

WORKERS' COMPENSATION IN NOVA SCOTIA

REFERENCE GUIDE

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INTRODUCTION

The partner agencies in the Workplace Safety and Insurance System are pleased to make available this Reference Guide dealing with workers' compensation in Nova Scotia. This Reference Guide was put together through the cooperation and hard work of staff from the Workers' Compensation Board, the Workers' Compensation Appeals Tribunal, and the Workers' Advisers Program.

This Reference Guide is meant to be handy source of information regarding workers' compensation in Nova Scotia. But it should not be relied on as a substitute for legal advice or other more detailed or expert information. This Reference Guide does not take the place of the *Workers' Compensation Act* or the regulations, policies, and authoritative decisions from courts and elsewhere.

1. Scope and Application of the *Workers' Compensation Act*

1.1 The Workers' Compensation Board of Nova Scotia (WCB) is responsible for administering the *Workers' Compensation Act*, S.N.S. 1994-95, c.10, as am. (*Act*). This includes setting policies, deciding workers' claims, collecting assessments from employers, facilitating return to work, and promoting workplace safety.

1.2 The WCB is the primary investigator in the workers' compensation system and makes the initial decision on all questions of fact or law, except for right-to-sue applications.

1.3 Generally, when a work-related injury occurs, a worker cannot sue employers and other workers who are covered under the *Act*.

Commentary

Workers' compensation is a system of compulsory and publicly-administered no-fault insurance for work-related injuries.

Historic trade-off

The following are the five fundamental principles of the workers' compensation system, also known as the "Meredith Principles":

- compensation is to be paid without fault;
- workers should enjoy security of payment;
- the administration of the system and the adjudication of claims is to be handled by an independent board or commission;
- compensation to injured workers should be provided quickly and without resort to court proceedings; and
- the total cost of compensation is shared by all employers (collective liability).

The concept of the "historic trade-off" is fundamental to the workers' compensation system. Under the historic trade-off, workers give up the right to sue employers for work-related injuries in return for access to the no-fault workers' compensation system and benefits and services available under it. Employers, in return for this legal immunity, must cover the costs of the workers' compensation system through assessment premiums.

Covered workers and employers

Part I of the *Act* sets out the scope of workers' compensation coverage and the rights and obligations of workers and employers in the workers' compensation system.

Employers in industries for which it is mandatory to be covered under Part I of the *Act* are listed by the Governor in Council by regulation. See section 3 of the *Act* and the *Workers' Compensation General Regulations*, O.I.C. 96 - 59, N.S. Reg. 22/96, as am. ("Appendix "A" - List of Occupations Subject to the *Act*).

Section 3(2) of the *Act* provides that the Governor in Council may make regulations to exclude certain workers, employers, and industries from coverage.

Sections 3-18 of the *General Regulations* deal with the exclusion and inclusion of workers, employers, and industries with respect to the operation of Part I of the *Act*.

Section 15 of the *General Regulations* provides that "every business or undertaking" is excluded from the application of the *Act* until at least three workers are at the same time employed in the business or undertaking.

Section 16 of the *General Regulations* refers to a business or undertaking being carried on partly by an employer and partly by one or more contractors, or entirely by two or more contractors or an employer. In these circumstances, the business or undertaking is not excluded from the application of the *Act* after the time three or more workers are at the same time employed in the business or undertaking.

The definition of "worker", set out in section 2(ae) of the *Act*, is very broad and includes any full-time, part-time, or casual worker, and all owners, officers and directors of an incorporated company who are actively engaged in the business and carried on the payroll of the business at the person's actual earnings.

A worker covered under Part I of the *Act* may also include "any other person who, pursuant to Part I, the regulations or an order of the Board, is deemed to be a worker." See section 2(ae)(ix) of the *Act*.

Subject to employers excluded by regulation, section 4 of the *Act* permits the WCB to admit any person to the operation of Part I not otherwise within the definition of Part I. This provision applies to an independent contractor who may not otherwise be considered either a worker or employer.

Board authority

Section 185(1) of the *Act* authorizes the WCB to inquire into, hear, and determine all questions of fact and law arising under Part I of the *Act*, which includes matters relating

to workers' claims and employers' assessments.

Section 186 of the *Act* requires all WCB decisions, orders, and rulings to be based on the real merits and justice of each case and to be in accordance with the *Act*, the regulations, and WCB policies.

Section 183 of the *Act* authorizes the WCB Board of Directors to develop policies to assist with decision-making for workers' claims, administering and collecting assessments from employers to maintain the Accident Fund (from which benefits and other costs are paid), and promoting workplace safety.

Sections 178-182 of the *Act* deal with the WCB's authority to summon witnesses to appear and give evidence and to require the production of documents or other records necessary for a full investigation and consideration of any matter under its responsibility.

Sections 207-220 of the *Act* deal with penalties for infringing various provisions in the *Act* and the recovery of overpayments.

Statutory bar / Right to sue

Section 28 of the *Act* sets out the statutory bar which is a fundamental part of the historic trade-off. The statutory bar means an injured worker covered under the *Act* cannot sue his or her own employer, co-workers, or another covered employer or other covered employer's workers, for damages arising from a work-related injury or death. A worker's dependant is also subject to the statutory bar.

An exception to the statutory bar may arise when a worker's injury occurs as a result of a motor vehicle accident. A worker injured in such circumstances may have the right to sue a covered employer other than his or her own employer, or the other employer's workers. See section 28(2) of the *Act*.

Section 29 of the *Act* allows any party to a legal action to apply to the Nova Scotia Workers' Compensation Appeals Tribunal (WCAT) for a determination of whether a right of action exists. WCAT has sole responsibility to make this decision, and, absent a successful appeal of the WCAT decision, it is final and binding on a court.

Section 30 of the *Act* gives an injured worker the option to obtain benefits from the WCB or to take legal action against a person not covered under Part I of the *Act*. In circumstances where a worker suffers a work-related injury caused by a person who is not covered by Part I, the injured worker or his or her dependants may give up the right to sue and claim benefits from the WCB, who is then subrogated to the action. Alternatively, the worker or his or her dependants may decide to sue the person not covered (third party action) and can do so by preparing a written notice of election to sue and submitting it to the WCB within 180 days after the accident.

Sections 30-33 of the *Act* deal with the extent and authority of the WCB's involvement in a third party action. The WCB may undertake the action against a non-covered third party on behalf of the injured worker to recover claim costs if the WCB is subrogated to the action. Additional monies collected are used to pay WCB costs in the action and, finally, any remaining monies can be paid to the worker or his or her dependants. If less money is collected from the action than would cover the claim costs and legal fees, the WCB will cover the costs out of the Accident Fund.

The Supreme Court of Canada's decisions in *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 SCR 890, and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 SCR 504, are leading cases discussing the operation of the workers' compensation system.

2. Employment-related injury

2.1 If a worker suffers a work-related injury and is employed in an industry covered by Part I of the Act, the WCB will pay compensation as set out in Part I.

2.2 To establish a claim, a worker must show that the employment caused or contributed to the injury.

2.3 A worker may be entitled to receive compensation for a work-related injury even if a pre-existing condition or factor other than the work-related injury is present.

Commentary

Under section 10(1) of the *Act*, a worker injured while working in an industry covered under Part I of the *Act* is entitled to receive the appropriate workers' compensation benefits available under Part I. Compensation is payable where a worker suffers a "personal injury by accident arising out of and in the course of employment."

To establish a claim for compensation, a worker must show that the employment contributed to the injury. It is not necessary for the employment to be the sole cause or even the most significant cause of the injury.

A condition not caused by work may still qualify for compensation if it is found that employment duties aggravated, accelerated, or activated that condition.

WCB Policy 1.3.7 (General Entitlement - Arising out of and in the course of employment) provides guidance to decision-makers to determine if a worker suffered a personal injury by accident arising out of and in the course of employment. Policy 1.3.7 sets out the following questions that may be considered with respect to this issue:

- Was the activity part of the job, or a job requirement?
- Did the accident occur when the worker was in the process of doing something for the benefit of the employer?
- Did the injury occur while the worker was doing something at the instruction of the employer?
- Did the injury occur while the worker was using equipment or materials supplied by the employer?
- Was the injury caused by some activity of the employer or another worker?
- Was the worker being paid or receiving some consideration for the activity from the employer at the time of the accident?
- Was the worker on the employer's premises at the time of the accident?
- Was the worker travelling for employment purposes at the time of the accident?
- Did the worker's employment expose him or her to a greater risk of injury than the worker would have been exposed to as a member of the general public?
- Was the injury caused by an exposure in the workplace, or as part of employment activities?

The mere presence of symptoms while working does not necessarily prove a claim where evidence establishes that the symptoms did not arise out of the employment. An example would be where a worker develops cold or flu symptoms at work (in the course of employment), however, the evidence establishes that these symptoms were not a result of the employment duties being performed and, therefore, did not arise out of the employment.

Section 10(4) of the *Act* sets out presumptions that can assist an injured worker to establish a claim. Under section 10(4), if the accident arose out of employment, unless the contrary is shown, it will be presumed that it occurred in the course of employment. If, on the other hand, the accident occurred in the course of employment, unless the contrary is shown, it will be presumed that it arose out of the employment. A presumption can be rebutted if sufficient contrary information is provided.

