WORKSAFE
TRAVAIL SÉCURITAIRE NB

Dorine P. Pirie, LL.B.
Chairperson / Présidente du conseil d'administration

1 Portland Street, P.O. Box 160
Saint John, N.B. E2L 3X9
Phone 506 632-4955
Fax 506 632-4999

1, rue Portland, case postale 160
Saint John (N.-B.) E2L 3X9
Téléphone 506 632-4955
Télécopieur 506 632-4999

September 24, 2015

Legislative Review of Workers' Compensation
P.O. Box 6000
470 York Street
Fredericton, N.B. E3B 1X6
wclr@gnb.ca

Dear Consultation Panelists:

On behalf of the WorkSafeNB Board of Directors, I am pleased to submit our recommendations on Phase II of the review of workers' compensation legislation. Our attached submission includes an Executive Summary along with our position papers on the Governance Structure of WorkSafeNB, Advocates' Services, and Section 38 of the *Workers' Compensation Act*.

Please note that consideration should be given to the impact that any legislative changes made to section 38 of the *Workers' Compensation Act* (*WC Act*) may have on the *Firefighters' Compensation Act (FC Act),* as the benefits provided in the *FC Act* were intended to mirror the *WC Act*.

The WorkSafeNB Board of Directors is committed to continuously improving the workplace health, safety and compensation system. Our recommendations are the product of compromise between the Board's worker and employer representatives to strike the right balance between the interests of injured workers and employers in New Brunswick. These recommendations fairly reflect the Board's rigorous deliberations on all the issues under review.

Should you require additional information or clarification, please contact me at your convenience.

Yours truly,

Dorine P. Pirie

Dorine P. Pirie
WorkSafeNB Chairperson

Encl
DP/cm

EXECUTIVE SUMMARY

INTRODUCTION

WorkSafeNB's Board of Directors is focused on continuously improving the health, safety, and compensation system for its stakeholders. The Board welcomes the opportunity to submit recommendations to Government during Phase II of the legislative review, and formed its positions by weighing internal and external information, including comparative material from other jurisdictions and cost information, within the context of the founding principles of workers' compensation legislation (Meredith Principles). WorkSafeNB's Board of Directors has formed a position on each of the three areas under review. The Board also believes there are administrative amendments that could be made to provide clarity in understanding and administration. Should Government be interested in pursuing these amendments during Phase II, WorkSafeNB would be pleased to share this proposal with Government. The WorkSafeNB Board of Directors' submission to Government includes this Executive Summary and position papers on:

- Governance Structure of WorkSafeNB;
- Advocates' Services; and
- Section 38 of the *Workers' Compensation Act (WC Act)*.

GOVERNANCE STRUCTURE

WorkSafeNB's Board of Directors has a goal focused on advancing its disciplined stewardship and oversight of WorkSafeNB. This Board offers experienced insight on the governance of WorkSafeNB, which is reflected in the following recommendations.

RECOMMENDATIONS

Recommendation # 1 - Board Size and Composition

Remove the words "or more" under ss. 8(1)(b&c) of the *WHSCC & WCAT Act* to reflect the Board's view of a 10-member board being a reasonable size to effectively and efficiently govern WorkSafeNB.

Recommendation # 2 - Board Size and Composition

Repeal ss. 8(1.2) of the *WHSCC & WCAT Act* to remove the President & CEO as a non-voting member of the Board of Directors. This will better separate the distinct functions of the President & CEO and the Board of Directors.

Recommendation # 3 - Appointment of Directors

Amend legislation to give the Board of Directors authority to recommend board appointments to the Lieutenant-Governor in Council. This would ensure the appointment of Board members within the parameters of ABC criteria and based on the identified skills, knowledge, and experiences needed to carry out WorkSafeNB's mandate as a Board member.

Recommendation # 4 - Appointment Terms

Amend the *WHSSC & WCAT Act* to indicate the first term of office for a member of WorkSafeNB's Board of Directors is five years and the second term is three years, to allow the board member to fully contribute for a reasonable amount of time given the steep learning curve.

EXECUTIVE SUMMARY

Recommendation # 5 - Appointment Terms

Amend the *WHSCC & WCAT Act* to indicate that no more than two Board members' terms can expire in the same year. This will ensure staggered terms, board continuity, and a balance of seasoned members and those who are newly appointed.

Recommendation # 6 - Appointment Terms

Add legislation that would allow current Board members to continue to serve on the Board following their term expiry date until a replacement member has been appointed. This will ensure Board business continues during member transitions, especially during critical activities such as finalizing year-end legal obligations and approving the assessment rate and budget.

Recommendation # 7 - CEO Appointment

Amend the *WHSCC & WCAT Act* to remove the requirement that the Lieutenant-Governor in Council must approve the Board's hiring of the President & CEO. This aligns with the President & CEO being an employee of the Board and the Board being completely responsible for this position's performance and succession.

Recommendation # 8 - Residential Requirements

Add language to the *WHSCC & WCAT Act* indicating that all WorkSafeNB Board members must be permanent residents of New Brunswick and maintain residency throughout the term of appointment. The WorkSafeNB Board of Directors believes this is consistent with the provincial government's policy - An Appointment Policy for New Brunswick Agencies, Boards and Commissions and would contribute to Board members serving the best interests of the organization and the province.

Recommendation # 9 - Memorandum of Understanding (MOU)

Add the substance of ss. 6(1) of the *Accountability and Continuous Improvement Act* to the *WHSCC & WCAT Act* with respect to establishing a Memorandum of Understanding. This will ensure specific roles and responsibilities are defined so that all parties have a clear understanding of their purpose in the partnership to help achieve mutual goals.

ADVOCATES' SERVICES

Advocates' Services are funded by WorkSafeNB through the Accident Fund, with the programs reporting directly to the Department of Post-secondary Education, Training, and Labour. The WorkSafeNB Board of Directors believes that advocates provide important services to injured workers and employers, including help navigating the workers' compensation system and preparing and representing clients at appeals before the Workers' Compensation Appeals Tribunal.

EXECUTIVE SUMMARY

RECOMMENDATIONS

Recommendation # 10 – Annual Reporting

Amend the *WC Act* to require:

1) A system of information sharing where an annual report on the activities, volumes and functions of the workers' and employers' advocates are provided to the WorkSafeNB Board of Directors no later than July 1 of each year.
2) An annual meeting between WorkSafeNB and the Advocates' Services to discuss their activities and issues of mutual interest.

The Board believes advocates serve a broader purpose than just representing clients at appeals. It believes the program serves an important function in helping to guide clients who are trying to navigate the workers' compensation system. WorkSafeNB's Board of Directors, through the recommendations above, is committed to ensuring service excellence to its clients and stakeholders.

SECTION 38 *WORKERS' COMPENSATION ACT*

WorkSafeNB's legislated benefits compare strongly within Atlantic Canada, and are competitive over the long term when compared to our Western counterparts. However, WorkSafeNB has proposed a series of sound legislative improvements to an already competitive system. Please note that consideration should be given to the impact that any legislative changes made to section 38 of the *Workers' Compensation Act* (*WC Act*) may have on the *Firefighters' Compensation Act (FC Act),* as the benefits provided in the *FC Act* were intended to mirror the *WC Act*.

RECOMMENDATIONS

Recommendation # 11 - Three-Day Waiting Period

Reduce the waiting period from three days to two, with all other provisions remaining the same. This recommendation aligns with legislation in Nova Scotia and Prince Edward Island and has an estimated cost increase between $0.05 and $0.25 (on the assessment rate) for assessed employers, and between $0.5 and $3.4 million for self-insured employers.

Recommendation # 12 - Supplements to Compensation

Repeal ss. 38.11(9) of the *WC Act*. Provide new, explicit legislation to identify the types of remuneration that are to be offset from benefits, which are: actual earnings, vacation pay, sick and disability pay, employment insurance, and employer top-ups. The new legislation should also provide parameters to allow WorkSafeNB's Board of Directors to assess similar types of remuneration and whether they should be considered supplemental income. This provision is intended to ensure that the combination of benefits and remuneration related to an injury, do not exceed 85% of pre-accident net earnings.

Recommendation # 13 - Maximum Annual Earnings

Increase the multiplier from 1.5 to 1.75 of the New Brunswick Industrial Aggregate Earnings (NBIAE), which will compensate a higher proportion of workers' earnings. This will have the following estimated cost increases: Assessed employers – the increase in compensation costs will be primarily offset by a slightly higher revenue base. Self-insured - $500,000 annually and an increased liability of $3.318 million. *Firefighters' Compensation Act* - $30 per firefighter and an increased liability of $933,900.

Recommendation # 14 – Non Work-related Conditions
Add explicit legislation to provide direction on how to manage claims when non work-related conditions arise during rehabilitation. The Board recommends three components: 1) Accommodate the personal condition when possible; 2) Provide a notice period before temporarily suspending benefits when rehabilitation is interrupted and accommodation was not possible; and 3) Pay the entire cost of the claim in a lump sum when rehabilitation will never be completed, or the personal condition is the primary cause of not returning to work. This recommendation was arrived at by considering sections of legislation that compensate for injuries and illnesses that "arise out of and in the course of employment," the integration of benefit systems for the same injury (employment insurance, Canada Pension Plan Disability), and the Court of Appeal case: VSL Canada v. WHSCC (2011).

Recommendation # 15 - Canada Pension Plan Disability Offsets
No changes are recommended. The current provisions reflect the integration of workers' compensation benefits and Canada Pension Plan Disability for the same injury.

Recommendation # 16 - Annual Review of Benefits
Amend the *WC Act* to require the annual review on the anniversary date that loss of earnings benefits began, to ensure consistency in the timing of the review for all workers.

Recommendation # 17 - Annual Review of Benefits
Amend the *WC Act* to require that estimated capable earnings be indexed as part of the annual review, similar to the legislated provision for indexing average earnings, to keep pace with inflation.

Recommendation # 18 - Annuities
Amend the *WC Act* to clarify that the "average yield rate of the investment portfolio" may include negative interest, consistent with investment principles and standards.

