WORKERS' COMPENSATION IN NOVA SCOTIA

REFERENCE GUIDE

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INTRODUCTION

This Reference Guide was assembled by staff from the Workers' Compensation Board, the Workers' Compensation Appeals Tribunal, and the Workers' Advisers Program. It is meant to be used as a source of information regarding workers' compensation in Nova Scotia but should not be relied on as a substitute for legal advice or more detailed, expert information.

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

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 a no-fault compensation system. In return for this legal immunity, employers cover the costs through assessment premiums.

The Workers' Compensation Board of Nova Scotia ("Board") administers 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.

There are five fundamental principles of the workers' compensation system 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).

Covered workers and employers

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

Employers in industries for which coverage is mandatory are listed in s.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*).

Sections 3 to18 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 of an employer. In these circumstances, the business or undertaking is not excluded from the application of the *Act* once three or more workers are at the same time employed in the business or undertaking.

The definition of "worker", set out in s.2(ae) of the *Act*, includes any full-time, part-time, or casual worker, and all managers, officers, and directors of an incorporated company who are actively engaged in the business and on the payroll of the business.

A worker covered under Part I 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."

Section 4 of the *Act* permits independent contractors and employers, who may not otherwise be considered workers, to apply to the Board for coverage under the *Act* (known as "special protection" coverage).

Section 9 of the *Act* allows the Board to deem a person to be a worker under Part 1.

Board authority

Section 185(1) of the *Act* authorizes the Board 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 requires all decisions, orders, and rulings be based on the real merits and justice of the case and in accordance with the *Act*, the regulations, and Board policies.

Section 178 grants the Board and the Tribunal the authority to summon witnesses, to require the production of documents, and to punish persons guilty of contempt.

Sections 207 to 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 prohibits an injured worker covered under the *Act* from suing their 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 dependent 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 Workers' Compensation Appeals Tribunal ("Tribunal") for a determination of whether a right of action exists. The Tribunal has the sole authority to make this determination, which absent a successful appeal, is final and binding on a court.

Section 30 gives an injured worker the option to obtain benefits from the Board or take legal action against a person not covered under Part I of the *Act*, where a worker suffers a work-related injury caused by a person who is not covered by Part I. If the injured worker or their dependents decide to sue the person not covered (third-party action) a written notice of election to sue is to be submitted to the Board within 180 days of the accident. Sections 30 to 33 of the *Act* deal with the extent and authority of the Board's involvement in a third-party action.

2. Work-related injury

Under s.10(1) of the *Act,* a worker injured while working in an industry covered under Part I is entitled to receive benefits 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. With the exception of claims for psychological injuries, it is not necessary for employment to be the sole cause or even the most significant cause of the injury.

For physical injuries, a condition not caused by work may still qualify for compensation if it is found that employment duties aggravated, accelerated, or activated that condition. For psychological injuries, to establish a claim, the injury must be "wholly or predominantly caused" by one or more, or a cumulative series, of work-related stressors.

WCB Policy 1.3.7R (General Entitlement - Arising out of and in the Course of Employment) provides guidance to decision-makers when determining if a worker suffered a personal injury by accident arising out of and in the course of employment. The policy sets out the following questions that may be considered:

- 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?

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.”

“Accident” includes claims for psychological injury caused by gradual onset or traumatic stress, but does not include stress caused by interpersonal conflicts, unless the interpersonal conflict constitutes bullying or harassment, or actions or decisions of an employer relating to the worker’s employment including changing the work performed by the worker, altering working conditions, or disciplinary actions.

The mere presence of symptoms while working does not establish a claim where evidence establishes that the symptoms 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.

Occupational disease is defined in s.2(v) 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.

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 a loss of earnings, (b) the date on which the Board 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) of the *Act* 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 commonsense 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.

3. Regulations and policies

Section 183(2) of the *Act* authorizes the 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.