An "accident" is broadly defined in section 2(a) of the *Act* and "includes" an injury resulting from a single incident, a number of incidents, or a gradual process. The definition of accident includes a "disablement, including occupational disease, arising out of and in the course of employment."

The definition of accident does not include stress other than an acute reaction to a traumatic event.

Occupational disease is defined in section 2(v) of the *Act* to mean a disease arising out of and in the course of employment and resulting from causes or conditions peculiar to or characteristic of a particular trade, occupation, or employment, and includes silicosis and pneumoconiosis.

Section 12 of the *Act* deals with compensation payable for occupational disease as if it was a personal injury by accident. Section 12(2) provides that the date of a worker's injury in the case of occupational disease is the earliest of (a) the date on which the occupational disease results in loss of earnings, (b) the date on which the WCB determines the worker has a permanent impairment caused by the occupational disease, or (c) the date on which the worker's death is caused by the occupational disease.

Section 12(3) provides that, in the absence of proof to the contrary, certain diseases prescribed by regulation will be presumed to have been due to a worker's employment in certain types of processes, trades, or occupations prescribed by regulation. Appendix "B" to the *General Regulations* sets out the list of certain diseases presumed to be due to certain processes, trades, or occupations.

Section 35 of the *Act* sets out the principle of "automatic assumption" for a coal miner who has worked at the face of a mine or in similar conditions for 20 years or more and suffers a permanent impairment that is a loss of lung function. In such circumstances, the coal miner's loss of lung function is automatically assumed to be a work-related injury and the appropriate benefits are payable.

Under section 10(3) of the *Act*, if the injury results from the worker's own serious and willful misconduct, then compensation will not be paid unless the injury causes death to the worker or results in serious and permanent impairment.

When adjudicating a claim for causation, a common sense approach is to be used. It is not necessary for a worker to establish a claim according to the standard of medical or scientific certainty.

Notable Court Cases

Ferneyhough v. Nova Scotia Workers' Compensation Appeals Tribunal (2000), 189 NSR(2d) 76 (CA) (causation; "but for"; "material contribution")

Durnford v. Workers' Compensation Board (N.S.) et. al. (2000), 188 NSR(2d) 318 (CA) (causation; workplace does not have to be sole cause of injury; worker does not have to prove claim according to scientific certainty)

Michelin North America (Canada Inc.) v. Workers' Compensation Board (NS) (2003), 211 NSR(2d) 273 (CA) (simply because symptoms arise at the workplace does not mean that the symptoms arose out of and in the course of employment)

3. Regulations and policies

3.1 In making decisions, the WCB applies the Act, the regulations, and its policies in a fair and reasonable manner and taking into account the particular circumstances of the case.

3.2 The WCB Board of Directors may adopt policies and regulations to be followed in making decisions.

Commentary

Section 183(2) of the *Act* authorizes the WCB's Board of Directors to adopt policies consistent with Part I of the *Act* and the regulations to be followed in the application of Part I or the regulations.

Section 183(5) provides that the policies are binding on the WCB itself, the Chair, and every officer and employee of the WCB and WCAT. However, section 183(5A) provides that a policy is only binding on WCAT if the policy is consistent with Part I or the regulations.

While the Chair and every officer and employee of the WCB and WCAT may interpret policies, section 183(7) provides that the WCB cannot refuse to apply a policy on the ground that it is inconsistent with the *Act* or the regulations.

Section 183(6) authorizes the WCB to make policies retrospective or prospective in application and retroactive to any designated date. However, section 183(6A) provides that a policy may only be made retroactive if it benefits the worker.

Section 183(8) allows a participant to appeal a Hearing Officer's decision to the Nova Scotia Court of Appeal on the ground that a policy upon which the Hearing Officer's decision was made is not consistent with the *Act* or the regulations.

Section 184 of the *Act* authorizes the WCB, with the approval of the Governor in Council, to make any regulation that is required to properly administer Part I. Section 184A provides that a regulation made under Part I may be made retroactive if it benefits the worker.

Section 10(6) of the *Act* provides that the WCB may, by regulation, exclude any type or class of personal injury or occupational disease from the operation of Part I.

Section 10(7) provides that the WCB may, by regulation, include any type or class of personal injury or occupational disease that meet certain terms or conditions, including rates, types, and durations of compensation, other than those specified in Part I.

4. Weighing evidence

4.1 The WCB considers and weighs all of the information relating to a case. Each piece of information may not be of equal importance.

Commentary

Evidence may take many forms, including medical or expert evidence. Decision-makers consider and weigh all the evidence, bearing in mind some of the following principles:

- the expertise of the person providing the opinion;
- the correctness of the facts relied upon in the opinion;
- the timeliness of the opinion;
- the credibility of the person providing the opinion;
- subjective versus objective medical evidence; and
- scientific studies relied upon in the opinion.

Decision-makers should not automatically prefer the medical evidence of one category of physicians or experts over that of another.

Decision-makers may conduct further investigation or seek further medical evidence as necessary.

WCB Policy 1.4.3 discusses the principles to be applied in the weighing of evidence.

5. Benefit of the doubt

5.1 A worker making a claim for compensation is entitled to receive the benefit of the doubt.

5.2 If the factors in favour of a worker's claim are just as likely as the factors against, the matter is resolved in the worker's favour.

5.3 To successfully challenge a claim, employers and the WCB must meet a "more likely than not" standard.

Commentary

Section 187 of the *Act* sets out the benefit of the doubt, which means an issue must be resolved in a worker's favour if there is doubt about the issue and the disputed possibilities are evenly balanced.

By virtue of section 187, a worker only has to establish it is as likely as not that the compensation requested is required as a result of a work-related injury. There must be some evidence provided.

Section 187 cannot be used by the WCB or employers, who must establish their cases according to the civil standard (more likely than not).

The leading case dealing with the operation of section 187 is *Workers' Compensation Board (N.S.) v. Johnstone et al.*, 1999 NSCA 164.

6. Responsibilities of a worker

6.1 A worker is responsible to report an injury to his or her employer, file a claim for compensation, provide any other information required for the proper administration of the claim, and to co-operate in reducing the impact of the injury.

6.2 The WCB may suspend, reduce, or terminate a worker's compensation where the worker fails to mitigate the injury or co-operate with the WCB.

6.3 Time limits apply with respect to reporting and making a claim for compensation.

Commentary

Sections 82-85 of the *Act* deal with specific responsibilities a worker has in filing a claim for compensation and maintaining entitlement to benefits.

Under section 82, if a worker is eligible to apply for compensation, the worker is required to:

- file a claim for compensation with the WCB;
- ensure the attending physician's report is submitted to the WCB; and
- provide any further evidence the WCB requires.

Section 83 sets time limitations for submitting a claim for compensation. If an injury is not an occupational disease, a worker must:

- give notice of the injury to the employer as soon as practicable after the injury and before leaving the employment where the worker was injured; and
- make a claim for compensation within 12 months of the accident.

Under section 83, if the injury is an occupational disease, the worker must:

- give notice of the injury to the employer as soon as practicable after the worker learns that he or she suffers from an occupational disease; and
- make a claim for compensation within 12 months of the worker learning of the occupational disease for which compensation is claimed.

The WCB may extend the time for filing a claim, but not beyond five years from the date of the accident or from when the worker learned of the occupational disease.

The worker has a duty to co-operate with the WCB. Section 84 directs a worker to:

- take all reasonable steps to reduce or eliminate any permanent impairment and loss of earnings;
- seek out and co-operate in any treatment that, in the opinion of the WCB, promotes the worker's recovery;
- take all reasonable steps to provide full and accurate information to the WCB on any matter relevant to a claim for compensation; and
- notify the WCB immediately of any change in circumstances that may affect entitlement to compensation.

If the worker fails to meet any of these obligations, the WCB has the discretion to suspend, reduce, or terminate the compensation.

Given the range of actions available to a decision-maker, the following progressive approach may be followed regarding a worker's benefits:

- verbal warning(s);
- written warning(s);
- suspension(s); and
- termination.

It may not always be possible to follow a progressive approach, particularly when the conduct involved supports a need for a stiffer penalty.

There are responsibilities a worker must adhere to when participating in a vocational rehabilitation program. Section 113 of the *Act* outlines the worker's duty to cooperate with the WCB in the development and implementation of a rehabilitation program.

WCB Policies 4.1.4, 4.1.5, and 4.1.6 address the types of behaviour that constitute non-cooperation in the vocational rehabilitation context. Non-cooperation includes:

- claimed inability to participate where the medical information does not support that inability;

- failure to develop a vocational rehabilitation plan, attend necessary assessments, or where a worker consistently presents obstacles which delay the start or finish of a plan;
- failure to complete any aspect of the vocational rehabilitation plan for reasons unrelated to the work-related injury;
- failure to meet performance or attendance criteria in relation to a vocational rehabilitation plan for reasons unrelated to a work-related injury;
- failure to accept an appropriate offer of employment, or failure to actively pursue such employment in cases where the prospective employment equals or surpasses vocational rehabilitation goals;
- refusal of appropriate light duty or modified work during a period of temporary disability; or
- whenever action or inaction jeopardizes the successful completion of the vocational rehabilitation plan.

Policy 4.1.5 provides that absences from a training program for more than 10% of the required time each month may permit the WCB to terminate a training program.

Policy 4.1.6 describes what may happen to a vocational rehabilitation program if the worker cannot participate because of circumstances outside the worker's control. Benefits will generally be continued in cases where the interruption is of a short duration and the impact on the vocational rehabilitation program is not significant, or the worker can do other activities consistent with the vocational rehabilitation plan.