Recommendation # 19 - Annuities
Amend the legislation by changing the requirement in ss. 38.22(12) from a minimum annuity amount to a minimum lump sum payment amount equal to 50% of the New Brunswick Industrial Aggregate Earnings. This will resolve difficulties that injured workers encounter when trying to purchase annuities with smaller amounts.

Recommendation # 20 - Estimated Capable Earnings
Create a new subsection under 38.11 to clarify that estimated capable earnings are remuneration in the calculation of loss of earnings, ensuring that workers have equivalent benefits regardless of whether they return to work or not.

Recommendation # 21 – Loss of Earnings Benefits
That compensation paid to injured workers remain at 85% of loss of earnings. This is consistent with or higher than compensation paid by other Atlantic Canada compensation jurisdictions.

Recommendation # 22 - Permanent Physical Impairment Legislation

Since the Board agrees with the dual award system currently in place, it recommends these subsections remain unchanged.

Recommendation # 23 - Permanent Physical Impairment Regulation

Amend the Permanent Physical Impairment Rating Schedule Regulation (as attached to Section 38 of the *WC Act* document) to reflect current medical best practices.

Recommendation # 24 – Survivors' Benefits

Repeal legislation defining surviving spouse benefits and create a new benefit that would be:

- 85% of the deceased worker's loss of earnings from the beginning of the claim and until the surviving spouse attains age 65, with no family income test; and
- 10% to be set aside for the purchase of an annuity at age 65.

This amendment would improve the benefit, reduce the uncertainty of choosing between benefit plans, and better align with other jurisdictions and with the model for injured worker benefits in New Brunswick.

ADMINISTRATIVE AMENDMENTS

One of the goals of the legislative review is "to modernize the act with plain language to ensure that those impacted by its legislation are able to fully understand its implications and what it means to them." As such, the WorkSafeNB Board of Directors has identified several amendments under s. 38 of the *WC Act* that would provide clarity in understanding and administration. Should the Government pursue these types of amendments in Phase II of the legislative review, the WorkSafeNB Board of Directors would be pleased to provide its position paper on these amendments.

WorkSafe
Travail sécuritaire NB

WorkSafeNB Board of Directors' Governance Structure September 2015

Recommendations from the WorkSafeNB Board of Directors Phase II Legislative Review

INTRODUCTION

WORKSAFENB BOARD OF DIRECTORS' RECOMMENDATIONS

Good governance systems are designed to help organizations focus on the activities that contribute most to their overall objectives, use their resources effectively, and ensure that they are managed in the best interests of their stakeholders. Through the desire to continuously improve, WorkSafeNB's Board of Directors established a Quality Governance Goal, becoming the first jurisdiction in Canada to develop a goal tied to specific board activities.

Quality Governance

"We will demonstrate transparency, accountability, and commitment to our stakeholders through our disciplined governance practices as we serve the best interests of WorkSafeNB."

The goal aims to advance the Board's discipline around the oversight and stewardship of WorkSafeNB, as well as ensuring transparent governance to our stakeholders.

As the stewards of WorkSafeNB, the Board of Directors offers experienced insight on the governance of WorkSafeNB. As such, this paper outlines the Board's recommendations with respect to the governance structure of WorkSafeNB under *the Workplace Health Safety and Compensation Commission & Workers' Compensation Appeals Tribunal Act (WHSCC & WCAT Act).*

WHO WE ARE

WorkSafeNB is a Crown Corporation under Part IV of New Brunswick's Public Service. We are responsible for administering the following four Acts:

- *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*;
- *Workers' Compensation Act;*
- *Occupational Health and Safety Act;* and
- *Firefighters' Compensation Act*.

WorkSafeNB is governed by an independent Board of Directors consisting of a chair, a vice-chair and an equal number of worker and employer representatives. The President & Chief Executive Officer is a non-voting member.

BOARD SIZE AND COMPOSITION

RECOMMENDATION #1

WorkSafeNB's Board of Directors recommends amending ss. 8(1)(b&c) of the *WHSCC & WCAT Act* to remove the words "or more" from both ss. 8(1)(b) and 8(1)(c). As a result, ss. 8 (1.1) can also be repealed.

BOARD COMPOSITION

8(1) The affairs of the Commission shall be administered by a board of directors consisting of the following persons who shall be appointed by the Lieutenant-Governor in Council

(b) Four or more persons who, in the opinion of the Lieutenant-Governor in Council, are representative of workers;

(c) Four or more persons who, in the opinion of the Lieutenant-Governor in Council, are representative of employers.

8(1.1) The number of persons appointed under paragraph (1)(b) and the number of persons appointed under paragraph (1)(c) shall be equal.

RATIONALE

Board membership across Canadian compensation jurisdictions ranges from five to 15 members; with worker and employer member representatives ranging from one (B.C.) to seven (Que.). Similar to New Brunswick, five boards require equal representation between employer and worker representatives.

Outlined in ss. 8(1) of the *WHSCC & WCAT Act*, the Board of Directors is currently made up of a chairperson, a vice-chairperson, four or more members representing workers and four or more members representing employers. WorkSafeNB's Board of Directors recommends deleting the "or more" wording from legislation as it believes the 10-member board has been effective and efficient in governing WorkSafeNB.

Furthermore, this size, compared to a possibly larger board, facilitates better relationships, trust among members, and as a result, effective consensus-based decision-making as well as consistency in board size.

BOARD SIZE AND COMPOSITION

RECOMMENDATION #2

WorkSafeNB's Board of Directors recommends repealing ss. 8(1.2) of the *WHSCC & WCAT Act.*

BOARD APPOINTMENTS

8(1.2) The President and Chief Executive Officer of the Commission is, by virtue of his or her office, a non-voting member of the board of directors.

RATIONALE

An effective relationship between the Board of Directors and the President & CEO is built on clear, well-defined roles and responsibilities. The Board of Directors is responsible for the oversight and governance of the organization and, as such, creates the vision, direction and policies for the organization. The CEO, as a hired employee, is responsible for managing day-to-day operations and implements the strategic direction as set out by the Board. Although these roles support and balance each other, they are each very unique and have distinct functions. WorkSafeNB's Board of Directors recommends repealing ss. 8(1.2) to ensure these roles remain separate and well-defined.

During Board of Directors meetings, the President & CEO is present to provide information, answer questions, and clarify practice on a variety of topics including policy, communications, risks and opportunities. By removing the President & CEO as a non-voting member of the Board of Directors, he or she would continue to be present as that link to operations.

APPOINTMENT OF DIRECTORS

RECOMMENDATION #3

WorkSafeNB's Board of Directors recommends amending ss. 8(1) of the *WHSCC & WCAT Act* to indicate that Board members be appointed by the Lieutenant-Governor in Council on the recommendation of WorkSafeNB.

RATIONALE

Under s. 8(1) of the *WHSCC & WCAT Act*, the Lieutenant-Governor in Council (LGIC) appoints WorkSafeNB's Board of Directors. The New Brunswick Government Agencies, Boards and Commissions has a process that concentrates on promoting merit, with special efforts to promote diversity and inclusion of New Brunswick's two official languages, women, First Nations, persons with disabilities, visible minority groups and all geographic regions of the province.

By giving WorkSafeNB the legislated authority to recommend board appointments to the LGIC, the Board would be able to further identify the skills, knowledge, and experiences needed to achieve optimal Board composition and appropriate succession planning, in addition to selecting applicants within the parameters of the ABC criteria noted above.

If the Board is to be held accountable, it must have the ability to identify those people best qualified to carry out the mandate of WorkSafeNB as a Board member.

LEGISLATION

Section 8(1) The affairs of the Commission shall be administered by a board of directors consisting of the following persons who shall be appointed by the Lieutenant-Governor in Council

APPOINTMENT TERMS

RECOMMENDATION #4

WorkSafeNB's Board of Directors recommends amending ss. 9(1-5) of the *WHSCC & WCAT Act* to indicate that the first term of office for a member of WorkSafeNB's Board of Directors is five years and the second term is three years.

RATIONALE

As outlined in s. 9 of the *WHSCC & WCAT Act*, WorkSafeNB Board terms are limited to four years for members with one additional reappointment; the exception is when a vacancy occurs during the term of office of a member of the Board. In this case, a new member will be appointed by the LGIC to fill the vacancy and serve the remainder of the term of office of that member. When appointed mid-term, a person is still eligible to serve two additional terms. Across Canada, chairperson appointments range from three to five years. Member appointments across Canada vary from two to four years with reappointment for an additional term.

While WorkSafeNB's Board agrees that a total of eight years, served over two terms, is fair and reasonable, they believe that a first term of five years is warranted in response to the steep learning curve required of WorkSafeNB Board members due to the complex nature of the organization, its governing legislation and the diverse strategic and policy issues Board members must oversee. This additional year would allow Board members who only serve one term to fully contribute as an effective Board member for a reasonable amount of time.

APPOINTMENT AND TERMS

The Chairperson of the board of directors shall be appointed for a term of up to four years and he or she is eligible for re-appointment with the approval of the board of directors.

9(1.1) Notwithstanding subsection (2), the first appointment under paragraph 8(1)(a.1) may be for a term not exceeding four years.

9(2) The term of office of a member of the board of directors, other than the Chairperson of the board of directors and the President and Chief Executive Officer of the Commission, is for four years.

9(3) The Vice-Chairperson of the board of directors shall act as Chairperson in the absence or inability to act of the Chairperson of the board of directors or in the case of a vacancy.

9(5) Subject to subsection (7.1), members referred to in paragraphs 8(1)(a.1)(b) and (c) are eligible for reappointment for one additional term.

APPOINTMENT TERMS

RECOMMENDATION #5

WorkSafeNB's Board of Directors recommends amending s. 9 of the *WHSCC & WCAT Act* to indicate that no more than two Board members' terms can expire in any given year.

RATIONALE

There is currently no legislative provision that ensures the terms of WorkSafeNB's Board members are staggered. The Board's recommendation of adding staggered terms in legislation would promote continuity, allowing the Board to better maintain a balance of seasoned members and those who are newly appointed.