Under s.183(5) policies are binding on the Board itself, the Chair, and every officer and employee of the Board and the Tribunal. However, section 183(5A) of the *Act* provides that a policy is only binding on the Tribunal if it is consistent with Part I and the regulations. While the Board may interpret policies, s.183(7) provides that the Board cannot refuse to apply a policy on the grounds that it is inconsistent with the *Act* or the regulations.

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

Section 183(8) of the *Act* 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 Board, 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 may be made retroactive if it benefits the worker.

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

Section 10(7) of the *Act* provides that the Board 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

Evidence may take many forms, including medical or expert evidence. Policy 1.4.3 discusses the principles to be applied in the weighing of medical 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.

5. Benefit of the doubt

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 of the *Act* cannot be used by the Board or employers, who must establish their cases according to the civil standard of proof, which is on a more likely than not basis.

6. Responsibilities of a worker

Obligation to file a claim and provide notice

Sections 82 to 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 of the *Act*, if a worker is eligible to apply for compensation, the worker is required to:

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

Section 83 of the *Act* 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 of the *Act*, 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 they suffer from an occupational disease; and
- make a claim for compensation with the Board within 12 months of learning of the occupational disease for which compensation is claimed.

For post-traumatic stress disorder (PTSD) claims made under the presumption in s. 12A, the worker must give the employer notice as soon as practicable after being diagnosed with PTSD and make a claim for compensation with the Board within the time frame set out in the regulations (within five years).

The Board may extend the time for filing a claim, if neither the employer nor the Board has been prejudiced by the delay, but not beyond five years from the date of the accident or from when the worker learned of the occupational disease.

Obligation to cooperate

The worker has a duty to cooperate with the Board. Section 84 of the *Act* directs a worker to:

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

If the worker fails to meet any of these obligations, the Board has the discretion to suspend, reduce, or terminate the compensation which the worker is otherwise entitled to receive.

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.

Obligations during vocational rehabilitation

When participating in a vocational rehabilitation program, s.113 of the *Act* imposes the duty to cooperate with the Board in the development and implementation of a rehabilitation program. Failure to cooperate means the Board can reduce, suspend, or terminate benefits otherwise payable.

Policies 4.1.4, 4.1.5, and 4.1.6 address behaviours that constitute non-cooperation in the vocational rehabilitation context. Non-cooperation includes a worker:

- claiming an inability to participate absent supportive medical information;
- failing to help develop a vocational rehabilitation plan, by not attending necessary assessments or meetings, or consistently creating obstacles which delay the start or finish of a plan;
- failing to complete any aspect of the vocational rehabilitation plan for reasons unrelated to the work-related injury;
- failing to meet performance or attendance criteria in relation to a vocational rehabilitation plan for reasons unrelated to a work-related injury;
- failing to accept an appropriate offer of employment, or failing to actively pursue appropriate employment;
- refusing appropriate light-duty or modified work during a period of temporary disability; or
- doing something or failing to do something such that the successful completion of the vocational rehabilitation plan is jeopardized.

Policy 4.1.5 provides that absences from a training program for more than 10% of the required time each month may lead to termination of the 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 continue where it is a short interruption and the impact on the vocational rehabilitation program is not significant, and where the worker can do other activities consistent with the vocational rehabilitation plan during the interruption. In some cases, the vocational rehabilitation plan and associated earnings-replacement benefits will be suspended.

If requested by the employer, s.85 of the *Act* requires a worker to undergo a medical

examination, unless the worker raises a reasonable objection to the examination. The employer will generally receive medical information relevant to developing and implementing a vocational rehabilitation plan so that appropriate work and accommodations can be arranged if needed.

7. Responsibilities of an employer for a worker's claim

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

The employer shares responsibility with the worker for filing a claim for compensation with the Board when an injury occurs. Under s.86 and policy 10.1.1R employers are required to notify the Board within five business days of the date of becoming aware of an accident. Failure to report may result in penalties to the employer under s.207. The employer must complete an injury 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 Board.

Section 87 of the *Act* provides that a worker cannot agree to waive benefits to which the worker might become entitled. Any waiver for this purpose is void. A worker may still make a claim for compensation for a work-related injury even if they have previously agreed not to do so. The obligations for filing a claim and providing information to the Board continue to apply.