If the interruption does not meet the criteria above, the vocational rehabilitation plan and associated earnings-replacement benefits will be suspended. The WCB will consider resuming vocational rehabilitation for a worker once the worker is able to resume vocational rehabilitation efforts.

Section 85 requires a worker to undergo a medical examination, if requested by the worker's employer, unless the worker raises a reasonable objection to the examination.

7. Responsibilities of an employer for a worker's claim (employers have other responsibilities for assessments)

7.1 An employer is responsible to notify the WCB of an accident and to provide other information as requested.

7.2 An employer must not prevent a worker from making a claim or penalize a worker for doing so.

Commentary

An employer's responsibilities with respect to a worker's claim for compensation are generally set out in sections 86-88 of the *Act*.

The employer shares responsibility with the worker for filing a claim for compensation. When an injury occurs, section 86 requires the employer to notify the WCB within five business days of the date of the accident. The employer must complete a WCB Accident Report, which must include the following information:

- the occurrence and nature of the injury;
- the time the injury occurred;
- the name and address of the worker;
- the location where the injury happened;
- the name and address of the attending physician or surgeon, if any;
- the name and address of the hospital or other health care institution, if any, where the worker was taken immediately following the injury; and
- any other information required by the WCB.

Section 87 provides that a worker cannot agree to waive benefits to which the worker might become entitled. Any waiver for this purpose is void.

Section 88 lists employer conduct that is not permitted. An employer is prohibited from doing the following:

- deduct from workers any amount the employer owes the WCB for premiums;

- require or allow a worker to contribute in any manner toward the liabilities of the employer under Part I of the *Act*;
- collect, receive, or retain from a worker any contribution toward medical aid expenses;
- deduct from a worker's accumulated sick leave any amount for a period of time when the worker was receiving an earnings-replacement benefit;
- influence or attempt to influence a worker not to claim or receive compensation; and
- discipline or discriminate against a worker who reports an injury, makes a claim, or receives compensation.

Section 107 of the *Act* requires every employer to provide, at the employer's expense, immediate and appropriate transportation for an injured worker to a hospital or physician located within a reasonable distance of the place of injury.

8. Re-employment obligations

8.1 Generally, an employer who regularly employs 20 or more workers has a duty to offer to re-employ or accommodate an injured worker.

8.2 The re-employment obligations of an employer apply until the earlier of two years after the date of injury or when the worker reaches 65 years of age.

8.3 In general, the re-employment obligations do not apply to the construction industry, to a worker who has not been employed by the employer for at least 12 continuous months at the date of injury, or when the obligations cause the employer undue hardship. Special rules apply to seasonal and certain other workers.

Commentary

The re-employment obligations in sections 89-101 of the *Act* set out the rules and standards about when and how the employer must accommodate an injured worker to enable the worker to return to work as quickly and safely as possible following a work-related injury.

Section 89 provides that the re-employment obligations do not apply to:

- an employer that regularly employs fewer than 20 employees or such other number of workers less than 20 as the WCB may prescribe by regulation;
- the construction industry unless included by the WCB by regulation; and
- injuries occurring prior to these sections coming into force (February 1, 1996).

Pursuant to section 90, an employer must offer to re-employ a worker who:

- has been unable to work because of the injury; and
- had been employed by the employer, at the date of injury, for at least 12 consecutive months.

When the re-employment obligations apply, an employer must accommodate a worker up to the point where the accommodation causes undue hardship for the employer.

Section 92 provides that if a worker can return to either pre-injury work or other suitable work, the employer must offer a re-employment opportunity. The employer's obligation lasts for two years from the date of injury, or until a worker reaches 65 years of age, whichever comes first. If a worker is re-employed less than six months before the two-year re-employment obligation ends, the employer's obligation lasts for six months following the date of re-employment.

Section 93 provides that if a worker refuses a re-employment offer by the employer, the employer is no longer bound by these obligations.

An employer that terminates a worker's employment within six months of the date of re-employment is presumed, pursuant to section 94, not to have met its obligations unless the contrary is shown.

Section 95 authorizes the WCB to determine whether an employer has fulfilled its obligations under the re-employment provisions.

Under section 97, if the WCB determines that the worker is able to perform the essential duties of the pre-injury work, the employer is obligated to offer to reinstate the worker to his or her pre-injury work.

If the WCB is satisfied that the employer is unable to reinstate the worker to pre-injury employment, the employer is obligated to offer alternative work, which must be comparable to the worker's pre-injury work. Section 89(3)(a) defines "alternative work" to mean employment that is comparable to the worker's pre-injury work in nature, earnings, qualifications, opportunities, and other aspects.

Where alternative work cannot be provided, the employer must provide suitable work as described in section 98. Section 89(3)(b) defines "suitable work" to mean work which the worker has the necessary skills to perform and which does not pose a health or safety hazard to the worker or any co-workers.

Section 99 sets out penalties that may be levied against employers for not meeting their re-employment obligations. The WCB may order reinstatement of the worker and financial penalties against the employer.

9. Government Employees' Compensation Act (federal employees)

9.1 The *Government Employees' Compensation Act*, R.S., c. G-8, s. 1, (*GECA*), brings various federal employees under the *Workers' Compensation Act* (*Act*).

9.2 Almost all *GECA* claims are adjudicated in the same way as other claims. An exception is that, unlike under the *Act*, *GECA* may allow "gradual onset stress" to be compensated.

Commentary

Section 2 of *GECA* defines "accident" to include a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause.

Unlike the definition in *GECA*, "accident" in section 2(a) of the *Act* does not include stress other than as "an acute reaction to a traumatic event."

A federal regulation made under *GECA*, SOR/86 - 791 (*Government Employees' Compensation Regulations*, C.R.C., c. 880), section 2, provides that compensation is payable to an employee or dependants where the employee is disabled by reason of a disease that is not an industrial disease, but is due to the nature of the employment and peculiar to or characteristic of the particular process, trade, or occupation in which the employee was employed at the time the disease was contracted. This coverage for federal employees basically corresponds to coverage for occupational disease under sections 2(v) and 12 of the *Act* for other workers in the province.

Section 4(1) of *GECA* basically corresponds to section 10(1) of the *Act*. Section 4(1) of *GECA* requires compensation to be paid to a federal employee who suffers a personal injury by accident arising out of and in the course of employment, or who is disabled by reason of an industrial disease due to the nature of the employment. Compensation is paid to the dependants of a federal employee whose death results from such an accident or industrial disease.

Section 4(2) of *GECA* provides that a federal employee or dependants are entitled to receive compensation for work-related injuries "at the same rate and under the same conditions" as other workers in the province where the federal employee is "usually employed".

Through section 4(2), *GECA* incorporates provisions from the *Act* provided they relate to the rate or conditions of compensation and do not conflict with any of the provisions

in *GECA* itself. See, for example, *Cape Breton Development Corporation v. Morrison*, 2003 NSCA 103, paras. 68-72 (the benefit of the doubt in section 187 of the *Act* applies to a federal employee), and *Connolly v. Nova Scotia (Workers' Compensation Board)*, 2006 NSCA 3, paras. 29-33 (sections 10E and 10F of the *Act* apply to a federal employee).

In *Nurnber v. Workers' Compensation Board (N.S.) et al.*, 2004 NSCA 83, para. 16, the Court confirmed the rule from *Morrison* that provisions of the *Act* do not apply if they conflict with provisions in *GECA*. Such a conflict would exist in a case where the provincial law excluded compensation for a condition that is compensable under the federal law.

Section 4(3) of *GECA* provides that compensation for work-related injuries for federal employees and dependants is determined by “the same board, officers or authority” as is established for other workers in the province.

In *Thomson v. Workers' Compensation Board (N.S.)*, 2003 NSCA 14, paras. 19, 33-34, the Court confirmed that *GECA* incorporates procedural provisions in the *Act*, including rights of appeal, for workers' compensation claims concerning federal employees.

As noted, the definition of “accident” in section 2(a) of the *Act* does not include stress other than as “an acute reaction to a traumatic event.” The definition of “accident” in section 2 of *GECA* does not limit compensation for stress as in the *Act*. In recognition of the broader scope of coverage for stress under *GECA*, the WCB has enacted Policy 1.3.6 to adjudicate federal employees' stress claims. Policy 1.3.6 sets out criteria for the compensation of federal employees for traumatic or gradual onset stress.

Under Policy 1.3.6, a federal employee's traumatic onset stress claim requires the presence of a traumatic event whereby the employee experienced, witnessed, or was confronted with an event that involved actual or threatened death or serious injury or a threat to physical integrity of self or others, and the employee's response involved intense fear, helplessness, or horror.

For a federal employee's gradual onset stress claim to be successful under Policy 1.3.6, it has to meet a number of criteria, including that it must be the result of a reaction to unusual and excessive work-related stressors acting over time.

Policy 1.3.6 requires that, for each type of stress, the federal employee must be diagnosed with a mental or physical condition in accordance with the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders – 4th Edition* (DSM IV) either by a psychiatrist or by a registered and clinically-trained psychologist.

Policy 1.3.6 excludes from compensation mental or physical conditions when caused by labour relations issues such as a change in working conditions, the discipline of a worker, and termination of employment, as well as routine employment-related actions such as interpersonal relationships and conflicts, performance management, and work evaluation.