There is an operational risk to WorkSafeNB when Board members depart from the organization taking with them experience and knowledge. In the past, this risk has been acute due to several Board member terms expiring at the same time, creating a gap in Board experience. More recently, this risk has been critical as the Board went without a Chairperson or Vice-Chairperson for five months before appointments occurred. Without these two members, meetings could not be held, compromising the Board's ability to meet its goals and its year-end legal obligations.

Alberta, Manitoba, Nova Scotia, Ontario and the Yukon have legislative or policy provisions ensuring that Board members' terms are staggered to ensure minimal impact when transitioning from retiring to new members.

MANITOBA EXAMPLE

Subsection 50.2(3.1) of the *Workers' Compensation Act* of Manitoba, for example, provides that in making Board appointments, the Lieutenant Governor in Council "may have regard to the length of the terms so that no more than one-third of the appointments expire in any year". When staggered appointments were first introduced, Board members were appointed for two, three or four year terms.

APPOINTMENT TERMS

RECOMMENDATION #6

WorkSafeNB's Board of Directors recommends adding a subsection to the *WHSCC & WCAT Act* that allows current Board members to continue to serve on the Board following their term expiry date until a replacement member has been appointed.

RATIONALE

To ensure Board business continues during member transitions, especially during critical Board activities, like finalizing year-end legal obligations and approving the assessment rate and budget, WorkSafeNB's Board of Directors recommends including a legislative provision that Board members continue to serve until either they are reappointed or a replacement has been appointed.

CEO APPOINTMENT

RECOMMENDATION #7

WorkSafeNB's Board of Directors recommends amending ss. 10(2) of *the WHSCC & WCAT Act* to remove the requirement that the LGIC must approve the Board's hiring of the President & Chief Executive Officer.

RATIONALE

Currently, the President & CEO's appointment is made by the Board of Directors with approval of the LGIC. This position is responsible for the operations of WorkSafeNB within the guidelines established by the Board of Directors. Since the President & CEO is an employee of the Board and the Board is completely responsible for this position's performance and succession, WorkSafeNB's Board of Directors recommends removing the LGIC approval from legislation.

If the Board is to be held accountable, it must have the ability to hire the person they believe is best suited to carry out WorkSafeNB's mission and mandate as President & CEO.

PRESIDENT & CHIEF EXECUTIVE OFFICER

10(2) Subject to subsection (3), the appointment of the President and Chief Executive Officer of the Commission shall be made by the board of directors with the approval of the Lieutenant-Governor in Council.

RESIDENTIAL REQUIREMENTS

RECOMMENDATION #8

WorkSafeNB's Board of Directors recommends adding language to legislation indicating that all WorkSafeNB Board members must be permanent residents of New Brunswick and maintain residency throughout the term of appointment.

RATIONALE

Like other Canadian compensation boards, WorkSafeNB Board members are not required by legislation to live in the province they serve. However, the provincial government recently noted in their policy, An Appointment Policy for New Brunswick Agencies, Boards and Commissions, that "recruitment efforts for members will focus primarily on the citizens of New Brunswick, if for no other reason than current residents are arguably better informed about local and regional issues that might have an impact on the governance of provincial agencies, boards and commissions."

As such, the WorkSafeNB Board of Directors believes all members should be a permanent resident in the province of New Brunswick throughout their term(s) to best serve the interests of the organization and the province.

APPOINTMENT POLICY FOR NEW BRUNSWICK AGENCIES, BOARDS AND COMMISSIONS

In an era of increased public accountability, it is especially important that appointments to New Brunswick agencies, boards and commissions be made in a transparent, fair and equitable manner. To retain the trust and confidence of our citizens, the public must be assured that these appointments best reflect the needs and interests of all New Brunswickers.

MEMORANDUM OF UNDERSTANDING

RECOMMENDATION #9

WorkSafeNB's Board of Directors recommends adding the substance of ss. 6(1) of the *Accountability and Continuous Improvement Act* to the *WHSCC & WCAT Act,* which requires the establishment of a Memorandum of Understanding between WorkSafeNB and Government.

RATIONALE

Through legislation, the Government of New Brunswick and WorkSafeNB are required to maintain a Memorandum of Understanding (MOU). This MOU is important because it outlines specific roles and responsibilities so that all parties have a clear understanding of their purpose in the partnership. With a clear understanding of the goal(s) of the MOU, both organizations can effectively work together to the mutual benefit of WorkSafeNB and the Government of New Brunswick.

Because the signing of a MOU is critical to the organization, WorkSafeNB`s Board of Directors believes there is merit to adding a new subsection to the *WHSCC & WCAT Act,* reiterating the provisions in the *Accountability and Continuous Improvement Act,* with details referencing WorkSafeNB`s specific MOU.

ACCOUNTABILITY AND CONTINUOUS IMPROVEMENT ACT

6(1) Within three months after the commencement of this section or within three months of an entity becoming a Crown corporation, the responsible minister and the Crown corporation shall jointly develop a memorandum of understanding that shall contain the following:

(a) the Crown corporation's mandate;

(b) the roles and responsibilities of the Crown corporation, the members of the Board of the Crown corporation, the chief executive office of the Crown corporation, if any, and the responsible minister and Deputy Minister;

(c) the Crown corporation and the responsible minister's mutual expectations in respect of communication, collaboration and consultation with each other;

(d) the financial, staffing and administrative arrangements for the Crown corporation;

(e) the requirement for providing quarterly financial reports to the responsible minister;

(f) any other information required by Executive Council.

Advocates' Services - *Workers' Compensation Act*
September 2015

Recommendations from the WorkSafeNB Board of Directors
Phase II Legislative Review

ADVOCATES' SERVICES

RECOMMENDATION #10

WorkSafeNB's Board of Directors recommends that the *WC Act be* amended to require:

1) A system of information sharing where an annual report on the activities, volumes and functions of the workers' and employers' advocates are provided to the WorkSafeNB Board of Directors no later than July 1 of each year.
2) An annual meeting between WorkSafeNB and the Advocates' Services to discuss their activities and issues of mutual interest.

RATIONALE

WorkSafeNB's Board of Directors agrees that current legislative provisions and mandates for both worker and employer advocates are sufficient. Both emphasize that advocates are available to injured workers and employers for more than working through the appeals process. The Board of Directors believes it is important that advocates are available to provide advice and guidance to those trying to navigate the workers' compensation system.

As WorkSafeNB funds the advocate programs, WorkSafeNB's Board of Directors recommends that legislation provide for a system of information sharing where an annual report on the activities, volumes and functions are provided to the WorkSafeNB Board of Directors no later than July 1 of each year. The Board also recommends that an annual meeting take place between WorkSafeNB and the Advocates' Services to discuss their activities and issues of mutual interest.

Workers' Compensation Act

Workers' Advocates

83.1(2) A Worker's Advocate may examine all files, records and other material of the Commission that relate to the injury or death in respect of which the claim is made.

83.1(3) The Commission shall make an annual grant to the Department of Post-Secondary Education, Training and Labour equal to the cost, including salaries and administration, of providing the services of Workers' Advocates under this section.

Employers' Advocates

83.2(2) An Employer's Advocate may examine all files, records, and other material of the Commission that relate to that employer or the injury or death in respect of which the claim is made.

83.2(3) The Commission shall make an annual grant to the Department of Post-Secondary Education, Training and Labour equal to the cost, including salaries and administration, of providing the services of Employers' Advocates under this section.

WorkSafe
Travail sécuritaire NB

Section 38 - *Workers' Compensation Act*
September 2015

Recommendations from the WorkSafeNB Board of Directors
Phase II Legislative Review

TABLE OF CONTENTS

INTRODUCTION

WORKSAFENB BOARD OF DIRECTORS' RECOMMENDATIONS

Through legislation, WorkSafeNB has been granted stewardship of the *Workers' Compensation (WC) Act,* and therefore, has a vested interest in the government's ongoing legislative review. Furthermore, it believes it has the expertise and responsibility to recommend legislative amendments to government as mandated by paragraph 7(*f*) of the *WHSCC & WCAT Act.* As such, the WorkSafeNB Board of Directors' recommendations for s. 38 (benefits) of the *WC Act* are provided in this position paper.

WorkSafeNB's disciplined approach to managing all aspects of its business has resulted in New Brunswick being among the safest jurisdictions to work in the country. Employers pay some of the lowest premiums and our long-term benefit package is among the most competitive. While we believe preventing injuries is the best way to protect families, when injuries do occur, we are committed to helping New Brunswickers, especially those most seriously affected by workplace injuries.

In forming our position and recommendations presented within this paper, WorkSafeNB's Board of Directors sought to ensure that the Meredith Principles, founded on the 'historic compromise', were upheld.

It should also be noted that with the exception of the three-day waiting period, consideration should be given to how these recommendations may apply to firefighters under the *Firefighters' Compensation Act*.

WHO WE ARE

WorkSafeNB is a Crown Corporation under Part IV of New Brunswick's Public Service. We are responsible for administering the following four *Acts*:

- *Workplace Health, Safety and Compensation Commission and Workers' Compensation Appeals Tribunal Act*;
- *Workers' Compensation Act;*
- *Occupational Health and Safety Act;* and
- *Firefighters' Compensation Act*.

WorkSafeNB is governed by an independent Board of Directors consisting of a chair, a vice-chair and an equal number of worker and employer representatives. The President and Chief Executive Officer is a non-voting member.

INTRODUCTION

MORNEAU SHEPELL FINDINGS

WorkSafeNB's Board of Directors is continuously looking ahead to plan for WorkSafeNB's future and provide excellent services and programs for the workers and employers of this province. By many standards, WorkSafeNB is already among the best workers' compensation systems in the country, balancing both a high standard of benefits with long-term sustainability. A recent comparison of Canadian jurisdictions by Morneau Shepell, an independent provider of actuarial services, indicated that WorkSafeNB compares favourably to our counterparts across the country.