Section 88 of the *Act* lists employer conduct that is prohibited which includes:

- deducting from workers any amount the employer owes for premiums;
- requiring or allowing a worker to contribute in any manner toward the liabilities of the employer under Part I of the *Act;* including collecting any amount of the benefits paid to the worker by the Board;
- collecting from a worker any financial contribution toward medical aid expenses for the work-related injury;

- deducting from a worker's accumulated sick leave any amount for a period of time when the worker was receiving an earnings-replacement benefit;

- influencing or attempting to influence a worker not to claim or receive compensation; and

- disciplining or discriminating 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

Sections 89 to 101 of the *Act* set out the rules for when and how the employer must accommodate an injured worker to enable them to return to work as quickly and safely as possible following a work-related injury.

Under s.89 and policy 5.6.1 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 Board may prescribe by regulation;

- the construction industry unless included by the Board by regulation.

Under s.90 and policy 5.6.1, 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, as defined by policy 5.6.1.

A worker's entitlement to earnings-replacement benefits is not a prerequisite for application of the re-employment obligations. If a worker can return to either pre-injury work or other suitable work, the employer must offer a re-employment opportunity. When the re-employment provisions apply, an employer must accommodate a worker up to the point where the accommodation causes undue hardship for the employer.

The re-employment obligation lasts for two years from the date of injury, or until a worker reaches 65 years of age, whichever comes first. The date of injury is defined by policy 5.6.1 as the date the time loss commences. 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 of the *Act* provides that if a worker refuses a re-employment offer, 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 of the *Act* and policy 5.6.1, not to have met its obligations unless the contrary is shown.

Section 95 of the *Act* authorizes the Board to determine whether an employer has fulfilled its obligations under the re-employment provisions. Policy 5.6.1 provides defenses and exceptions to re-employment obligations.

Under s.97 and policy 5.6.1, if the Board 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 their pre-injury work.

If the Board 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) of the *Act* 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 s.98 of the *Act*, which means work which the worker has the necessary skills to perform and which does not pose a health or safety hazard.

Section 99 and policy 5.6.1 sets out penalties that may be levied against employers for not meeting their re-employment obligations. The Board may order reinstatement of the worker and financial penalties against the employer.

Policy 5.6.1 provides that if there is a conflict between the terms of a collective agreement and the re-employment provisions, subject to seniority provisions, whichever provides the worker with better re-employment opportunities shall prevail.

9. *Government Employees' Compensation Act* (*GECA*)

Section 4(2) of the *GECA* provides that a federal employee or their dependents 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".

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

Through section 4(2), the *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 the GECA itself.

The Supreme Court of Canada in *Martin v. Alberta (WCB)*, 2014 SCC 225 (CanLII) virtually eliminated the scope of potential conflict between provincial legislation and the GECA by highlighting Parliament's intention to delegate the administration of workers' compensation to the provincial agencies. The Court indicated that provinces might define eligibility for compensation differently, but the open-ended definition of "accident" in *GECA* enabled this flexibility and did not curtail it. It upheld the application of the provincial test for eligibility to the federal worker in that case.

Accordingly, Part 1, including its criteria for eligibility and payment of benefits, generally applies to federal government workers in the same way that it applies to other workers in Nova Scotia.

10. Earnings-Replacement Benefits

Section 37(1) of the *Act* provides that an earnings-replacement benefit is payable to a worker who experiences a loss of earnings because of a work-related injury. Earnings-replacement benefits may be either temporary or extended.

Initially, 2/5ths (40%) of a worker's first week of earnings-replacement benefits is not payable. If 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 they must be off work for more than two days before earnings-replacement benefits are payable.

Temporary earnings-replacement benefits (TERB)

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

TERB is payable for loss of earnings related to a work injury unless the injury is found to be permanent. After an injury becomes permanent, TERB is payable if the worker is doing a vocational rehabilitation program under the Board's supervision.