10. Earnings-Replacement Benefit

10.1 A worker who loses earnings due to a work-related injury is entitled to receive an earnings-replacement benefit.

Commentary

Section 37(1) provides that an earnings-replacement benefit is payable to a worker who experiences a loss of earnings as a result of a work-related injury.

Initially, 2/5ths (40%) of a worker's first week's earnings-replacement benefit is not payable. If, however, the worker's loss of earnings extends for more than five weeks, the 40% deducted from the first week's earnings-replacement benefit is paid to the worker. For most workers, this means she or he must be off work for more than two days before earnings-replacement benefits are payable.

11. Temporary Earnings-Replacement Benefits and Extended Earnings-Replacement Benefits

11.1 Earnings-replacement benefits may be either temporary or extended. Temporary earnings-replacement benefits are payable for loss of earnings related to a work-related injury unless the worker's injury is found to be permanent.

11.2 If a worker's injury becomes permanent, then extended earnings-replacement benefits may be payable.

11.3 Even after a finding that a worker's injury is permanent, a temporary earnings-replacement benefit is payable if the worker is doing a vocational rehabilitation program under the WCB's supervision.

Commentary

A worker who experiences a loss of earnings as the result of a compensable injury is entitled to an earnings-replacement benefit.

Definitions

Section 2(ad) of the *Act* defines a temporary earnings-replacement benefit as an earnings-replacement benefit payable prior to the date an extended earnings-replacement benefit, if any, becomes payable.

Section 2(o) of the *Act* defines an extended earnings-replacement benefit as an earnings-replacement benefit payable from the later of the date the WCB determines the worker has a permanent impairment pursuant to section 34, or, having found a permanent impairment, the worker has completed vocational rehabilitation services.

Duration of benefits

Earnings-replacement benefits are payable to a worker until the earlier of the date that,

- the loss of earnings end,
- the loss of earnings no longer relates to the work-related injury, or
- the worker reaches 65 years of age.

However, if a worker is 63 years of age or older when the loss of earnings commences due to a work-related injury or recurrence, earnings-replacement benefits may be paid for a maximum of 24 months following the commencement of loss of earnings.

Earnings-loss Supplement

Section 73A of the *Act* sets out criteria when the WCB may pay a temporary earnings-loss supplement to a worker who is already receiving an extended earnings-replacement benefit.

Initial rate

A worker's earnings-replacement benefits for the first 26 weeks of entitlement to those benefits is based on 75% of net loss of earnings less any permanent-impairment benefit payable. For the first 26 weeks earnings-replacement benefits are based on the worker's normal weekly earnings before the injury.

A worker's loss of earnings is the difference between net average earnings before the loss of earnings commences and the net average earnings the worker

- is earning
- is capable of earning in suitable and reasonably available employment,
- is receiving or is entitled to receive as a periodic benefit pursuant to Canada Pension Plan or the Quebec Pension Plan, in which case the WCB will include 50% of the benefit,

after the loss of earnings commences.

A worker's net average earnings are gross average earnings less probable deductions the worker would pay for income tax, Canada Pension Plan/Quebec Pension Plan premiums, unemployment-insurance plan premiums, and any other deduction the WCB may prescribe by regulation.

In determining probable deductions, it is not necessary for the WCB to consider a worker's actual circumstances or deductions.

Generally, a worker's net average earnings and maximum earnings are those at the date of injury.

For workers with two or more concurrent employers at the time of an accident (whether assessed employers or not), the Board will consider losses from normal weekly earnings at all sources when determining the earnings-replacement benefit rate.

Section 41 of the *Act* provides for the maximum amount of earnings that can be used to determine a worker's earnings-replacement benefits. The WCB periodically adjusts the maximum amount of insurable earnings.

Long-term Rate

After a worker receives earnings-replacement benefits for 26 weeks, further earnings-replacement benefits are based on 85% of net loss of earnings less any permanent-impairment benefit payable.

As well, from the 26-week point onward, earnings-replacement benefits are based on a long-term earnings profile which uses the worker's earnings calculated over a period up to three years immediately preceding the commencement of the loss of earnings. The WCB may choose any period in the three-year period that allows it to best represent the worker's actual loss of earnings suffered as a result of the work-related injury.

Recurrence

If the original loss of earnings ends and there is a recurrence, the earnings at the time of the initial injury will be used to determine earnings-replacement benefits if the recurrence is within 12 months of the end of the original loss of earnings.

However, if the recurrence of the loss of earnings is more than 12 months following the end of the previous loss of earnings, the net average earnings and maximum earnings may be taken from the date of the injury or the date of the recurrence, whichever best reflects the worker's actual loss of earnings in the WCB's opinion. The same choice is available when the original loss of earnings does not commence until more than 12 months after the date of injury.

Special Case, Self-employed, etc.

There are various provisions in the *Act*, the *General Regulations*, and the WCB policies dealing with calculating earnings for workers in various situations. For example, there are provisions in the *Act* dealing with workers who at the time of injury are engaged in casual or short-term employment, learners, under 30, or self-employed.

Special protection coverage is optional insurance that self-employed workers may purchase. The amount of workers' compensation benefits available to a worker with special protection coverage may be less than the worker's actual earnings. If a worker purchases special protection coverage that is less than their actual earnings, any earnings-replacement benefits payable will be based on the amount of special protection coverage in place at the time of injury.

Review of Compensation

Section 72 of the *Act* provides that the amount of compensation being provided as a temporary earnings-replacement benefit can be reviewed and adjusted at any time.

Section 73 of the *Act* provides for the limited review of compensation payable as an

extended earnings-replacement benefit. By policy, the WCB conducts a mandatory review of an extended earnings-replacement benefit 36 months after it is initially determined. The WCB will decide in the 36-month review if a subsequent 24-month review is required. See WCB policies 3.4.1R1 and 3.4.2R1.

Under section 73, an increase of 10% or more in a worker's permanent medical impairment rating may trigger a review and adjustment in an extended earnings-replacement benefit.

Section 73 also permits a review and adjustment of an extended earnings-replacement benefit at any time if it was based on a misrepresentation of fact.

Following a review, the WCB will not change a worker's extended earnings-replacement benefit unless the change would result in a variance of at least 10% of the amount paid as an extended earnings-replacement benefit prior to the review.

General

Policy 3.1.1R2 specifies the manner in which earnings-replacement benefits will be calculated in various circumstances. The Policy includes a list of income sources which are considered part of "normal weekly earnings." In *Canada Post Corporation v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2009 NSCA 41, the Court of Appeal decided that disability benefits, jointly funded by the worker and the employer, were not post-injury "earnings" and should not be considered in the calculation of earnings-replacement benefits. On the basis of the Court's reasoning, WCAT held in *Decision 2008-290-AD* (July 29, 2009, NSWCAT) that severance payments paid to the worker after the end of employment were not earnings and should not be used in the calculation of earnings-replacement benefits.

With respect to the foregoing discussion, see especially sections 37-48 of the *Act*, sections 20-22 of the *General Regulations*, and WCB Policy 3.1.1R2.

12. Apportionment

12.1 Generally, there is no apportionment of temporary earnings-replacement benefits, medical aid, or vocational rehabilitation benefits to a worker if the injury or loss of earnings are only partly related to a work-related injury.

12.2 The degree of apportionment, if any, for a permanent-impairment benefit or extended earnings-replacement benefit to a worker depends on the nature and extent of the pre-existing disease or disability or cause other than the injury.

Commentary

Section 10(5) of the *Act* provides that if a personal injury by accident results in a loss of earnings or permanent impairment due in part to the injury and in part to causes other than the injury (including a pre-existing disease or disability), compensation is payable for the part of the loss of earnings or permanent impairment reasonably attributed to the injury.

WCB Policy 3.9.11R1 guides the WCB's apportionment of workers' compensation benefits.

Under Policy 3.9.11R1, generally there is no apportionment of temporary earnings-replacement benefits, medical aid, or vocational rehabilitation benefits to a worker.

Under Policy 3.9.11R1, the terms "activation", "acceleration", or "aggravation" of a pre-existing disease or disability are defined to mean a permanent increase in permanent impairment and/or loss of earnings resulting from the disease or disability. An "exacerbation" is defined to mean a temporary worsening of a pre-existing disease or disability.

Policy 3.9.11R1 defines "non-compensable factor" as any condition unrelated to the compensable injury, which may affect recovery, the extent of permanent impairment, and/or loss of earnings. A non-compensable factor may occur pre-injury or post-injury, and specifically includes a pre-existing disease or disability and causes other than the injury.

If a permanent impairment is found and the decision-maker determines that part of the permanent impairment is attributable to the work-related injury and part to a non-compensable factor, the next step is to determine whether the non-compensable factor can be assigned a permanent impairment rating. The permanent impairment rating attributed to the non-compensable factor is then subtracted from the total permanent impairment rating.

If, in the context of permanent impairment, it is not possible to assign a specific rating to the non-compensable factor, the decision-maker will then classify the non-compensable factor as “minor”, “moderate”, “major”, or “severe” in accordance with the definitions of those terms in Policy 3.9.11R1. The degree of severity of the pre-existing condition determines the degree of apportionment. A similar approach applies with respect to the apportionment of extended earnings-replacement benefits.

As a practical matter, the decision-maker will obtain as much evidence as possible with respect to the time loss or medical treatment as a result of a non-compensable factor.