When comparing WorkSafeNB to our neighbours in Atlantic Canada, we continue to offer a competitive compensation system regarding short-term benefits. WorkSafeNB's long-term benefits offered to injured workers stack up positively against all Canadian compensation jurisdictions. WorkSafeNB's average assessment rate for employers remains one of the lowest in the country.

When comparing workers' compensation wage loss benefits outlined in legislation across the country, it is important to remember that each province has its own unique economic, historical, and cultural situation that has created the current system, which must be taken into account when recommending changes.

Throughout this paper, WorkSafeNB's Board of Directors has rationalized its legislative recommendations to provide a series of sound improvements to an already competitive system. These recommendations have been made, while considering the balance between the needs of injured workers and the responsibilities of employers and keeping in mind the current social and economic environment within which WorkSafeNB operates.

SECTION 38

Section 38 makes up approximately 30% of the *WC Act* and includes 16 provisions that outline benefits and entitlements paid when a person is injured at work.

In the 1970s and early 1980s, there was a shift from an impairment - based system to a wage loss system. Benefits were changed again in 1993 to focus on fiscal restraint and in 1998 to improve benefits and rebalance the system.

As a result of these past amendments, the various provisions outlining benefits and entitlements are not consolidated, not arranged sequentially, and are difficult to read. This is especially problematic in a province that reports low literacy levels.

FOUNDING PRINCIPLES

PRINCIPLES OF THE SYSTEM

The concept of modern workers' compensation in Canada began in Ontario when Justice William Meredith was appointed to a Royal Commission to study the topic in 1910. The *Meredith Report* outlined a trade-off in which workers relinquish their right to sue in exchange for compensation benefits. Meredith advocated for no-fault insurance, collective liability, independent administration and exclusive jurisdiction.

These five basic cornerstones to the original workers' compensation laws have become known as the 'Meredith Principles', form the foundation in every Canadian jurisdiction, and were highlighted in the Minister's annual mandate letter to WorkSafeNB, committing us to uphold these principles.

1. No-fault compensation

Workplace injuries are compensated regardless of fault. Workers and employers waive the right to sue. There is no argument over responsibility or liability for an injury. Fault becomes irrelevant, and providing compensation becomes the focus.

2. Collective liability

The total cost of the compensation system is shared by all employers. All employers contribute to a common fund. Financial liability becomes their collective responsibility.

3. Security of payment

A fund is established to guarantee that compensation monies will be available. Injured workers are assured prompt compensation and future benefits.

4. Exclusive jurisdiction

All compensation claims are directed solely to the compensation board. The board is the decision maker and final authority for all claims. The board is not bound by legal precedent; it has the power and authority to judge each case on its individual merits.

5. Independent board

The governing board is both autonomous and non-political. The Board is financially independent of government or any special interest group. The administration of the system is focused on the needs of its employer and worker clients, providing service with efficiency and impartiality.

THREE-DAY WAITING PERIOD

RECOMMENDATION #11

WorkSafeNB's Board of Directors recommends amending ss. 38.11(3) of the *WC Act* to reduce the waiting period from three days to two days, with all other provisions of the waiting period remaining the same.

1998 AMENDMENTS

Several legislative changes were introduced in 1998 to restore balance to the system and improve provisions related to the three-day wait, including:

- Waiving the waiting period if a worker was admitted to hospital [ss. 38.11(5), 38.11(6)];
- Reducing the period after which an injured worker can be reimbursed for the three days, from 30 working days to 20 working days [ss. 38.11(7)]; and
- Requiring that only one three-day waiting period be applied when an injured worker has a recurrence of injury within 20 working days of the initial injury [ss. 38.11(8)].

As of 2009, firefighters and police officers are exempt from the three-day wait [ss. 38.11(8.1)].

RATIONALE

The legislative amendment to reduce the waiting period would see New Brunswick align with its Maritime counterparts, Nova Scotia and Prince Edward Island, currently with waiting periods of two days.

Morneau Shepell's actuarial valuation examined the reduction, elimination, and other provisions of the three-day waiting period. The following impacts to the system could be expected based on a reduction of the wait period to two days:

- An approximate 10% increase in claim frequency based on Prince Edward Island's experience;
- Rate increase for assessed employers will range between $0.05 and $0.25; and
- Estimated cost for self-insured employers between $0.5 and $3.4 million.

The reduction to a one-day waiting period could result in a rate impact for assessed employers between $0.20 and $0.30 under the low scenario and between $0.47 and $0.70 under the high scenario. The estimated cost for self-insured employers could be between $2.9 and $4.3 million under the low scenario and between $6.7 to $10.1 million under the high scenario.

If the three-day waiting period was removed, rates for assessed employers could increase by a range of $0.30 to $0.70, with a plausible yet extreme scenario of an increase of $0.92. The estimated cost for self-insured employers could increase by a range of $4.3 to 10.1 million, with an extreme scenario showing an increase of $13.2 million.[1]

[1] Morneau Shepell (2015) : *Estimated Cost Impact of Removal or Reduction of the Three Day Waiting Period,* June 2015.

THREE-DAY WAITING PERIOD

HISTORY OF THREE-DAY WAIT IN NEW BRUNSWICK

The three-day waiting period became law on January 1, 1993, as part of a series of legislative amendments intended to help WorkSafeNB re-establish a fully-funded and sustainable compensation system.

While re-introduced in 1993, the concept of a waiting period dates back to Meredith's creation of workers' compensation in 1913 to promote fairness with respect to the financial burden faced by workers and employers.

New Brunswick adopted a seven-day waiting period when it introduced its legislation in 1918, then 30 years later reduced the waiting period to four days. In 1975, legislative amendments resulted in compensation benefits being paid the day following disablement, similar to what is predominantly in place in other jurisdictions today.

IMPACT OF RE-INTRODUCING THE WAITING PERIOD

With the 1993 amendments, along with an increase in assessment rates and administrative prudence, the financial status of WorkSafeNB improved. There was also a reduction in reported claims. The volume of lost-time claims, which had already begun to decline in 1990, declined by about half in 1993 and continued to decline until 1995.

VALUE OF A WAITING PERIOD

Although WorkSafeNB's Board of Directors recommends reducing the waiting period, it sees significant value in retaining a waiting period for several reasons:

- It will continue to uphold Meredith's original concept of a waiting period – to promote fairness and balance with respect to the financial burden faced by workers and employers;
- There is evidence that benefit levels impact claiming patterns – the system saw a reduction in claim volumes once the three-day wait was implemented;
- Since claims involving more serious injuries (20 days or more, or hospitalization) are reimbursed, the waiting period remains consistent with WorkSafeNB's Board of Directors' philosophy of allocating resources to workers with the greatest need; and
- Financial prudence, balance, and sustainability of the workers' compensation system.

LEGISLATION

38.11(3) Notwithstanding subsection (2), the Commission shall not pay compensation under subsection (2) until the worker who is injured or has suffered a recurrence of an injury has not received any remuneration from the employer or any income replacement or supplement benefit from the employer or from an employment-related source for a period of time after the injury or recurrence of the injury that is equivalent to three working days.

SUPPLEMENTS TO COMPENSATION

RECOMMENDATION #12

WorkSafeNB's Board of Directors recommends that:

a. Subsection 38.11(9) of the *WC Act* be repealed; and

b. A new section be added to the *WC Act* to explicitly address those types of remuneration that are to be offset from loss of earning benefits and considered supplements to compensation.

The new section of legislation recommended by WorkSafeNB's Board of Directors should explicitly list the following as supplements to compensation:

- Actual earnings;
- Sick and disability pay;
- Employment insurance;
- Vacation pay; and
- Employer top-ups.

This new section should also include a clause providing WorkSafeNB's Board of Directors the authority to assess similar types of remuneration and whether they should be considered supplemental income.

RATIONALE

The intent of the supplements legislation is for WorkSafeNB to use employment-related remuneration to offset loss of earnings benefits so that the total combination of compensation and remuneration does not exceed 85% of pre-accident net earnings. Structuring benefits in this way provides financial support to workers as they recover while minimizing any disincentives for returning to work. Studies have demonstrated that a safe return to work is an important part of an injured worker's therapy and long-term health. Research also indicates that not working can double or triple the chances of poor physical and mental health, and increase mortality rates by 20%.[1]

[1] Alyward, M. and P. E. Sawney (2007). Chapter 4: Support and rehabilitation (restoring fitness for work). Fitness for Work: The Medical Aspects. K. T. Palmer, R. A. F. Cox and I. Brown. Oxford, Oxford University Press: 69-79.

WHAT ARE SUPPLEMENTS?

Until July 2013, any employment-related remuneration received while also receiving workers' compensation benefits was used to reduce the compensation benefits if the total combination exceeded 85% of pre-accident net earnings (this amount is not subject to the benefit cap).

The supplements to compensation policy reflected previous Boards' understanding of the intent of the legislation as enacted Jan. 1, 1993 and as it remains written today. Using "any" employment-related remuneration as a benefit offset was also consistent with the previous Boards' understanding of how the legislation intended this wage loss system to co-exist with other government income replacement programs.

SUPPLEMENTS TO COMPENSATION

WorkSafeNB's Board of Directors also recognizes that the nature of employment and the types of remuneration paid to workers may change over the next five, 10, or 20 years. As such, the Board of Directors also recommends adding a clause to legislation that would allow WorkSafeNB's Board of Directors to assess similar types of remuneration that may be paid for the same injury, and have the authority to determine whether they should be classified as supplemental income. This clause may read: *"Through policy, WorkSafeNB's Board of Directors has the authority to assess similar types of remuneration not identified in legislation and determine whether this remuneration should be used to offset benefits*."

Also, WorkSafeNB's Board of Directors recommends that ss. 38.11(9) be repealed due to the longstanding interpretation issues regarding the term "any employment related income".

