

2006/06/20-01

THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA**RESOLUTION OF THE BOARD OF DIRECTORS****RE: Transitional Provision Regarding Recurrence of Disability****WHEREAS:**

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

AND WHEREAS:

On May 5, 2006, the Supreme Court of British Columbia released a decision in *Cowburn v. Workers' Compensation Board of British Columbia*, 2006 BCSC 722, finding that the interpretation of the term "recurrence" for the purposes of section 35.1(8) of the *Act* to include deteriorations in a permanent disability is patently unreasonable;

AND WHEREAS:

In light of the court's decision, the Board of Directors' has reviewed policy item #1.03 of the *Rehabilitation Services & Claims Manual* ("*RS&CM*"), Volumes I and II, which addresses the term "recurrence" for the purposes of section 35.1(8) of the *Act*;

AND WHEREAS:

The Board of Directors has considered how the policy amendments approved in this resolution should be implemented in light of the principles outlined in Governors' Decision No. 36 concerning the retroactivity of policy changes;

AND WHEREAS:

The Board of Directors has considered the payment of interest on any retroactive awards as a result of the policy amendments approved in this resolution in light of policy item #50.00 of the *RS&CM*, Volumes I and II.

THE BOARD OF DIRECTORS RESOLVES THAT:

1. Amendments to policy item #1.03 of the *RS&CM*, Volume II, attached as Appendix A, are approved and apply to decisions, including appellate decisions, made on or after October 16, 2002.
2. Amendments to policy item #1.03 of the *RS&CM*, Volume I, attached as Appendix B, are approved and apply to decisions, including appellate decisions, made on or after October 16, 2002.
3. Interest will not be paid on any retroactive payments as a result of the policy amendments approved in this resolution.
4. This resolution constitutes a policy decision of the Board of Directors.
5. This resolution is effective August 1, 2006.

DATED at Richmond, British Columbia, June 20, 2006.

By the Workers' Compensation Board

**DOUGLAS J. ENNS, CHAIR
BOARD OF DIRECTORS**

#1.03 *Scope of Volumes I and II in Relation to Benefits for Injured Workers*

(a) General

Subject to subsequent amendments, Volume I sets out the law and policies that were in effect immediately prior to June 30, 2002 in relation to compensation for injured workers. For convenience, the law and policies in effect immediately prior to that date, as amended, will be called the “former provisions”.

Volume II sets out the law and policies in effect on or after June 30, 2002, as they may be amended from time to time, in relation to worker benefits. For convenience, the law and policy on or after that date, including any subsequent amendments, will be called the “current provisions”.

Unless otherwise stated, in Volume II of this *Manual* the “Act” refers to the *Workers Compensation Act*, as amended on or after June 30, 2002. The *Interpretation Act*, RSBC 1996, Chapter 238, applies to the Act, unless a contrary intention appears in either the *Interpretation Act* or the Act.

(b) Amendment Act, 2002 (Bill 49) Transitional Provisions

The following rules apply to determining whether the former provisions (Volume I) or the current provisions (Volume II) apply in a particular case. These rules are based upon the transitional rules in section 35.1 of the *Workers Compensation Act*, as amended by the *Amendment Act, 2002*.

1. The current provisions apply to an injury that occurs on or after June 30, 2002.
2. Except as noted in rules 3, 4, and 5, the former provisions apply to an injury that occurred before June 30, 2002.
3. Subject to rule 4 respecting recurrences, if an injury occurred before June 30, 2002, but the first indication that it is permanently disabling occurs on or after June 30, 2002, the current provisions apply to the permanent disability award with two modifications:
 - (i) 75% of average earnings (former provisions) is used for calculating the award rather than 90% of average net earnings (current provisions); and
 - (ii) no deduction is made for disability benefits under the Canada Pension Plan (former provisions).

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Under this rule, for an injury that occurred before June 30, 2002, where the first indication of permanent disability also occurs before June 30, 2002, the permanent disability award will be adjudicated under the former provisions. Where the first indication of permanent disability is on or after June 30, 2002, the award will be adjudicated under the current provisions, using the modified formula described in (i) and (ii) above. The determination of when permanent disability first occurs will be based on available medical evidence.