If a worker’s non-compensable factor resulted in only minimal limitation in working capacity, and required only occasional medical care, generally the worker’s permanent-impairment benefit and extended earnings-replacement benefit will not be subject to apportionment.

13. Periodic or Lump-Sum Payment

13.1 The WCB determines whether to pay compensation periodically or as a lump sum.

13.2 Generally, if a worker's permanent impairment rating is 30% or less and no extended earnings-replacement benefit is payable, the WCB pays a permanent-impairment benefit to the worker as a lump sum.

Commentary

Section 74 of the *Act* authorizes the WCB to determine the most convenient way to pay workers' compensation benefits.

Temporary earnings-replacement benefits and benefits received while participating in an approved vocational rehabilitation program are made every two weeks.

Extended earnings-replacement benefits are paid monthly.

The WCB's preference is to replace lost income with periodic payments. In the *Act* the reference to "periodic" with respect to benefits payable usually means that the benefits are payable monthly. This distinguishes them from benefits that are commuted and paid as a lump sum on a one-time basis.

For a claim relating to an injury that occurred on or after March 23, 1990 and where the permanent-impairment rating is less than 30%:

- if there is an extended earnings-replacement benefit payable to the worker, the permanent impairment benefit will be paid on the same schedule;
- if no extended earnings-replacement benefit is payable, the worker's permanent-impairment benefit will be paid as a lump sum.

For a claim relating to an injury that occurred on or after March 23, 1990 and where the permanent-impairment rating is more than 30%, the worker may apply to have the permanent-impairment benefit paid as a lump sum.

For a claim relating to an injury that occurred before March 23, 1990 and where the permanent-impairment rating is 10% or less, the worker has the option to choose a lump-sum payment or monthly payments.

For a claim relating to an injury that occurred before March 23, 1990 and where the permanent-impairment rating is more than 10%, the worker may apply to have the

permanent impairment benefit paid as a lump sum.

It is important for a worker injured before March 23, 1990 to be aware that a lump-sum payment may adversely affect the worker's eligibility to supplementary benefits possibly available under section 227 of the *Act*. Also see WCB Policy 3.8.1R4. Therefore, the WCB may decide not to commute (pay as a lump sum) a pension to a worker injured before March 23, 1990 unless it is clearly advantageous to the worker.

The Board's overriding concern is whether commutation is in the worker's best long-term interests. In general, the Board will consider the following factors when determining whether to pay a periodic benefit as a lump sum:

- a) the commuted benefit is to be used for a purpose approved by the Board. An approved purpose is a purpose determined by the Board to enhance the worker's vocational rehabilitation. However, in cases where vocational rehabilitation is not a consideration, given the worker's age or the nature of the injury, a benefit may be commuted for a purpose other than vocational rehabilitation;
- b) there are no other sources of funds that are accessible and appropriate for the approved purpose;
- c) the worker is not dependent on the periodic benefit for the necessities of life, nor is expected to be in the future;
- d) the worker's injury-related condition has stabilized; and
- f) the final scheduled review for an extended earnings-replacement benefit (if applicable) has been completed.

A commutation of a benefit may be partial, and it may include the permanent impairment benefit and/or extended earnings-replacement benefit.

With respect to the commutation of benefits, see WCB Policies 3.7.2R and 3.9.5

14. Permanent Medical Impairment

14.1 Impairment refers to a loss of, loss of use of, or derangement of any body part, system, or function after maximum medical recovery is reached.

14.2 An impairment is considered permanent when it becomes static or stable, and it is unlikely to improve despite further medical treatment.

14.3 A permanent medical impairment rating accounts for a worker's usual pain for the type of injury sustained.

Commentary

After a worker reaches maximum medical recovery in relation to a work-related injury, the WCB can determine the existence and degree of a permanent-impairment rating for the worker.

WCB Policy 3.3.2R governs the determination of a worker's permanent impairment rating for an injury that occurred before January 1, 2000. This means that the Permanent Medical Impairment Guidelines attached to Policy 3.3.2R will apply.

Where the worker's injury occurred on or after January 1, 2000, WCB Policy 3.3.4R governs the determination of a worker's permanent impairment rating. Policy 3.3.4R generally requires the use of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th ed., to determine permanent impairment.

See section 34 of the *Act* with respect to the determination of a permanent-impairment benefit.

15. Chronic Pain

15.1 Chronic pain is defined as pain that continues beyond the normal recovery time or that is disproportionate for the type of injury.

15.2 Chronic pain includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions.

15.3 Chronic pain does not include pain supported by significant, objective, physical findings at the site of the injury which indicate the injury has not healed.

15.4 A worker with chronic pain may be found to have a 3% or 6% pain-related impairment rating depending on how the pain has increased the impact of the original injury on the worker's life.

15.5 Workers with chronic pain injured on or after March 23, 1990 may also be entitled to receive temporary and extended earnings-replacement benefits, medical aid, vocational rehabilitation, and other appropriate benefits.

Commentary

The *Chronic Pain Regulations*, O.I.C. 2004-299 (July 22, 2004) provide that chronic pain which is causally connected to an original compensable injury is considered an "injury" as defined under Part I of the *Act*.

The definition of chronic pain is set out in section 10A of the *Act* and in the *Chronic Pain Regulations* to mean pain

- continuing beyond the normal recovery time for the type of personal injury that precipitated, triggered, or otherwise predated the pain, or
- disproportionate to the type of personal injury that precipitated, triggered, or otherwise predated the pain,
- and includes chronic pain syndrome, fibromyalgia, myofascial pain syndrome, and all other like or related conditions,
- but does not include pain supported by significant, objective, physical findings at the site of the injury which indicate that the injury has not healed.

In the context of chronic pain

- “objective” means noticeable to the external senses and objective physical findings are not dependant on the patient and are unlikely to be influenced by the patient,
- “subjective” findings are those only perceived by the patient and not noticeable by another person, and
- a “physical” finding is considered significant if it plays a meaningful role in explaining the existence and degree of a worker’s pain.

A worker found to have chronic pain may receive a 3% award for a slight pain-related impairment, which means the pain increased the impact of the compensable injury to a mild or moderate degree.

A worker with chronic pain may receive a 6% award for a substantial pain-related impairment, which means the pain increased the impact of the compensable injury to a moderately severe to severe degree.

The criteria for “slight” and “substantial” pain-related impairments are drawn from table 18.3 (Impairment Classification Due to Pain Disorders) of the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 5th ed.

A worker’s total pain-related impairment award cannot exceed 6% for the whole person regardless of the number of injuries or claims involved.

A worker may have an injury that can result in

- a non-chronic pain component for which he or she can receive a permanent medical impairment, which accounts for usual pain, which means all pain except for chronic pain, and
- a chronic pain component for which he or she can also receive a pain-related impairment.

A pain-related impairment rating is included in the determination of a permanent-impairment benefit (section 34) or a permanent disability award (sections 226 and 227) in the same manner as a permanent medical impairment rating.

Notable Court Cases

Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, [2003] 2 SCR 504 (workers with chronic pain are entitled to receive an individualized assessment of whether their chronic pain is related to a work-related injury)

Huphman v. Workers' Compensation Board (N.S.) et al., (2001), 191 NSR(2d) 384 (CA) (an injury may have chronic pain and non-chronic pain components)

16. Permanent-Impairment Benefit

16.1 A worker injured on or after March 23, 1990 and found to have a permanent medical impairment and/or a pain-related impairment resulting from the injury is entitled to be paid a permanent-impairment benefit.

Commentary

Section 34 of the *Act* sets out the formula for calculating a permanent-impairment benefit:

- 85% of a worker's net average earnings x 30% x permanent-impairment rating.

Section 71 of the *Act* provides that if there is a change in a worker's condition and at least 16 months have elapsed since the last permanent-impairment rating determination, the WCB may review and adjust the worker's permanent-impairment benefit.

17. Medical Aid

17.1 A worker who needs health care services, products, or devices as a result of an injury may be entitled to receive medical aid to cover the costs of these items and related expenses.

Commentary

Section 2(r) of the *Act* defines medical aid to include any health care service, product, or device provided to an injured worker as a result of a work-related injury as the WCB may authorize. Medical aid also includes reasonable expenses, as the WCB may authorize, incurred by a worker to obtain medical aid.

Section 102(1) of the *Act* authorizes the WCB to provide medical aid to an injured worker as the WCB considers necessary or expedient as a result of the work-related injury.

Section 104(1) states that all questions as to the necessity, character, and sufficiency of any medical aid will be determined by the WCB.

Policy 2.3.1R deals with the provision of medical aid and requires medical aid to be:

- appropriate for the type of injury, and
- consistent with the standards of healthcare practices in Canada.

Medical aid may be ordered as a preventative measure to assist an injured worker to remain at work and/or prevent further injury or complications.

Approval of medical aid does not require that the treatment ultimately be successful.

Items to assist an injured worker to meet basic needs may be approved as medical aid. For example, items that allow an injured worker to wash, get out of bed, use the washroom, and remain mobile within the home.

Generally, home maintenance items will not be approved for medical aid. Also, items that are solely for recreational use generally will not be approved for medical aid.

Cost is relevant to the determination of whether medical aid will be approved.

The WCB will pay for medical aid according to its schedule. No provider is allowed to charge more than the fee allowed in the schedule.

