the requirements of one of the other items of Schedule B). This includes claims for chronic bronchitis, emphysema, chronic obstructive pulmonary disease, obliterative bronchiolitis, reactive airways dysfunction syndrome (RADS), chronic rhinitis, and conditions considered to be due to exposure to tobacco smoke. The same is true of a claim made by a worker with acute respiratory symptoms where the requirements of section 6(3) of the *Act* are not met (see policy item #~~26.22~~ **26.23**). Where a worker who develops an acute reaction to a substance with irritating or inflammatory properties subsequently develops a persistent or chronic respiratory condition, a decision will be made based on the merits and justice of that claim on whether the chronic condition is a compensable consequence of the acute reaction.

A claim made by a worker who has inhaled a vapour or gas which was at a temperature high enough to cause thermal injury (such as inhaling steam) will be treated as a claim for a personal injury and will be adjudicated in accordance with the policies set out in Chapter 3.

Use of the words “high concentration” in Schedule B is a recognition that the amount of the particular substance in the air must be significant for the presumption to apply. The manner in which an exposed individual will react will depend on the properties of the substance inhaled (e.g., acidity/alkalinity, chemical reactivity, water solubility, asphyxiating potential) and the amount inhaled. Individual judgment must be exercised in each case to determine whether there was a "high concentration" of the particular substance having regard to the medical and scientific evidence available, including evidence as to the irritating and/or inflammatory properties of that substance.