Extended earnings-replacement benefits (EERB)

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

Duration of earnings-replacement benefits

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

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

If a worker is 63 years of age or older when the loss of earnings commences or reoccurs, earnings-replacement benefits may be paid for a maximum of 24 months following the commencement of loss of earnings.

Initial rate

The first 26 weeks of entitlement to an earnings-replacement benefit is based on 75%

of net loss of earnings less any permanent impairment benefit payable. Net loss of earnings is 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 the 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.

Net average earnings are gross average earnings less probable deductions for income tax, Canada Pension Plan/Quebec Pension Plan premiums, employment-insurance plan premiums, and any other deduction the Board may prescribe by regulation.

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

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 benefit. The Board 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. Benefits are based on a long-term earnings profile which uses the worker's earnings calculated over a period of up to three years immediately preceding the commencement of the loss of earnings. The Board may choose any period in the three-year period that best represents the actual loss of earnings suffered as a result of the work-related injury.

What are earnings?

Policy 3.1.1R5 includes a list of income sources which are considered part of "normal weekly earnings." These include:

- regular overtime,

- commissions,
- bonuses,
- vacation pay,
- a profit-sharing arrangement with the worker's employer,
- tips and gratuities, and
- taxable benefits, if reportable on a worker's T4 slip.

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. In *Decision 2008-290-AD* (July 29, 2009, NSWCAT) WCAT found 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.

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

Special provisions

Where it is impracticable to compute earnings because of the length of time the worker has been employed, or the casual nature of the employment, the Board may determine the worker's earnings in a way that best represents the actual loss of earnings suffered by the worker by reason of the injury (s.43 of the *Act*).

The earnings of a worker who is a "learner" will generally be deemed at the level the worker would have achieved within the next 12 months had they become qualified in their trade or occupation (s.45 of the *Act*). A "learner" is generally defined as "an apprentice".

Where the Board determines that a worker's earnings at the time of accident do not represent their probable earnings because the worker is less than 30 years of age, the probable increase in earnings may be included in the long-term profile (s.46 of the *Act*).

The determination of a contractor's gross average earnings will be calculated based on the labour portion of the contract (Policy 3.1.1R5).

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.

Recurrence

If the original loss of earnings ends, and there is a recurrence of the injury, 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 (s.40(2) of the *Act*).

If the recurrence 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. The same choice is available when the original loss of earnings does not commence until more than 12 months after the date of injury (s.40(3) of the *Act*).

Review of Compensation

Section 72 of the *Act* provides that the amount of compensation being provided as TERB can be reviewed and adjusted at any time.

Under s.73 there is a limited review of EERBs. A mandatory review of an EERB is conducted 36 months after it is initially determined. The Board will decide in the 36-month review if a subsequent 24-month review is required (Policies 3.4.1R1 and 3.4.2R2). An increase of 10% or more in a worker's permanent medical impairment rating may trigger a review and adjustment in an EERB. A review and adjustment of an EERB is permitted at any time if it was based on a misrepresentation of fact.

Following a review, the Board will not change a worker's EERB unless the change would result in a variance of at least 10% of the amount paid as an EERB prior to the review.

Earnings-loss supplement

Section 73A of the *Act* provides that the Board may pay a temporary earnings-loss supplement to a worker who is receiving an EERB if they suffer a loss of earnings that:

- is temporary,
- results from the injury for which the EERB is being paid, and
- was not taken into account in the most recent setting or review of the EERB.

11. Apportionment

Policy 3.9.11R1 guides the apportionment of workers' compensation benefits and defines the terms "activation", "acceleration", or "aggravation" of a pre-existing disease or disability as a permanent increase in impairment and/or loss of earnings. 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 impairment is attributable to the work-related injury and in part to a non-compensable factor, the next step to determine is whether the non-compensable factor can be assigned a permanent impairment rating. The rating attributed to the non-compensable factor is then subtracted from the total permanent impairment rating.

- If 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 in policy 3.9.11R1. The degree of severity of the pre-existing condition determines the degree of apportionment. A similar approach applies for apportionment of an EERB.