All health care providers are required to provide to the WCB any information requested regarding a worker claiming compensation.

18. Rehabilitation

18.1 An injured worker who needs assistance to return to work due to the injury, and to reduce the effects of the injury, may be entitled to receive rehabilitation services.

Commentary

Rehabilitation services generally are provided to injured workers who experience difficulties in returning to their pre-injury work because of the injury.

Sections 112 and 113 of the *Act* govern the provision of rehabilitation services. Section 112(1) authorizes the WCB to make any expenditures and take any measures that, in the WCB's opinion, will

- aid injured workers in returning to work, and
- reduce the effects of workers' injuries.

WCB Policy 4.1.1R1 states that rehabilitation services may be provided to an injured worker who

- in the opinion of the WCB, is likely to suffer a permanent impairment, and
- may experience an earnings loss as a result of the permanent impairment.

Rehabilitation services may include assistance ranging from the alteration of an injured worker's workstation to assistance in securing different employment with a different employer.

WCB Policy 4.1.3 states:

- The goal of each vocational rehabilitation plan is to assist the injured worker, through various job-specific interventions, to return to work.
- The following Hierarchy of Objectives is followed when developing a vocational rehabilitation (re-employment) plan (in descending order of preference):
 - return to the same job with the same employer;
 - return to a similar or comparable job with the same employer;

- return to a different but suitable job with the same employer;
- return to work in a similar or comparable job with a different employer;
- return to work in a different but suitable job with a different employer;
- retrain for jobs that are suitable and reasonably available; and
- self-employment.

Each step down the Hierarchy of Objectives generally will increase the amount of time and effort needed for a positive outcome and, generally, the likelihood of long-term success is reduced. It is, therefore, very important to ensure all potential opportunities are explored at each level in the Hierarchy before moving down to the next level.

If a job could be secured with the pre-injury employer, the injured worker would continue to receive the benefits they are accustomed to, such as a pension plan and medical/dental coverage, as well maintain the social relationships they previously enjoyed in that work environment.

If returning to work with the pre-injury employer is not possible, the WCB may provide such services as job search assistance and on-the-job training programs to assist the injured worker in finding other gainful employment.

The primary goal of a vocational rehabilitation program is to return the injured worker to gainful employment in a timely manner at the highest potential earnings.

19. Estimated Potential Earnings Ability

19.1 In deciding whether a worker is entitled to receive an extended earnings-replacement benefit for loss of earnings, the WCB will consider various types of earnings.

19.2 In determining a worker's entitlement to an extended earnings-replacement benefit, the WCB may make an estimated potential earnings ability decision to determine if there is employment that is suitable and reasonably available to the worker.

Commentary

After an injured worker completes a rehabilitation program or the WCB has determined that rehabilitation services are not appropriate, the WCB will consider whether the worker is entitled to receive an extended earnings-replacement benefit to compensate for loss of earnings resulting from the work-related injury.

If the worker is not employed after the rehabilitation program, or the worker has lower earnings compared to pre-injury earnings, the WCB may estimate earnings the worker is capable of earning in suitable and reasonably available employment, as authorized under section 38(b)(ii) of the *Act*.

WCB Policy 3.5.1 defines suitable employment as employment the worker has the necessary skills to perform, is medically able to perform, and which does not pose a health or safety hazard to the worker or any co-worker. For employment to be suitable for a given worker, it must be in keeping with the worker's physical and mental capacities.

WCB Policy 3.5.2 sets out the criteria to determine if employment is reasonably available. Employment is reasonably available if there are currently employment opportunities within the worker's home area and the worker has a reasonable chance of securing employment.

The home area of a worker is defined as all points up to 100 km from the worker's ordinary place of residence, or a greater distance if the worker was travelling a greater distance to work prior to the accident.

To consider if employment is reasonably available, the WCB's consideration may include the following:

- labour market information for the geographic area in question;

- recent job opportunities found through job postings; and
- contacts to employers in the area to determine recent hires or future hiring potential.

20. Annuities

20.1 A worker who is entitled to receive an extended earnings-replacement benefit is eligible to receive an annuity when the worker turns 65 years of age.

20.2 The WCB will set aside an additional amount equal to 5% of the worker's extended earnings-replacement benefit and permanent-impairment benefit to provide for an annuity for the worker.

20.3 The amount reserved for an annuity is not deducted from the compensation payable to a worker.

Commentary

Only workers injured on or after March 23, 1990 are potentially eligible for an annuity.

When a worker is entitled to receive an extended earnings-replacement benefit, the WCB will set aside an additional amount equal to 5% of the combined value of the extended earnings-replacement benefit and permanent-impairment benefit to provide an annuity for the worker.

When a surviving spouse is eligible to receive a survivor pension, the WCB will set aside an additional amount equal to 5% of the value of the survivor pension to provide an annuity for the surviving spouse.

A person eligible to receive an annuity will receive an annual report outlining the accumulated principal and interest.

When a worker reaches 65 years of age the annuity will be paid.

In the case of a surviving spouse, the annuity becomes payable when the surviving spouse reaches 65 years of age, or when the deceased worker would have reached 65 years of age, whichever is later.

If the total value of the annuity (principal + interest) is less than \$10,000.00, it will be paid as a lump sum (commutation), although the worker may elect otherwise.

If the total value of the annuity (principal + interest) is more than \$10,000.00, it will be paid in monthly installments.

If the annuity is valued at more than \$10,000.00, the WCB will pay it to a financial institution for administration. A worker may apply to have the annuity transferred into a financial institution of his or her choice.

All annuity payments are tax free.

If a worker has received payment of an extended earnings-replacement benefit as a lump sum rather than as periodic payments, the WCB may consider paying the annuity as a lump sum prior to age 65 years.

If a person entitled to have an annuity reserved on his or her behalf dies before becoming eligible to receive the annuity, an amount equivalent to the accumulated principal and interest will be paid as a lump sum to the surviving spouse or, if the worker is not survived by a spouse, to any dependent children. If there is no surviving spouse or dependent child, the accumulated principal and interest will be paid into the Accident Fund.

If a person dies before the term of the annuity expires, the balance of the annuity will be paid to any person designated by the recipient in a manner satisfactory to the WCB. If no arrangement has been made for the annuity, it will be paid to the surviving spouse. If there is no surviving spouse, the annuity will be paid to any dependent children. The annuity will be paid as a lump sum unless the designated person elects otherwise.

If the WCB must allocate a survivor pension among more than one surviving spouse, annuity contributions will be made for each spouse based on 5% of the value of the survivor pension payable to each spouse.

If one surviving spouse ceases to qualify for a survivor pension, the whole of the survivor pension is reapportioned among the remaining surviving spouses. In that case, annuity contributions will be based on 5% of the reapportioned amount payable to each remaining surviving spouse.

With respect to annuities, generally see sections 50-58 and 66 of the *Act*, section 23 of the *General Regulations*, and WCB Policies 3.6.1 to 3.6.9.

21. Survivor benefits

21.1 If a worker dies as a result of a work-related injury, the WCB will pay the necessary burial expenses of the worker to the prescribed amount, and a death benefit and survivor pension to the worker's dependent spouse. The WCB may also pay other dependent benefits.

21.2 Entitlement to survivor benefits does not require the work-related injury to be the only or the most significant factor in causing the worker's death. The primary test to establish causation between an injury and death is the "but for" test; "but for" the injury, the worker would not have died. If the "but for" test is unworkable in the circumstances, it must be established that the injury "materially contributed" to the death, meaning the injury contributed to the death in more than a trivial way.

21.3 If a worker dies while receiving compensation, the WCB will pay the worker's dependent spouse or dependent children an amount equal to three times the monthly payment that would have been payable to the worker if the worker were alive. Payment of this amount does not require that the worker's death resulted from the injury.

Commentary

If a work-related injury caused or contributed to a worker's death, the following benefits are payable under section 60(1) of the *Act* and the regulations:

- burial expenses up to \$5000.00, providing that an application for burial expenses has been made to the Canada Pension Plan; and
- transportation expenses up to \$500.00 for the body of the worker to his or her place of residence, if the death occurs in Nova Scotia, or the actual expenses if the death occurred elsewhere.

If the deceased worker whose work-related injury caused or contributed to his or her death had a dependent spouse, the following benefits are also payable to the dependant spouse under section 60(1):

- a death benefit of not less than \$15,000.00; and
- a survivor pension.

In addition, if the deceased worker whose work-related injury caused or contributed to his or her death had dependent children, the following benefit is payable to dependent children under section 60(1) and the regulations:

- a dependent-child benefit of \$196.00 per month for each child.

A survivor pension will not exceed the amount that would have been payable to the worker as a combined extended earnings-replacement benefit and permanent-impairment benefit for permanent loss of earnings.

A survivor pension is payable until the worker would have attained 65 years of age, or the surviving spouse attains 65 years of age, whichever is later. An annuity is payable after the survivor pension ends.

However, if a worker was injured before February 1, 1996 and the worker died as a result of the injury on or after February 1, 1996, the survivor pension is payable for the life of the surviving spouse. An annuity is not payable to the surviving spouse in such a case.

If survivor benefits are not payable under section 60(1) of the *Act*, the WCB may recognize as dependent persons other than the deceased worker's spouse or children and pay compensation as prescribed.

If a dependent spouse's survivor benefits were terminated under the former workers' compensation legislation due to remarriage, these benefits may be reinstated retroactively upon application and subject to the specific provisions of section 60A of the *Act*.