LEGISLATION

38.11(9) Notwithstanding subsection (2), where a worker has not received remuneration from the employer or any income replacement or supplement benefit from the employer or from an employment-related source in respect of the injury or recurrence of the injury for a period of time after the injury or recurrence of the injury that is equivalent to three working days and where the worker commences to receive compensation under subsection (2), there shall be payable to the worker only that portion of compensation which, when combined with the amount of any remuneration received by the worker from the employer or any income replacement or supplement benefit received by the worker from the employer or from an employment-related source, does not exceed eighty-five per cent of the worker's pre-accident net earnings calculated for the same period of time as that during which compensation is paid.

MAXIMUM ANNUAL EARNINGS

RECOMMENDATION #13

WorkSafeNB's Board of Directors recommends increasing the current multiplier used to calculate maximum annual earnings from 1.5 as prescribed in ss. 38.1(3) of the *WC Act* to 1.75 of the New Brunswick Industrial Aggregate Earnings .

RATIONALE

Increasing the maximum annual earnings (MAE) ensures a higher percentage of New Brunswick workers' wages are covered, resulting in higher loss of earnings benefits for these workers. This will have the following estimated cost impacts:

- **Assessed Employers** – The increase in compensation costs will be primarily offset by a slightly higher revenue base;
- **Self-insured Employers** – Annual cost increase of approximately $500,000; and an increased liability of $3.318 million; and
- ***Firefighters' Compensation Act*** – Annual cost increase of approximately $30 per firefighter; and an increased liability of $933,900.

SETTING MAXIMUM ANNUAL EARNINGS

Maximum annual earnings function as a cap or limit on loss of earnings benefits payable. It also serves as the maximum assessable earnings – the maximum amount upon which employer assessments are levied for each worker.

Subsection 38.1(3) the *WC Act* requires the MAE to be determined as 1.5 times the New Brunswick Industrial Aggregate Earnings. For 2015 this is $60,900. In 2016, using the current multiplier of 1.5, the MAE will increase to $61,800.

Changing legislation to increase the MAE multiplier to 1.75 of the NBIAE would result in MAE of $72,100 for 2016 – an increase of 14%. This results in increased benefits for workers who currently earn above the present MAE. Employers with higher wage earners will pay more in assessments.

In 2012, based on annual earnings from Statistics Canada, approximately 84% of New Brunswick workers would have been covered by WorkSafeNB's maximum annual earnings. If WorkSafeNB's maximum annual earnings that year had been determined by 1.75 times the NBIAE, the percentage of workers covered by the MAE would have increased to approximately 88%.

Of the claims currently being managed by WorkSafeNB (as of April 2015), about 9% of injured workers have earnings that are above the maximum annual earnings.

MAXIMUM ANNUAL EARNINGS

JURISDICTIONAL COMPARISONS

Province	2015 Compensation Maximum	2014 Compensation Maximum	2014 Average Annual Earnings**
Newfoundland and Labrador	$61,615	$60,760	$51,500
Prince Edward Island	$52,100	$51,100	$40,200
Nova Scotia	$56,800	$56,000	$42,600
New Brunswick	$60,900	$60,100	$43,300
Quebec	$70,000	$69,000	$44,200
Ontario	$85,200	$84,100	$48,800
Manitoba	$121,000*	$119,000*	$44,900
Saskatchewan	$65,130	$59,000	$50,700
Alberta	$95,300	$92,300	$59,800
British Columbia	$78,600	$77,900	$46,600
Yukon	$84,837	$83,501	$53,900
Northwest Territories and Nunavut	$86,000	$84,200	$68,100

*use for assessable earnings only

** Source: Statistics Canada table – *Earnings, average weekly, by province and territory*, aggregated to annual earnings and rounded to nearest hundred.

METHODS FOR SETTING MAXIMUM EARNINGS IN OTHER JURISDICTIONS

- Alberta and Saskatchewan both ensure a certain percentage of workers have full earning coverage (90% and approximately 90% respectively);
- British Columbia, Ontario, Prince Edward Island, Quebec and the Yukon all index the previous year's MAE;
- Newfoundland and Labrador, Nova Scotia, and New Brunswick all index and use some type of multiplier;
- The Northwest Territories and Nunavut require the Governance Council to make a recommendation to amend the regulation for change; and
- Manitoba does not cap annual earnings, and only places a cap on assessable earnings paid by the employer.

NON WORK-RELATED CONDITIONS

RECOMMENDATION #14

WorkSafeNB's Board of Directors recommends that explicit legislation be added to the *WC Act* providing direction on how to manage claims when non work-related conditions arise.

CURRENT SITUATION

Legislation under s. 7 of the *WC Act* provides explicit direction for providing benefits when a pre-existing condition is aggravated by a workplace accident. When this occurs, the aggravation becomes part of the compensable condition and is managed by WorkSafeNB.

However, there is no explicit legislation to establish WorkSafeNB's responsibility when a personal condition (non work-related) arises and affects an injured worker's ability to participate in rehabilitation. In these situations, the personal condition is not medically linked to the workplace accident nor has it been aggravated by the accident - it is entirely personal in nature. When this occurs, there may be a temporary or permanent interruption in the prescribed rehabilitation.

RECOMMENDATION

To address this gap in legislation, WorkSafeNB's Board of Directors recommends adding a new section that would require:

1. Non work-related conditions first be accommodated during the rehabilitation of a workplace injury.

2. If accommodations are not possible, benefits would be suspended until the injured worker is able to resume rehabilitation. In these circumstances, the injured worker is given 30 days notice before benefits are suspended.

3. If it is unlikely that the injured worker would resume rehabilitation, or if the non work-related condition becomes the primary reason that the worker is not able to return to work, WorkSafeNB will pay benefits for the entire work-related injury based on the estimated healing time as recognized by generally accepted medical evidence.

NOTICE PERIOD

The recommendation to add a 30 day notice period before suspension of benefits would provide a set time for injured workers to manage or resolve personal conditions, or to find alternate payment systems for non work-related illnesses and injuries, before benefits are suspended.

This is the approach used in three of the jurisdictions that suspend benefits. Nova Scotia currently uses a four-week notice period, while Ontario and Saskatchewan both use three weeks. Thirty days also aligns with the average waiting period (28 days) between application and first payment of government benefits, such as Employment Insurance.

The goal of this notice period is to give injured workers time to access other benefit systems so there is no, or less of, an interruption to the worker's income, lessening financial hardship.

NON WORK-RELATED CONDITIONS

RATIONALE

These recommendations are based on evidence that the purpose of the workers' compensation system is to only pay for work-related injuries and illnesses. The intent of the *WC Act* is to ensure that workers who suffer an injury arising out of and in the course of employment (s. 7) receive the benefits to which they are entitled – wage replacement benefits (s. 38), medical aid (s. 41), and rehabilitation (s. 43).

If a New Brunswicker is injured and needs time off work, there are several social benefit programs they can follow, depending on the cause of the injury. If the injury or disease arose out of and in the course of employment, workers' compensation is available to support the injured worker. If the injury or illness is a personal condition and not work-related, an individual has access to other social benefit programs (EI, CPPD), as well as private insurance plans.

The intent of the *WC Act* was clarified through the New Brunswick Court of Appeal case *VSL Canada v. WHSCC* (2011), when the Court stated: "*Admittedly, the WC Act was never intended to serve as a general compensation scheme that embraces non-occupational injuries*."

These recommendations also align with the principle and intent of the legislation that the employers who fund the system pay for claims and associated expenses that result from work-related injuries only.

While provisions in s. 38 of the *WC Act* [ss. 38.11(14) and ss. 38.11(15)] are clear that compensation ceases for work-related injuries when loss of earnings cease to exist or the worker attains age 65 (or two years after compensation benefits begin, if a worker is 63-years-old or more at time of injury), there is no explicit section of the legislation providing WorkSafeNB direction relative to non-work related conditions. To uphold the intent of the legislation, this new section would explicitly determine if/how benefits should be adjusted when such injuries or illnesses prevent the injured worker from participating in their rehabilitation plan or from returning to work.

LEGISLATION

While there is no explicit legislation pertaining to personal non-compensable intervening conditions, s. 7 of the *WC Act* is explicit that for an injury to be accepted and, therefore, compensable, the injury or illness must have arisen out of and in the course of employment – in short, the injury must be work-related.

Within that context, past Boards, through policy, have also interpreted ss. 34(1) and 34(2)(*d*) to provide WorkSafeNB with the exclusive jurisdiction to determine the degree of loss of earnings resulting from the injury.

CANADA PENSION PLAN DISABILITY OFFSETS

RECOMMENDATION #15

WorkSafeNB's Board of Directors is recommending no changes to ss. 38.91(1) and 38.91(1.01) of the *WC Act*.

RATIONALE

WorkSafeNB's Board of Directors has concluded that no changes are warranted to ss. 38.91(1) and 38.91(1.01) of the *WC Act* to offset compensation payments by the amount received under Canada Pension Plan Disability (CPPD) given:

- The legislative intent for workers' compensation;
- That New Brunswick's approach is similar to other Canadian compensation systems; and
- The small and stable nature of the population of workers impacted.

CURRENT LEGISLATIVE OBLIGATIONS

WorkSafeNB's obligations under the *WC Act* require that any amount an injured worker receives as a compensation payment be reduced by the same proportion of Canada Pension Plan Disability (CPPD) benefit received for the compensable injury. This obligation has been part of the New Brunswick workers' compensation system [ss. 38.91(1)] since 1982, when the system converted from an impairment system to a wage loss system. The requirement to advance an amount equal to the income taxes payable was added in 1993 [ss. 38.91(1.01)].

WHAT HAPPENS IN OTHER JURISDICTIONS?

The integration of compensation benefits with CPPD benefits is common to the majority of other Canadian compensation systems; only Alberta and Northwest Territories/Nunavut do not offset compensation benefits by the amounts received under CPPD. Most jurisdictions will deduct a fixed percentage of CPPD received from compensation benefits (50% in B.C., N.S., P.E.I., Sask., Yukon; 75% in N.L.). The three jurisdictions (Man, N.B., Ont.) that will deduct up to 100% rely on formulas (similar to NB) to calculate the percentage by which to reduce compensation benefits when receiving CPPD.