The decision-maker will obtain as much evidence as possible regarding the time loss or medical treatment for 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 EERB will not be subject to apportionment.

12. Periodic or Lump-Sum Payment

Section 74 of the *Act* authorizes the Board to determine the most convenient way to pay workers' compensation benefits. TERB and benefits received while participating in an approved vocational rehabilitation program are paid every two weeks. EERBs are paid monthly.

The Board's preference is to replace lost income with periodic payments. "Periodic" 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, where the permanent-impairment rating is less than 30%:

- if there is an EERB payable to the worker, the permanent impairment benefit will be paid on the same schedule;

- if no EERB is payable, the worker's permanent-impairment benefit will be paid as a lump sum.

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.

For pre-March 23, 1990 injuries a lump-sum payment may adversely affect the worker's eligibility for supplementary benefits under s.227 of the *Act*. Therefore, the Board may decide not to make a lump sum payment to a worker injured before March 23, 1990 unless it is clearly advantageous to the worker.

The Board's overriding concern is 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:

- the commuted benefit is to be used for a purpose approved by the Board;

- there are no other sources of funds that are accessible and appropriate for

the approved purpose;

- the worker is not dependent on the periodic benefit for the necessities of life and is not expected to be in the future;
- the worker's injury-related condition has stabilized; and
- the final scheduled review for an EERB (if applicable) has been completed.

A commutation of a benefit may be partial, and it may include the permanent impairment benefit and/or EERB.

13. Permanent Medical Impairment

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

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. An impairment is considered permanent when it becomes static or stable, and it is unlikely to improve despite further medical treatment. A permanent medical impairment rating accounts for a worker's usual pain for the type of injury sustained**.**

Policy 3.3.6 governs the determination of a worker's permanent impairment rating for all injuries. As of April 1, 2024, the most current version of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* is used to determine or reassess a worker's degree of permanent impairment.

14. Chronic Pain

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 dependent 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 Board developed the "Pain-Related Impairment Assessment Tool" to determine whether a worker has a "slight" or "substantial" pain-related impairment.

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

A worker may have an injury that results in

- a non-chronic pain component for which they can receive a permanent medical impairment, and

- a chronic pain component for which they can also receive a pain-related impairment.

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

15. Permanent-Impairment Benefit

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 (PIB).

Section 34 of the *Act* sets out the formula for calculating a PIB:

- 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 Board may review and adjust the worker's PIB.

16. Medical Aid

Section 2(r) of the *Act* defines medical aid to include any health care service, product, or device provided to an injured worker because of a work-related injury and includes reasonable expenses incurred to obtain medical aid.

Section 102(1) authorizes the Board to provide medical aid to an injured worker that it considers necessary or expedient because of the work-related injury. The term "necessary" includes the notion of something essential or indispensable. The term "expedient" includes the notion of being advantageous, advisable or appropriate.

Section 104(1) states that all questions as to the necessity, character, and sufficiency of any medical aid will be determined by the Board. In the exercise of this discretion, the Board will act reasonably, weighing the full facts and circumstances of the claim in light of the *Act* and policies.

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 health care 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 Board 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 any information requested by the Board regarding a worker claiming compensation.

17. Rehabilitation

An injured worker who needs assistance to return to work due to the injury may be entitled to receive rehabilitation services. Services are also provided to reduce the effects of the injury.

Sections 112 and 113 govern the provision of rehabilitation services. Section 112(1) authorizes the Board to make any expenditures and take any measures that, in the Board'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 Board, 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.

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 increases 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 before moving down to the next level.

If returning to work with the pre-injury employer is not possible, the Board 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.

18. Estimated Potential Earnings Ability

In deciding whether a worker is entitled to receive an EERB, the Board will consider various types of earnings and may make an estimated potential earnings ability decision to determine if there is employment that is suitable and reasonably available to the worker.