An example of when this rule applies is where a worker, injured before June 30, 2002, shows no signs of permanent disability before that date. However, on or after June 30, 2002, the worker has surgery, which first causes permanent disability. The permanent disability award will be adjudicated under the current provisions, using the modified formula.

4. If an injury occurred before June 30, 2002, and the disability recurs on or after June 30, 2002, the current provisions apply to the recurrence.

This transitional rule applies only to a recurrence of a disability on or after June 30, 2002. It does not apply to permanent changes in the nature and degree of a worker's permanent disability. Where a worker was entitled to a permanent disability award before June 30, 2002 in respect of a compensable injury or disease, the former provisions apply to any changes in the nature and degree of the worker's permanent disability after that date.

For the purposes of this policy, a recurrence includes any claim that is re-opened for an additional period of temporary disability, regardless of whether the worker had been entitled to a permanent disability award before June 30, 2002. However, where the worker was entitled to a permanent disability award before June 30, 2002, the former provisions apply to any changes in the nature and degree of the worker's permanent disability following an additional period of temporary disability.

~~For the purposes of this policy, a recurrence includes any claim that is re-opened for:~~

- ~~• any additional period of temporary disability where no permanent disability award was previously provided in respect of the compensable injury or disease;~~

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- ~~any additional period of temporary disability where a permanent disability award was previously provided in respect of the compensable injury or disease.~~
- ~~any permanent changes in the nature and degree of a worker's permanent disability.~~

The following are examples of a recurrence:

- A worker totally recovers from a temporary disability resulting in the termination of wage-loss payments. Subsequently, there is a recurrence of the disability and the claim is re-opened for compensation.
 - A worker is in receipt of a permanent **partial** disability award and the disability subsequently worsens **so that the worker is temporarily totally disabled**. The claim is re-opened to provide compensation for a new period of temporary disability ~~and/or an increase in entitlement for the permanent disability award~~. **The additional period of temporary disability is a recurrence to which the current provisions apply. However, a subsequent change in the nature and degree of the worker's permanent disability is adjudicated under the former provisions.**
5. Regardless of the date of injury, the current provisions on indexing apply to compensation paid for an injured worker on or after June 30, 2002. Indexing of retroactive awards payable before June 30, 2002 will be based on the former provisions.

EFFECTIVE DATE: ~~December 31, 2003~~**August 1, 2006**

APPLICATION: **Amendments to policy item #1.03(b)(4) that took effect on August 1, 2006 apply to all decisions, including appellate decisions, made on or after October 16, 2002.**
~~Policy items #1.01 to #1.03 were amended effective December 31, 2003 to reflect changes to the Act as a result of the Amendment Act, 2003.~~
~~The policy amendments made effective June 17, 2003 were not intended to change substantive decision-making. The amendments to policy items #1.00, #1.01, #1.02 and #1.03 were for purposes of clarification only and did not change the substance of the policies approved effective June 30, 2002 and October 16, 2002.~~

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HISTORY:

December 31, 2003 – Amendments to reflect consequential changes to the *Act* resulting from the *Amendment Act, 2003*.

June 17, 2003 – Reorganization of format and addition of content to address the scope of Volumes I and II of the Manual.

October, 16, 2002 – Amendments to clarify meaning of “recurrence” for the purposes of section 35.1(8) of the *Act*.

**APPENDIX B
VOLUME I**

#1.03 *Scope of Volumes I and II in Relation to Benefits for Injured Workers*

(a) General

Subject to subsequent amendments, Volume I sets out the law and policies that were in effect immediately prior to June 30, 2002 in relation to compensation for injured workers. For convenience, the law and policies in effect immediately prior to that date, as amended, will be called the “former provisions”.

Volume II sets out the law and policies in effect on or after June 30, 2002, as they may be amended from time to time, in relation to worker benefits. For convenience, the law and policy on or after that date, including any subsequent amendments, will be called the “current provisions”.

Except as otherwise stated and except in relation to matters covered by the *Amendment Act (No. 2), 2002*, in Volume I “Act” refers to the *Workers Compensation Act*, as it read immediately before June 30, 2002. The *Interpretation Act*, RSBC 1996, Chapter 238, applies to the *Act*, unless a contrary intention appears in either the *Interpretation Act* or the *Act*.