LEGISLATION

38.91(1) Any compensation or benefits payable by the Commission under section 38.11 or 38.2 to a worker shall be reduced by the same proportion of the amount the worker receives under the Canada Pension Plan with respect to the injury or recurrence of the injury, that the estimated loss of earnings bears to the average net earnings.

38.91(1.01) Where a worker receives a retroactive payment under the Canada Pension Plan with respect to an injury or recurrence of an injury and the compensation or benefits paid by the Commission under section 38.11 or 38.2 to the worker have not been reduced under subsection (1) and where the worker assigns the payment to the Commission and subsequently pays income tax on the amount assigned, the Commission shall reimburse the worker, from the Accident Fund, an amount which, in the opinion of the Commission, is equivalent to the income tax the worker paid on the amount assigned.

WHY IS COMPENSATION ADJUSTED IF RECEIVING CPPD?

The benefits paid under the compensation system have been integrated with CPPD benefits since 1982 when the compensation system became a wage-loss system. This integration exists to ensure fairness in the system, allowing workers to be paid benefits from only one system for the same injury.

ANNUAL REVIEW OF BENEFITS

RECOMMENDATION #16

WorkSafeNB's Board of Directors recommends amending ss. 38.11(12) of the *WC Act* to require a consistent annual review of benefits on the anniversary date that loss of earnings benefits began.

RATIONALE

Subsection 38.11(12) of the *WC Act* requires that loss of earning benefits are reviewed annually, adjusting the amount of compensation paid to injured workers.

To ensure the timing of the annual review is consistent for each injured worker, WorkSafeNB's Board of Directors recommends amending ss. 38.11(12) to require the annual review occur on the anniversary date that loss of earnings benefits began.

Legislation currently requires that the annual review occur "as of the anniversary date of the injury or recurrence of the injury." Often, the date of injury and the date that benefits begin are the same or similar. However, at times, the actual loss of earnings (and, therefore, the loss of earnings benefit) may not occur at the same time as the injury; there may be a lapse of weeks or even months before loss of earnings benefits would begin. For example, an occupational disease where the worker is not immediately unable to work. Since ss. 38.11(12) requires the annual review occur at the date of injury or recurrence, there are times when the benefit being reviewed may have been established only weeks or months before the required review, whereas for other injured workers, their annual review occurs much later.

ANNUAL REVIEW OF BENEFITS

RECOMMENDATION #17

WorkSafeNB's Board of Directors recommends amending ss. 38.11(12) of the *WC Act* to require that estimated capable earnings be indexed as part of the annual review.

RATIONALE

Including estimated capable earnings (ECE) during the yearly indexation of benefits would accurately reflect the pace of inflation.

INDEXING ESTIMATED CAPABLE EARNINGS

As part of the annual review, legislation requires that average earnings be indexed annually by the percentage change in the consumer price index as calculated under the *WC Act*. However, ECE are not indexed as part of the current annual review.

New Brunswick and British Columbia are the only two jurisdictions that do not adjust earnings capacity:

- Manitoba, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec, and the Yukon annually index the estimated earnings capacity of the injured worker;
- Alberta, Northwest Territories, and Nunavut allow for a review at any point in time;
- Saskatchewan applies a staged wage increase;
- Ontario does a final review at 72 months; and
- Newfoundland and Labrador, Quebec, and Yukon specify the indexation in their legislation.

LEGISLATION

38.11(12) Compensation being paid for loss of earnings shall be reviewed each year as of the anniversary date of the injury or recurrence of the injury and shall be adjusted on the basis of

(*a*) the worker's average earnings previously determined by the Commission, increased by the annual percentage increase in the New Brunswick Industrial Aggregate Earnings, less any income tax and premiums under the *Employment Insurance Act* and contributions under the *Canada Pension Plan* that would be payable by the worker on those earnings, as increased, less

(*b*) the earnings it is estimated the worker is then capable of earning at a suitable occupation less any income tax and premiums under the *Employment Insurance Act* and contributions under the *Canada Pension Plan* that would be payable by the worker based on those earning.

ANNUITIES

RECOMMENDATION #18

WorkSafeNB's Board of Directors recommends amending ss. 38.22(9) of the *WC Act* to clarify that negative interest may be included in the "average yield rate of the investment portfolio."

RATIONALE

Annuities compensate injured workers for a loss of pension benefits as Canada Pension Plan Retirement only requires that contributions are made on taxable income and WorkSafeNB benefits are non-taxable. The *WC Act* provides explicit direction in s. 38.22 for setting aside amounts for the purchase of an annuity at age 65. Interest is calculated as prescribed by ss. 38.22(9).

In keeping with investment principles and standards, along with the sustainability and balance of the system, WorkSafeNB's Board of Directors believes the legislation intended both positive and negative rates of return be applied as the "average yield rate of the investment portfolio of the Pension fund during each quarter" includes both positive and negative rates of return.

To capture this intent even more explicitly, the legislation could be amended as follows:

> **38.22**(9) Interest shall be assumed to have been paid quarterly on the amount credited to each worker's account in the Pension Fund and the rate of interest payable shall be the average yield rate, **including both positive and negative rates of return**, of the investment portfolio of the Pension Fund during each quarter.

LEGISLATION

38.22(1.2) … the Commission shall set aside for the worker's account in the Pension Fund such amount of money as though it had been paid into the account at the rate of 10% plus interest accrued at the rate prescribed in subsection (9), and such sum shall be used to provide a pension to the worker at age sixty-five or to be disbursed in accordance with subsection (13).

38.22(9) Interest shall be assumed to have been paid quarterly on the amount credited to each worker's account in the Pension Fund and the rate of interest payable shall be the average yield rate of the investment portfolio of the Pension Fund during each quarter.

ANNUITIES

RECOMMENDATION #19

WorkSafeNB's Board of Directors recommends changing the requirement in ss. 38.22(12) from a minimum annuity amount to a minimum lump sum payment amount equal to 50% of the New Brunswick Industrial Aggregate Earnings.

RATIONALE

WorkSafeNB's Board of Directors recommends increasing the lump sum payments for annuities to resolve difficulties injured workers have in locating financial providers from which they are able to purchase annuities of smaller amounts.

LUMP SUM PAYMENTS

Under ss. 38.22(12) of the *WC Act*, when an annuity would be less than $500 per year (or roughly $7,200), WorkSafeNB may pay to the worker, in lieu of the annuity, the accumulated set-aside and interest in a lump sum.

It is recommended that the threshold for a lump sum payment in New Brunswick be set to the equivalent of 50% of the New Brunswick Industrial Aggregate Earnings (NBIAE). For 2015, the NBIAE is $40,615. Should the threshold for the lump sum be increased, annuities equal to or less than $20,308 would be paid out in a lump sum. Set asides and interest in excess of this amount would require the injured worker to purchase an annuity.

LEGISLATION

38.22(12) Where the pension to which a worker is entitled under subsection (1) or (2) would be less than five hundred dollars per year, the Commission may, in lieu of that pension, pay to the worker at age sixty-five the accumulated capital and interest.

LUMP SUM BENEFITS

Six jurisdictions provide an annuity benefit as a lump sum.

The benefit is paid as a lump sum:

- Always in Nova Scotia and British Columbia;
- In Ontario when it is less than $83,200;
- In the Yukon when it is less than $25,000;
- In Saskatchewan when it is less than $20,000; and
- In Manitoba when it is less than $15,000.

ESTIMATED CAPABLE EARNINGS

RECOMMENDATION #20

WorkSafeNB's Board of Directors recommends a new subsection under s. 38.11 of the *WC Act* to clarify that estimated capable earnings are remuneration in the calculation of loss of earnings.

RATIONALE

Estimated capable earnings is an estimate of earning potential, which should reflect an injured worker's capacity to perform a range of employment options.

WorkSafeNB has had a long standing practice to include ECE as remuneration in the calculation of benefits. This ensures workers have equivalent benefits regardless of whether they return to work or not. When ECE is not included as remuneration, the injured worker who returns to work has a lesser benefit than the one who does not.

To clarify the legislative intent to include ECE in the benefit calculation and to positively impact return to work outcomes, a new subsection of legislation is required. For example, under s. 38.11, a subsection could be added to achieve this purpose as follows:

> There shall be payable to the worker only that portion of compensation which, when combined with **estimated capable earnings, whether earned or not,** does not exceed eighty-five per cent of the worker's pre-accident net earnings calculated for the same period of time as that during which compensation is paid.

An example on the following page demonstrates this discrepancy in loss of earning benefits when ECE is not included as remuneration.

LEGISLATION

38(1)(*f*) where deemed just, the impairment of earning capacity may be estimated from the nature of the injury, having always in view the worker's fitness to continue the employment in which he was injured, **or to adapt himself to some other suitable occupation,**

38.11(2) Where injury or recurrence of an injury to a worker referred to in subsection (1) results in a loss of earnings beyond the day of the injury, the Commission shall estimate the loss of earnings therefrom and shall pay compensation to the worker in an amount equal to eighty-five per cent of the estimated loss of earnings.

ESTIMATED CAPABLE EARNINGS

BENEFIT CALCULATION			
		ECE is considered as remuneration as it is earned	ECE is not considered as remuneration as it is not earned
Calculation	Pre-accident Net Earnings	$2,680.20	$2,680.20
	85% Pre-accident Net Earnings	$2,278.17	$2,278.17
	Avg. Net Earnings	$2,680.20	$2,680.20
	Net ECE	$1,240.52	$1,240.52
Step 1	LOE = Avg. Net earnings - Net ECE	$2,680.20 - $1,240.52 = $1,439.68	$2,680.20 - $1,240.52 = $1,439.68
	85% LOE	$1,223.73	$1,223.73
Step 2	Combined Earnings = Net ECE + 85% LOE	$1,240.52 + $1,223.73 = $2,464.25	$0.00 + $1,223.73 = $1,223.73
	Excess Amount = Combined Earnings - 85% Pre-accident Net Earnings	$2,464.25 - $2,278.17 = $186.08	$1,223.73 - $2,278.17= ($1,054.44)
Amount Payable	Amount Payable = 85% LOE - Excess Amount	$1,223.73 - $186.08 = **$1,037.70**	$1,223.73 - $0.00 = **$1,223.73**

LEGISLATION

38.11(9) … there shall be payable to the worker only that portion of compensation which, when combined with the amount of any remuneration received by the worker from the employer or any income replacement or supplement benefit received by the worker from the employer or from an employment-related source, does not exceed eighty-five per cent of the worker's pre-accident net earnings calculated for the same period of time as that during which compensation is paid.