If the worker dies and, at the time of death, is in receipt of a 100% permanent-impairment award, under section 36 of the *Act* the worker's death will be presumed to be the result of the work-related injury unless there is evidence sufficient to rebut this presumption.

Under section 11 of the *Act*, any worker found dead in the underground workings of a coal mine is presumed to have died as a result of a work-related injury, unless there is evidence sufficient to rebut this presumption.

Death benefits and survivor benefits are not subject to apportionment under section 10(5) of the *Act* and WCB Policy 3.9.11R1.

Under section 10(3) of the *Act*, compensation remains payable where a worker's death resulted from a work-related injury that is attributable wholly or primarily to the serious and wilful misconduct of the worker.

Where a worker dies while in receipt of an “automatic assumption” pension under section 35 of the *Act*, survivor benefits are not payable unless it is established that the work-related injury caused or contributed to the worker’s death. That is, automatic assumption cannot be relied on to establish causation. In this regard, see the Court’s decision in *Nova Scotia (Workers’ Compensation Board) v. Nova Scotia (Workers’ Compensation Appeals Tribunal) (McGean)*, 1998 NSCA 74.

If a worker dies while in receipt of compensation, but the death is not related to the work-related injury, the WCB will pay to the worker’s dependent spouse or dependent children an amount equal to three times the monthly payment that would have been payable to the worker if the worker were alive. This payment increases to nine times the monthly payment that would have been payable to the worker if the worker were alive and if the worker was receiving a 100% permanent impairment at the time of death.

With respect to survivor benefits, generally see sections 59-68 of the *Act*, sections 24-27 of the *General Regulations*, and WCB Policies 6.1.1-6.3.1R. Sections 10(3), 11, and 36 of the *Act* are also relevant in this area.

The Court’s decision in *Ferneyhough v. Nova Scotia Workers’ Compensation Appeals Tribunal* (2000), 189 NSR(2d) 76 (CA), is a leading case dealing with causation in the context of survivor benefits.

23. Supplementary benefits

23.1 A worker injured before March 23, 1990 and who is receiving or entitled to receive periodic compensation for permanent disability (a permanent-impairment award) by February 1, 1996, may be eligible to receive supplementary benefits if the worker's annual income falls below a prescribed amount.

23.2 Only workers injured prior to March 23, 1990 are potentially eligible for supplementary benefits.

Commentary

Under section 227 of the *Act* and the *General Regulations*, the criteria discussed below must be satisfied before supplementary benefits may be awarded.

The Worker

- was injured before March 23, 1990 and is receiving or is entitled to receive periodic compensation for permanent disability or is entitled to receive the amended interim earnings loss benefit under section 10D of the *Act* as a result of the injury; or
- dies before February 1, 1996 and the worker's dependent spouse or invalid child is receiving or is entitled to receive periodic compensation in connection with the worker's death,

and the worker or the dependent spouse or the invalid child

- has a personal income below one-half the average industrial wage for Nova Scotia as prescribed by regulation; and
- meets the conditions the Board prescribes by regulation.

With respect to an injured worker applying for supplementary benefits, section 29(2) of the *General Regulations* sets out the following additional conditions for eligibility:

- the injured worker must be receiving a Canada Pension Plan or Quebec Pension Plan disability pension for the work-related injury, or
- in the WCB's opinion, the injured worker would be eligible to receive a Canada Pension Plan or Quebec Pension Plan disability pension but for insufficient contributions or lack of contributions to those programs.

In the *Act*, the reference to “periodic” with respect to benefits payable usually means that the benefits are payable monthly. This distinguishes them from benefits that are commuted and payable as a lump sum on a one-time basis.

To be eligible for supplementary benefits, it is critical that the compensation is received periodically. Compensation paid as a lump sum subsequently disqualifies the injured worker or other person from eligibility for supplementary benefits.

Section 32 of the *General Regulations* provides that the amount of a supplementary benefit is the amount necessary to increase an applicant's individual annual personal income to an amount equal to one-half of the average industrial wage for Nova Scotia.

Section 33 of the *General Regulations* provides that an applicant's individual annual personal income is the applicant's total income for the calendar year preceding the benefit year minus income received that year in the form of a supplementary benefit from the WCB. An applicant's total income for the calendar year is as defined by the Canada Customs and Revenue Agency for purposes of individual income tax returns.

Eligibility for supplementary benefits is reviewed annually and, if all the criteria remain satisfied, these benefits will continue until the month after the month in which the applicant reaches 65 years of age.

See sections 227(4) and 10D of the *Act*, sections 28-33 of the *General Regulations*, and WCB Policy 3.8.1R3 with respect to supplementary benefits.

24. Appealing a Claim

24.1 A worker or an employer can appeal a WCB decision to a Hearing Officer of the WCB and, subsequently, to the Workers' Compensation Appeals Tribunal (WCAT). The right to appeal from a WCAT decision to the Nova Scotia Court of Appeal is limited.

24.2 The participants in an appeal dealing with compensation include the worker and the worker's employer. A worker cannot participate in an appeal dealing with an employer's assessment.

24.3 A worker who has a matter under appeal may be entitled to assistance from the Workers' Adviser Program.

Commentary

Internal Appeals

The WCB makes decisions relating to the acceptance of claims, compensation payable to workers, assessments payable by employers, and penalties against employers.

Any decision of a WCB staff member may be appealed to a Hearing Officer of the WCB's Internal Appeals Department.

A worker or an employer can appeal a decision dealing with compensation payable to a worker. Only an employer can appeal a decision dealing with an assessment or penalty matter.

A decision must be appealed in writing to a Hearing Officer within 30 days of a person being notified of it.

Under section 189 of the *Act*, an addressee is deemed to have received a written decision five business days after the day it was mailed.

Under section 190, time limits relating to an appeal to a Hearing Officer can be extended if enforcing them would result in an injustice.

A Hearing Officer may give participant status to a person other than a worker or the worker's employer if the person has a direct and immediate interest in the matter. In deciding whether to give participant status to a person other than a worker or employer, the Hearing Officer must consider the confidential nature of information involved in the hearing and any delay that may be caused by adding another participant.

The Hearing Officer may hold an oral hearing if requested, but if a participant requests an adjournment of the hearing, the Hearing Officer may decide the appeal by a file review only.

Hearing Officer decisions are usually rendered within 30 days of submission deadlines or the oral hearing date. However, the time limit can be extended.

A Hearing Officer can make any decision that could have been made by a staff member. A Hearing Officer may also, before making a decision, adjourn the appeal and refer it to the Chair of the Board of Directors if the issue under appeal raises a question of law or general policy. The Hearing Officer must apply WCB policies, even if they believe a policy is inconsistent with the *Act*.

Unless or until a staff member's decision is reversed or revised, it remains in effect.

An appeal of a staff member's decision does not operate as a stay of the decision.

External Appeals

Part II of the *Act* establishes WCAT and its authority. In addition, under section 29 of the *Act* (in Part I) WCAT has the exclusive jurisdiction to determine if a civil right of action is statute-barred under section 28 of the *Act*.

WCAT, while part of the Workplace Safety and Insurance System, is independent of the WCB. WCAT's primary function is to decide appeals of Hearing Officer decisions.

WCAT decision makers are called Appeal Commissioners.

Appeal Commissioners basically have the same powers as Hearing Officers. The primary differences are that Appeal Commissioners

- are not WCB employees,
- do not apply WCB policies that they determine are inconsistent with the *Act*, and
- can decide whether a worker's right to sue employers has been removed by the statutory bar in the *Act* (see sections 28 and 29 under Part I of the *Act*).

A Hearing Officer decision must be appealed in writing to WCAT within 30 days of a person being notified of the decision.

Time limits relating to an appeal to WCAT can be extended if enforcing them would result in an injustice.

Both a worker and the worker's employer may participate in an appeal concerning a claim. However, only an employer may participate in an appeal concerning an employer's assessment or a penalty.

WCAT may give participant status to a person other than a worker or the worker's employer if that person has a direct and immediate interest in the matter.

The WCB is also a statutory participant in any appeal to WCAT.

WCAT provides a copy of the Notice of Appeal to the WCB and sets the time for all participants to provide submissions and other information.

WCAT may hold an oral hearing if requested, and if so, it must record the hearing.

WCAT decisions are usually rendered within 60 days of submission deadlines or after the oral hearing date.

WCAT can confirm, change or reverse a decision of a Hearing Officer or direct a Hearing Officer to reconsider a matter. WCAT may also, before making a decision, adjourn the appeal and refer it to the Chair of the WCB's Board of Directors.

A participant in a WCAT appeal who is not satisfied with WCAT's decision may apply for leave to appeal to the Nova Scotia Court of Appeal on a question of law or jurisdiction, but not on a question of fact.

A more detailed description of WCAT's procedures and jurisdiction can be found in its "Practice Manual", which is also on its website at www.gov.ns.ca/wcat.

Workers' Advisers Program

Part III of the Act establishes the Workers' Advisers Program (WAP).

WAP is independent of the WCB.

WAP provides assistance, advice and representation in accordance with specific eligibility criteria to workers.

Workers' Advisers with WAP provide legal assistance, advice, and representation to workers in accordance with WAP's eligibility criteria.

WAP represents workers throughout Nova Scotia. Its main office is in Halifax with a second office in Sydney.