After an injured worker completes a rehabilitation program, or the Board has determined that rehabilitation services are not appropriate, the Board will consider whether the worker is entitled to receive an EERB to compensate for the 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 Board may estimate earnings the worker is capable of earning in suitable and reasonably available employment, as authorized under s.38(b)(ii) of the *Act*.

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.

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 Board’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.

19. Annuities

A worker who is entitled to receive an EERB is eligible to receive an annuity when they turn 65 years of age. The Board will set aside an additional amount equal to 5% of the worker's EERB and PIB to provide for the annuity. The amount reserved for an annuity is not deducted from the compensation payable to the worker.

When a surviving spouse is eligible to receive a survivor pension, the Board 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, unless an EERB review has resulted in discontinuation of the EERB before age 65. The annuity is paid at the time the EERB is discontinued.

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.

All annuity payments are tax free.

If a worker has received payment of an EERB as a lump sum rather than as periodic payments, the Board may consider paying the annuity as a lump sum prior to age 65.

If a person entitled to have an annuity reserved on their 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 Board. 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.

If the Board 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.

20. Survivor benefits

If a worker dies as a result of a work-related injury, the Board may pay the necessary burial or cremation expenses up to $15,000.00, a death benefit, and a survivor pension.

Entitlement to survivor benefits does not require the work-related injury to be the only or the most significant cause of 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.

If a worker dies while receiving compensation, the Board 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. If the worker was receiving a 100% permanent impairment at the time of death, nine times the monthly payment will be paid. Payment of this amount does not require that the worker's death resulted from the injury.

Under s.60 of the *Act* and the regulations, burial or cremation expenses are adjusted for consumer price indexing providing that an application for burial expenses has been made to the Canada Pension Plan. Transportation expenses up to $500.00 are paid for the body of the worker to be moved to their place of residence, if the death occurs in Nova Scotia, or the actual expenses if the death occurred elsewhere.

If the deceased worker had a dependent spouse, the following benefits are also payable to the dependent spouse under s.60(1) of the *Act*:

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

If the deceased worker had dependent children, a dependent-child benefit of $196.00 per month for each child until age 18, or 25 if still attending school, is payable. This benefit is subject to consumer price indexing.

A survivor pension will not exceed the amount that would have been payable to the worker as a combined EERB and PIB 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 s.60(1) of the *Act*, the Board may recognize other dependent persons besides 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 s.60A of the *Act*.

If the worker is in receipt of a 100% permanent-impairment award at the time of death, under s.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 s.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 s.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 due to the serious and willful misconduct of the worker.

Where a worker dies while in receipt of an "automatic assumption" pension under s.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.

21. Permanent disability

A worker injured before March 23, 1990, who is receiving or entitled to receive compensation for permanent disability (a permanent-impairment award) by February 1, 1996, is not entitled to receive an EERB for permanent loss of earnings. A worker in these circumstances will receive compensation for permanent disability according to the legislation and policies in place before March 23, 1990.

A permanent disability benefit is payable for life and calculated according to the following formula:

75% of the worker's gross average weekly earnings before the accident
x
the permanent-impairment rating determined by the WCB.

By virtue of s.227(3) of the *Act*, the review of permanent-impairment benefits under s.71 applies to the review of permanent disability benefits. This means it is possible for the Board to review or adjust a worker's permanent disability benefits after 16 months have elapsed from the most recent determination of these benefits.

22. Supplementary benefits

A worker injured before March 23, 1990, 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.

Under s.227 of the *Act* and the *General Regulations*, the following criteria 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 s.10D of the *Act*; 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, s.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

- 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.

To be eligible for supplementary benefits, compensation must be received periodically. Compensation paid as a lump sum erases 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 Board. An applicant's total income for the calendar year is as defined by the Canada 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.

23. Appealing a Claim

Internal Appeals

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

Any decision of a Board staff member may be appealed to a Hearing Officer of the Board's Internal Appeals Department. A decision must be appealed in writing to a Hearing Officer within 30 days of a person being notified of it. Under s.189 of the *Act*, an addressee is deemed to have received a written decision five business days after the day it was mailed.