LOSS OF EARNINGS

RECOMMENDATION #21

WorkSafeNB's Board of Directors recommends that compensation paid to injured workers remain at 85% of loss of earnings pursuant to ss. 38.11(2) of the *WC Act*.

RATIONALE

New Brunswick adopted a wage-loss system effective January 1, 1982, following significant consultation and recommendations made through a report commissioned by the government and authored by Roland Boudreau. The principle that no person should have more spendable income when they are not working than when they are working, nor should compensation reduce an injured worker and the worker's family to poverty or make them a charge on society, became the foundation on which the wage-loss system was established in New Brunswick.

The percentage of loss of earnings used to determine benefits varies across Canada. In Atlantic Canada, the percentage varies between 75% and 85%. From Quebec west to British Columbia, the percentage ranges from 85% to 90%, with the Yukon using 75% of gross earnings, rather than net earnings, which is common in every other jurisdiction.

Only in Western Canada, where economies are stronger, does the percentage of loss of earnings paid reach 90%. WorkSafeNB's Board of Directors believes the percentage paid for injured workers in New Brunswick is competitive when compared to the other Atlantic provinces.

Based on its jurisdictional comparison of wage loss protection across Canadian compensation systems, Morneau Sheppell concludes that New Brunswick's overall benefit package paid to injured workers over the long term fares well, even when compared to some of the western boards.

WC ACT DEFINITION:

"loss of earnings means"

(*a*) Average net earnings, less

(*b*) the earnings the worker is estimated to be capable of earning at a suitable occupation after sustaining the injury, less any income tax and premiums under the *Employment Insurance Act* and contributions under the *Canada Pension Plan* that would be payable by the worker based on those earnings.

PERCENTAGE OF LOSS OF EARNINGS PAID

- 1982 - 90%
- 1993 - 80% for the first 39 weeks, and 85% thereafter
- 1998 - 85%

PERMANENT PHYSICAL IMPAIRMENT AWARD

RECOMMENDATION #22

WorkSafeNB's Board of Directors recommends that ss. 38.11(17) and 38.2(8) of the *Workers' Compensation Act* remain unchanged.

RATIONALE

WorkSafeNB's Board of Directors continues to support a separate lump sum to recognize that, regardless of any wage loss, an impairment may or may not have caused it can reasonably be assumed that there are necessary expenditures related to the impairment that would not have existed before the work-related injury.

Further, WorkSafeNB's Board of Directors agrees that this award should be calculated in accordance with a rating schedule prescribed by regulation.

LEGISLATION

The award for a Permanent Physical Impairment is provided in ss. 38.11(17) and 38.2(8) of the *Workers' Compensation Act.*

> In recognition of loss of opportunity there shall be payable to a worker in a lump sum an award for a permanent physical impairment arising out of an injury, and the amount of the award, which shall be calculated in accordance with a rating schedule prescribed by regulation, shall not be less than five hundred dollars and not more than the maximum annual earnings.

PERMANENT PHYSICAL IMPAIRMENT AWARD

RECOMMENDATION #23

WorkSafeNB's Board of Directors recommends that the Permanent Physical Impairment Rating Schedule Regulation be amended to reflect current medical best practice. For the proposed regulation changes, please see the attached spreadsheet with recommended changes and rationale.

RATIONALE

WorkSafeNB's Board of Directors recommends the Permanent Physical Impairment Rating Schedule Regulation reflect current medical best practices that have been identified through a 2014 comprehensive review of the regulation by WorkSafeNB's Chief Medical Officer and the WorkSafeNB Board of Directors.

The recommended changes update the current permanent physical impairment rating system, which was developed based on medical consensus arrived at in the 1970s, to a rating that is consistent with current international medical consensus and practice by impairment evaluating physicians, including those in New Brunswick.

SUPPLEMENTAL MATERIAL

Please see attached spreadsheet.

SURVIVORS' BENEFITS

RECOMMENDATION #24

WorkSafeNB's Board of Directors recommends that the *WC Act* (s. 38.51 – 38.54) be amended to remove the two benefit plans for surviving spouses and instead provide one new benefit plan.

RATIONALE

The WorkSafeNB Board of Directors recommends that the benefits currently in place for surviving spouses be eliminated and a new benefit be legislated. The new benefit would be:

- 85% of the deceased worker's loss of earnings from the beginning of the claim and until the surviving spouse attains age 65, with no family income test; and
- 10% to be set aside for the purchase of an annuity at age 65.

This amendment would:

- Improve the benefit:
- Reduce the uncertainty of choosing between benefit plans; and
- Better align with other jurisdictions and with the model for injured worker benefits in New Brunswick.

This amendment would not affect benefits for:

- Guardians of dependent children (ss. 38.51(8);
- Dependent invalid children (ss. 38.51(11); or
- Other dependents (ss. 38.51(12).

With the improvements to burial and related expenses in 2012, the plans in the sidebar to the right became less distinguishable. Since 2012, all survivors receive a lump sum payment for costs that may arise, such as estate fees, travel for family to attend the funeral, family counselling, or other costs that may result from the workers' death.

CURRENT BENEFITS

- Year one – 80% of the deceased worker's average net earnings
- Within one year after the date of the worker's death, a dependent surviving spouse shall elect to receive benefits under one of the following two plans:

Plan one:

- 85% of the worker's average net earnings
- 5% annuity set-aside
- Benefits are subject to a family means test

Plan two:

- 60% of the worker's average net earnings
- An amount for each dependent child (percentage of the NBIAE)
- 8% annuity set-aside
- A lump sum payment equal to 60% of the net annual income of the worker

CONTACT

SAINT JOHN – HEAD OFFICE
1 Portland Street
P.O. Box 160
Saint John, N.B. E2L 3X9
Telephone: 506 632-2200
Toll-Free: 1 800 222-9775

PROPOSED LEGISLATIVE CHANGES TO APPENDIX "A" OF THE NEW BRUNSWICK REGULATION 82-165

PERMANENT PHYSICAL IMPAIRMENT RATING SCHEDULE UNDER THE *WORKERS' COMPENSATION ACT*

SEPTEMBER 2015

Current Wording	Proposed Wording	Comments/Rationale
		The current regulation was implemented in 1982. The basis for these ratings is outdated. A modification to some parts of the regulation was made in 2000. These too are outdated. The purpose of the recommended regulatory change is (1) to make the ratings and approach to ratings consistent with current international consensus and practice by impairment evaluating physicians; and (2) to address issues around interpretation for which a directive (2006) and then a policy (2008) were developed to address as an interim measure.
Section A-1: Introduction to the Schedule		
The rating schedule is designed to measure the magnitude of permanent physical impairment of body function arising out of an injury for the purpose of calculating a lump sum award in accordance with subsections 38.11(17) and 38.2(8) of the *Workers' Compensation Act*.	The rating schedule is designed to measure the magnitude of permanent physical impairment of body function arising out of an injury for the purpose of calculating a lump sum award in accordance with subsections 38.11(17) and 38.2(8) of the *Workers' Compensation Act*.	

Current Wording	Proposed Wording	Comments/Rationale
This schedule is at best only a guide, to be departed from when the occasion demands.	This schedule is a guide for the WorkSafeNB Medical Advisor or physician designated by WorkSafeNB, when assigning a rating. The physician may depart from the guide where medical evidence supports a departure.	This item has been moved into the introduction section from the "Schedule is a Guide" section of the current regulations. The change addresses confusion in the current regulations as to who assigns impairment ratings; and hence who determines "to be departed from when the occasion demands", as well as the framework for determining "when the occasion demands". This phrase has been used in the past by Medical Advisors to address exceptions when a claimant's actual impairment differs significantly from what would be assigned by the regulations. Some hand injuries are much worse than the current schedule would assign. Some injuries leave a claimant visibly scarred that is not covered by the current

Current Wording	Proposed Wording	Comments/Rationale
		schedule. In other cases, the schedule may overestimate the impairment. Significant advances in treatment since 1982 may reduce residual permanent impairment.
The evaluation of permanent physical impairment is to be done by experienced physicians who are knowledgeable about body function.	The evaluation of permanent physical impairment is to be done by experienced physicians who are knowledge-able about body function and are certified in impairment assessment: 1. Assessment of physical impairment is done by a physician who has been certified to do physical impairment assessments; and 2. Ratings are assigned by a WorkSafeNB Medical Advisor, or by a physician designated by WorkSafeNB, based on assessment of permanent physical impairment and/or based on reports from investigation where this is generally accepted practice. The physician doing the assessment of physical impairment may be the physician designated to assign a rating, but can be an independent physician who is not designated to assign a rating.	This addresses the issue of certification in impairment assessment. Physicians, who used AMA Guides prior to taking formal training and subsequently took training, tell us that they had not been using the AMA Guides properly prior to training. The American Board of Independent Medical Examiners is one agency that certifies physicians in impairment assessment. WorkSafeNB has required the use of certified physicians since 1988. The American Board of Independent Medical Examiners lists both WorkSafeNB and external physicians who are certified in NB. Distinguishing between

Current Wording	Proposed Wording	Comments/Rationale
		doing the impairment assessment and doing the rating has been practice for a long time for interjurisdictional claims. A claimant is assessed by a physician in the province that the claimant resides. The assessment is forwarded to the province in which the worker has a claim and a physician in that province assigns a rating based on the schedule for that province. The physician doing the assessment does not assign a rating. Distinguishing between doing the impairment assessment and doing the rating allows WorkSafeNB to obtain independent external assessments by physicians who are not familiar with the NB schedule. Directive 21-250.01 distinguishes between the function of assessing impairment and assigning a rating. The former requires a