A Worker Adviser can represent a worker before a Hearing Officer, WCAT, and in the Nova Scotia Court of Appeal.

In order for WAP to provide assistance to a worker, the following criteria must be met:

- there must be a written decision that has denied benefits to a worker (or an employer appeal of a decision which granted benefits).
- the value of the benefits must be at least \$500.
- there must be a “reasonable expectation of success” in the outcome of the appeal.

Workers’ Advisers only assist workers with workers’ compensation matters. WAP does not assist workers with matters such as CPP Disability applications, private insurance claims or labour disputes.

Regarding appeals see especially sections 197-198, 243-246, 256, and 259-274 of the *Act, the Workers’ Advisers Program Eligibility Regulation* and WCB Policies 8.1.3R1, 8.1.4R1.

25. Reconsideration

25.1 A decision of the WCB becomes a “final decision” if an appeal from that decision is not filed within the prescribed time limit and no extension of time to appeal is granted.

25.2 A final decision may be reconsidered and changed if “new evidence” is presented sufficient to warrant a change in that decision.

25.3 WCB Policy 8.1.7R1 sets out the criteria to determine whether new evidence is sufficient to warrant a reconsideration and change in a final decision.

25.4 Sections 71, 72, and 73 of the *Act* set out special rules and time periods for the review of workers’ permanent-impairment benefits, temporary earnings-replacement benefits, and extended earnings-replacement benefits that are separate from and not subject to the “new evidence” reconsideration process under WCB Policy 8.1.7R1.

Commentary

In general, if a decision is made and the time to bring an appeal of that decision has expired, the decision becomes the final decision of the WCB. A final decision can only be reconsidered under limited circumstances.

Sections 71, 72, and 73 of the *Act* set out special rules and time periods for the review of workers’ permanent-impairment benefits, temporary earnings-replacement benefits, and extended earnings-replacement benefits that do not follow the “new evidence” reconsideration process under WCB Policy 8.1.7R1.

Unless sections 71, 72, or 73 apply, a final decision of the WCB may only be reconsidered and changed if “new evidence” is presented in accordance with WCB Policy 8.1.7R1.

Under WCB Policy 8.1.7R1, the first part of the test is whether the evidence is truly new evidence. To be new evidence, the evidence must meet the following criteria:

- it must not be a reiteration of the evidence already on file;
- it must not be a new argument based on the same evidence; or
- it must not be evidence which is inconsequential and, therefore, even if accepted, would not impact on the final decision; and

- the evidence could not have been presented by the worker or the employer at the time the final decision was made.

If, under the first part of the test, the evidence is found to be “new evidence”, the decision-maker will consider the following second part of the test:

- Is the new evidence sufficient to persuade the WCB to alter the final decision?

Each part of the two-part test for reconsideration is separate. So, for example, if a Case Worker determines that “new evidence” has not been submitted, that part of the test is the only issue for consideration in any appeal from the Case Worker’s decision. If, on appeal, it is determined that “new evidence” has been submitted, then the claim will be referred back to the Case Worker to consider the second part of the test.

The leading decision dealing with reconsideration and WCB Policy 8.1.7R1 is the Court’s decision in *Cherubini v. Workers’ Compensation Board (N.S.) et al.* (2001), 95 NSR(2d) 51 (CA), which discussed the foregoing principles.

26. Review of Compensation

26.1 Sections 71, 72, and 73 of the Act set out special rules and time periods for the review of workers' permanent-impairment benefits, temporary earnings-replacement benefits, and extended earnings-replacement benefits.

26.2 The review provisions in sections 71, 72, and 73 operate independent of appeals but reviews under these sections may be appealed like any other decision.

Commentary

Section 71 provides that the WCB may review and adjust a worker's permanent-impairment benefit if, in the WCB's opinion, there is a change in the worker's condition

- that was not taken into account at the most recent determination of the worker's permanent-impairment rating by the WCB, and
- at least 16 months have elapsed from the time of the WCB's most recent determination of the worker's permanent impairment rating.

Section 72 provides that the WCB may review and adjust a worker's temporary earnings-replacement benefits at any time.

Section 73(1) provides that the WCB may review and adjust a worker's extended earnings-replacement benefits

- once, commencing in the 36th month after the initial award of extended earnings-replacement benefits (the WCB makes it mandatory to conduct this review);
- once, commencing in the 24th month after the completion of the 36th month review if, at the time of the 36th month review, the WCB is of the opinion that a further review is necessary (the WCB makes it optional to conduct this review);
- at any time, where the review of a worker's permanent-impairment rating under section 71 results in an adjustment of at least 10% in the rating; or
- at any time, where the extended earnings-replacement benefit was based on a misrepresentation of fact.

Section 73(1) is subject to section 73(2), which provides that an extended earnings-replacement benefit will not be varied unless the amount of the variation equals at least 10% of the extended earnings-replacement benefit paid at the time of the review.

Sections 73(1) and (2) are both subject to section 73(2A), which provides that where a worker's permanent-impairment benefit is adjusted under section 71, the WCB may adjust the worker's extended earnings-replacement benefit so that the adjusted permanent-impairment benefit and extended earnings-replacement benefit total 85% of the worker's loss of earnings calculated under section 38 of the *Act*.

Except as provided in section 73, a worker's extended earnings-replacement benefits will not be further reviewed or adjusted.

27. Assessments

27.1 Employers pay for the workers' compensation system through assessments collected by the WCB and paid into the Accident Fund.

27.2 For the purpose of establishing assessment rates, the Board divides employers into classes and subclasses, based on industry and business operations, and reviews the risks and accident experience for each group.

27.3 An employer's industry and claims history determines the amount of assessments to be paid.

Commentary

Classification and Rate Setting

Section 120 of the Act provides that the Board may divide employers into classes and subclasses, by industry.

An assessment rate is established for each class and subclass of employers. Where an employer engages in more than one industry or the employer's industry covers more than one class or subclass, the Board may assign the employer to the class or subclass of its primary business or undertaking, or to more than one class or subclass.

Section 121 of the Act provides the Board with the authority to establish an assessment rating system for employers, based on the risk, claim costs and accident experience.

Assessment rates for individual employers may be reduced where the risk, claim costs and accident experience of an employer is better than the average of other employers in the same class or subclass; and increased where the risk, claim costs or accident experience of an employer is worse than the average of the other employers in the same class or subclass.

General

Generally, for workers to be eligible for workers' compensation benefits they must work for an employer in an industry covered under the workers' compensation insurance plan.

Most employers are in industries where coverage is mandatory, although some industries are excluded. Some employers may be included voluntarily and by application approved by the WCB.

Coverage is not mandatory for a business or undertaking with two or fewer workers, regardless of the industry.

Employers may not deduct the cost of assessments from the earnings or employment benefits payable to their workers.

Nova Scotia employers with workers required to work outside the province must confirm whether coverage is required for them by the workers' compensation authority of the other province. If not required to be registered in the other province, employers may request the WCB to continue coverage of the worker.

Employers from outside Nova Scotia and doing business in Nova Scotia for more than five cumulative days are required to have workers' compensation coverage in Nova Scotia.

The amount of assessments an employer pays is a function of the overall cost of the workers' compensation system, the employer's industry costs and the individual employer's costs. Typically, the lower the costs, the lower the assessments.

An important consideration for an employer is the degree of liability protection they acquire for work-related injuries. In addition, with respect to fatalities, the compensation cost to an employer is limited to an amount equal to twice the maximum assessable earnings for the year of the injury. Excess costs do not affect the employer, nor that industry's experience and premium rate. An employer's injury experience, if less than the average claim cost for that industry, may result in an assessment reduction. Conversely, higher costs may result in higher assessments.

If a worker is unaware whether they are protected through workers' compensation, they may ask their employer or contact the WCB.

Special protection and self-insured employers

Employers in non-mandatory industries, regardless of the number of workers in their employ, may purchase optional (voluntary) coverage. As well, "special protection" coverage can be purchased for self-employed proprietors, partners, and family members of an employer living in the employer's household. In these cases, the amount of coverage available is dependent on the worker's earnings, as well as the amount of insurance the employer chooses to purchase. Generally, the compensation available is based on actual earnings, unless the coverage purchased is lower than the actual earnings.

Employers may also be "self-insured" employers; this type of employer is generally a federal or provincial public department or agency.

Rate setting process

WCB Policy 9.3.1R1 outlines the process for classifying employers and setting assessment rates. In general, this policy provides the following:

1. Classification of Employers by Standard Industrial Classification (SIC)

Each employer is classified based on the principle activity of the business. The framework used to classify employers is the SIC published by Statistics Canada.

2. Industry Group Formations

Industry groups are determined by combining SICs which have similar business activities.

3. Rate Group Formations

Rate groups are determined by combining industry groups with similar accident experience.

4. Setting of Rates by Rate Group

Assessment rates are determined for each rate group based on the rate group's five-year accident experience. This is referred to as the rate group's baseline rate.

5. Experience Rating

Experience rating is a program, designed to be revenue neutral, which adjusts employer rates on the basis of the comparison of their accident experience to the average accident experience of the rate group over a period of three years. Employers with better than average accident experience may receive merits (rate decreases), while employers with worse than average accident experience receive demerits (rate increases).

With respect to assessments, generally see sections 114-150 of the *Act*, sections 1-18 of the *General Regulations*, and WCB Policies 9.1.1R-9.8.5.