(b) Amendment Act, 2002 (Bill 49) Transitional Provisions

The following rules apply to determining whether the former provisions (Volume I) or the current provisions (Volume II) apply in a particular case. These rules are based upon the transitional rules in section 35.1 of the *Workers Compensation Act*, as amended by the *Amendment Act, 2002*.

1. Except as noted in rules 3, 4, and 5, the former provisions apply to an injury that occurred before June 30, 2002.
2. The current provisions apply to an injury that occurs on or after June 30, 2002.
3. Subject to rule 4 respecting recurrences, if an injury occurred before June 30, 2002, but the first indication that it is permanently disabling occurs on or after June 30, 2002, the current provisions apply to the permanent disability award with two modifications:
 - (i) 75% of average earnings (former provisions) is used for calculating the award rather than 90% of average net earnings (current provisions); and
 - (ii) no deduction is made for disability benefits under the Canada Pension Plan (former provisions).

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Under this rule, for an injury that occurred before June 30, 2002, where the first indication of permanent disability also occurs before June 30, 2002, the permanent disability award will be adjudicated under the former provisions. Where the first indication of permanent disability is on or after June 30, 2002, the award will be adjudicated under the current provisions, using the modified formula described in (i) and (ii) above. The determination of when permanent disability first occurs will be based on available medical evidence.

An example of when this rule applies is where a worker, injured before June 30, 2002, shows no signs of permanent disability before that date. However, on or after June 30, 2002, the worker has surgery, which first causes permanent disability. The permanent disability award will be adjudicated under the current provisions, using the modified formula.

4. If an injury occurred before June 30, 2002, and the disability recurs on or after June 30, 2002, the current provisions apply to the recurrence.

This transitional rule applies only to a recurrence of a disability on or after June 30, 2002. It does not apply to permanent changes in the nature and degree of a worker's permanent disability. Where a worker was entitled to a permanent disability award before June 30, 2002 in respect of a compensable injury or disease, the former provisions apply to any changes in the nature and degree of the worker's permanent disability after that date.

For the purposes of this policy, a recurrence includes any claim that is re-opened for an additional period of temporary disability, regardless of whether the worker had been entitled to a permanent disability award before June 30, 2002. However, where the worker was entitled to a permanent disability award before June 30, 2002, the former provisions apply to any changes in the nature and degree of the worker's permanent disability following an additional period of temporary disability.

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- ~~any permanent changes in the nature and degree of a worker's permanent disability.~~

The following are examples of a recurrence:

- A worker totally recovers from a temporary disability resulting in the termination of wage-loss payments. Subsequently, there is a recurrence of the disability and the claim is re-opened for compensation.
 - A worker is in receipt of a permanent **partial** disability award and the disability subsequently worsens **so that the worker is temporarily totally disabled**. The claim is re-opened to provide compensation for a new period of temporary disability ~~and/or an increase in entitlement for the permanent disability award~~. **The additional period of temporary disability is a recurrence to which the current provisions apply. However, a subsequent change in the nature and degree of the worker's permanent disability is adjudicated under the former provisions.**
5. Regardless of the date of injury or death, the current provisions on indexing apply to compensation paid on or after June 30, 2002. Indexing of retroactive awards payable before June 30, 2002, will be based on the former provisions.

EFFECTIVE DATE: ~~June 17, 2003~~**August 1, 2006**

APPLICATION: **Amendments to policy item #1.03(b)(4) that took effect on August 1, 2006 apply to all decisions, including appellate decisions, made on or after October 16, 2002.**

HISTORY: **June 17, 2003** – Reorganization of format and addition of content to address the scope of Volumes I and II of the Manual.

Amendments to transitional rule 4 in policy item #1.03(b) reflect the status quo by inserting the policy on the meaning of "recurrence" in section 35.1 of the *Act* that was previously approved effective October 16, 2002, and only inserted into Volume II.

~~The remaining amendments to policy items #1.00, #1.01, #1.02 and #1.03 are for purposes of clarification only and do not change the substance of the policies approved effective June 30, 2002.~~