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

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 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, but the timeline may 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 Board policies, even if they believe a policy is inconsistent with the *Act*.

External Appeals

Part II of the *Act* establishes the Tribunal and its authority. Under s.29 of the *Act* the Tribunal has the exclusive jurisdiction to determine if a civil right of action is statute-

barred under s.28 of the *Act*.

The Tribunal is part of the Workplace Safety and Insurance System but is independent of the Board. The Tribunal's primary function is to decide appeals of Hearing Officer decisions.

The decision makers are called Appeal Commissioners, and they basically have the same powers as Hearing Officers. The primary differences are that Appeal Commissioners

- are not Board employees,
- do not apply policies that they determine are inconsistent with the *Act,*
- can decide whether a worker's right to sue employers has been removed by the statutory bar in the *Act* (see s.28 and 29 under Part I of the *Act*), and
- can refer appeals to Hearing Officers for further investigation under s.251 of the *Act*.

A Hearing Officer decision must be appealed in writing within 30 days of a person being notified of the decision. Time limits relating to an appeal to the Tribunal 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. The Tribunal 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 Board is also a statutory participant in any appeal to the Tribunal.

The Tribunal may hold an oral hearing if requested, and if so, it must record the hearing. Decisions are usually rendered within 60 days of submission deadlines or after the oral hearing date.

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

Any participant who is not satisfied with the Tribunal'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.

Workers' Advisers Program

Part III of the *Act* establishes the Workers' Advisers Program (WAP). A worker who has a

matter under appeal may be entitled to assistance from WAP.

WAP is independent of the Board. Workers' Advisers may provide legal assistance, advice, and representation to workers in accordance with WAP's eligibility criteria which is:

- 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. They do not assist workers with CPP Disability applications, private insurance claims, or labour disputes.

24. Reconsideration

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 Board. 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' PIBs, TERB, and EERBs that do not follow the "new evidence" reconsideration process under WCB Policy 8.1.7R1.

Unless sections 71, 72, or 73 of the *Act* apply, a final decision of the Board may only be reconsidered and changed if "new evidence" is presented in accordance with policy 8.1.7R2.

Under Policy 8.1.7R2, 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;
- 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 Board 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.

25. Review of Compensation

Section 71 of the *Act provides* that the Board may review and adjust a worker's permanent-impairment benefit if, in the Board'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, and

- at least 16 months have elapsed from the time of the most recent determination of the worker's permanent impairment rating.

Section 72 of the *Act* provides that the Board may review and adjust a worker's TERB at any time.

Section 73(1) of the *Act* provides that the Board may review and adjust a worker's EERB

- once, commencing in the 36th month after the initial award of an EERB;

- once, commencing in the 24th month after the completion of the 36th month review if, at the time of the 36th month review, the Board is of the opinion that a further review is necessary;

- at any time, where the review of a worker's permanent-impairment rating under s.71 of the *Act results* in an adjustment of at least 10% in the rating; or

- at any time, where the EERB was based on a misrepresentation of fact.

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

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

Except as provided in section 73 of the *Act*, a worker's EERB will not be further reviewed or adjusted.

26. Assessments

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

For the purpose of establishing assessment rates, the Board divides employers into classes and subclasses, based on industry and business operations, not occupations, and reviews the risks and accident experience for each group.

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

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 Board. 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 Board 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 Board.

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 9.3.1R3 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).

27 Disclosure

A worker may request a copy of their claim file(s) at any time. A worker may receive a copy of any document or record in the Board's possession respecting the claim of the worker.

An employer is only allowed to request a worker's claim file materials once there is an active appeal, in which the employer is a participant. An employer, participating in an appeal, may receive a copy of any document or record in the Board's possession that the Board considers relevant to the appeal. An employer's access is restricted to materials that the Board (or Tribunal) considers relevant to the appeal.

In an appeal, a participant will be provided sufficient information and evidence to know the case that needs to be met.

If additional evidence is filed in an appeal, it must be provided to all the other participants. The Board may charge a fee for copying documents.