Current Wording	**Proposed Wording**	**Comments/Rationale**
		physician trained in impairment assessment but not necessarily familiar with the provincial regulation on assigning ratings. The latter requires a physician who is familiar with the provincial regulation.
The impairment rating process is based upon the application of the following rules:	The impairment rating process is based upon the application of the following rules:	
1. Awards are given for *permanent* physical impairment, so treatment must be complete, and adequate healing time allowed to elapse before the rating is done; 2. Impairment ratings are not based on the type of injury or the type of surgery performed but are based on demonstrable loss of body function; 3. Pain and suffering associated with the injury are not to be considered in impairment ratings, except as it directly affects impairment of body function;	1. Physical impairment is a loss or abnormality of physiological or anatomical structure or function; 2. Awards are given for <u>permanent</u> physical impairment, so treatment must be complete and adequate healing time allowed to elapse before the rating is done. An exception is when the worker is expected to die from the injury or illness. In this case, an award is given without the requirement for adequate time to elapse for healing; 3. Impairment ratings reflect the degree to which the impairment decreases an individual's ability to perform normal activities of daily living, excluding work; 4. Impairment ratings are not intended to reflect disability; 5. Impairment ratings are based on reproducible objective clinical and investigative findings of loss of body function;	These items have been expanded to eliminate confusion around interpretation of impairment and how pain and suffering are incorporated into impairment rating. Item 2: Expanded to capture current practice of granting an exception in cases of cancer where treatment is not expected to produce a cure. Item 3: Explains what is meant by "based on demonstrable loss of body function" based on current consensus interpretation of

Current Wording	**Proposed Wording**	**Comments/Rationale**
	6. Pain and suffering associated with the injury are not to be considered independently in impairment ratings. Pain and suffering are reflected in impairment ratings based on the extent of tissue damage; <u>Definition section</u>: "Tissue damage" refers to demonstrable (macroscopic or microscopic) damage to tissue. 1. "Tissue" is defined as: a collection of similar cells and intercellular structure that perform a particular function. There are four basic types of tissue: epithelium, connective tissue, muscle and nerve (Taber's). 2. "Damage" is defined by Webster's Online Dictionary (accessed Jan. 18, 2010) as: loss or harm resulting from injury.	impairment. Item 6: Expands on why pain and suffering are not to be considered in impairment ratings.
	7. Awards for permanent physical impairment are given for the compensable condition. Awards are not given for deconditioning or age-related degenerative changes. Awards are given for degenerative changes that are reasonably directly related to a compensable injury.	New: Addresses misunderstanding that while total impairment may include the effects of age and deconditioning, the intent of this award is to assess for work-related impairment.
4. Permanent physical impairment of a cosmetic nature or with respect to abdominal organs can be considered in the rating process;	8. Significant disfigurement, associated with a permanent physical impairment, can be considered in the rating process;	Changes: • Greater clarity on what is meant by "cosmetic nature"; and

Current Wording	**Proposed Wording**	**Comments/Rationale**
		• Reference to abdominal organs has been removed as Item 1, "physical impairment is a loss or abnormality of physiological or anatomical structure or function", already covers abdominal organs.
7. Physical impairment is to be expressed as a percentage of total body impairment;	9. Physical impairment is to be expressed as a percentage of Whole Person Impairment (WPI); 10. The maximum Whole Person Impairment (WPI) rating is 100%; 11. Conditions for which the generally accepted medical literature does not indicate there to be an expected physical impairment will have a Whole Person Impairment (WPI) rating of zero, unless there is objective clinical and investigative findings to the contrary;	The order has been changed from that in the current regulations. Current terminology in the AMA Guides and similar impairment rating schemes use the phrase "whole person impairment" (WPI). WorkSafeNB has experienced confusion from external health care providers over whether WPI can exceed 100%.
5. Impairment rating for the loss of function of an extremity cannot exceed the rating allowed for amputation of that extremity;	12. Impairment rating for the loss of function of an extremity cannot exceed the rating allowed for amputation of that extremity;	No change.
6. Impairment rating for the loss of function at a joint is not to exceed one half of the rating allowed for an amputation at that joint, unless special	13. Impairment rating for the loss of function at a joint is not to exceed one-half of the rating allowed for an amputation at that joint, unless special	No change. An example of a special

Current Wording	**Proposed Wording**	**Comments/Rationale**
circumstances exist;	circumstances exist; and	circumstance is ankylosis of a joint that is not in a functional position (e.g. a knee that is ankylosed in 80 degrees of flexion is more disabling than an amputation with a good prosthesis).
8. With the exception of a special schedule for loss of hearing and loss of vision, the smallest rating to be allowed is 1% of total body impairment.	14. The smallest rating is 1% WPI.	Exception removed. The smallest rating for loss of hearing and vision is 1%
	15. <u>Combining Two Or More Regions</u> The combination (as opposed to straight summation) method outlined below is generally used when clients have claim-related impairments in more than one region. i. Each region is to be expressed as a whole person impairment percent prior to combining. ii. The combined value for two regions is equal to A+B*(100-A), where A is the % WPI for the first region and B is the % WPI for the second. If more than two regions are to be combined, select any two and find their combined value as above. Then use that value and the next region in the above formula to obtain the combined value of the regions. This process can be repeated until all regions have been combined into a single WPI value.	Methodology of combining two or more regions is not covered in the current regulations. This has created confusion and variation in approaches to combining two or more regions. The proposed methodology is consistent with the AMA Guides.

Current Wording	Proposed Wording	Comments/Rationale
JUDGMENT RATINGS Many cases will not fit exactly into a rating category. The examining physician in using this schedule as a guide must exercise his judgement to estimate the percentage of total body impairment. The rating that is allowed should be consistent with ratings for impairment of other parts of the body which, in the average person, would have a similar effect on activities.	16. Judgment Ratings Many cases will not fit exactly into a rating category. The examining physician in using this schedule as a guide must exercise his judgement to estimate the percentage of total body impairment. The rating that is allowed should be consistent with ratings for impairment of other parts of the body which, in the average person, would have a similar effect on activities.	This item has been moved into the introduction section from the "Schedule is a Guide" section of the current regulations. No change.
ENHANCEMENT OF MULTIPLE INJURIES In multiple injuries, or in serious injuries, the impairment rating may be enhanced in order to accurately reflect the effect of the injury on the worker's activities. Particularly is this true when the injuries involve parts of the body which perform identical functions, e.g., both arms, both legs, both eyes. Ordinarily, there would be no enhancement factor between a hand and a foot, a foot and an eye, etc. An enhancement factor of up to 50 percent of the lesser impairment may be warranted in injuries to both arms or both legs, but the sum of the two individual ratings plus the added enhancement must not disproportionate when applied to the whole man. Enhancement is particularly important when dealing with finger injuries. For this reason the enhancement factor has been included as part of the finger injury rating schedule, as will as the schedules for loss of hearing and vision.	17. Enhancement of Multiple Injuries In multiple injuries, or in serious injuries, the impairment rating may be enhanced in order to accurately reflect the effect of the injury on the worker's activities. Particularly is this true when the injuries involve parts of the body which perform identical functions, e.g., both arms, both legs, both eyes. Ordinarily, there would be no enhancement factor between a hand and a foot, a foot and an eye, etc. An enhancement factor of up to 50 percent of the lesser impairment may be warranted in injuries to both arms or both legs, but the sum of the two individual ratings plus the added enhancement must not disproportionate when applied to the whole person. Enhancement is particularly important when dealing with finger injuries. For this reason the enhancement factor has been included as part of the finger injury rating schedule, as well as the schedules for loss of hearing and vision.	This item has been moved into the introduction section from the "Schedule is a Guide" section of the current regulations. No change.

Current Wording	Proposed Wording	Comments/Rationale
AMPUTATIONS The ratings suggested for amputations compensate for loss of tissue, however, the functional and cosmetic result must be considered in addition. For an amputation with an average result, the suggested rating covers the cosmetic aspect of the amputation: if the result is more serious than the average, the suggested rating should be increased to reflect the additional cosmetic aspect. In rating major limb amputation, the suitability of the stump for prosthetic fitting must be considered. The ratings suggested are applicable to "average" stumps suitably padded and sufficiently pain free to be functional. When an amputation stump has significant defects which cannot be repaired, a rating greater than the suggested rating may be allowed on a judgment basis.	18. <u>Amputations</u> The ratings suggested for amputations compensate for loss of tissue, however, the functional and cosmetic result must be considered in addition. For an amputation with an average result, the suggested rating covers the cosmetic aspect of the amputation: if the result is more serious than the average, the suggested rating should be increased to reflect the additional cosmetic aspect. In rating major limb amputation, the suitability of the stump for prosthetic fitting must be considered. The ratings suggested are applicable to "average" stumps suitably padded and sufficiently pain free to be functional. When an amputation stump has significant defects which cannot be repaired, a rating greater than the suggested rating may be allowed on a judgment basis.	This item has been moved into the introduction section from the "Schedule is a Guide" section of the current regulations. No change.
	19. <u>Subsequent Permanent Physical Impairment Assessments</u> If a claimant's permanent physical impairment increases over time, a subsequent assessment may be indicated, except for change due to deconditioning and age-related degenerative conditions. The current regulations and current reference authorities will be used to conduct the subsequent assessment. If the current regulations and references result in a lower impairment rating, the claimant's impairment award will	New: Provides needed guidance for subsequent impairment assessments. Where current impairment rating guidelines would result in a reduced rating, the previous rating will remain in effect.

Current Wording	Proposed Wording	Comments/Rationale
	remain unchanged.	
Section A-2: Scope of the Schedule		
SCOPE OF THE SCHEDULE The following schedule describes the type of impairment involved in the vast majority of compensation claims. When implementing the schedule, the medical examiner will employ judgment, taking into consideration such factors as loss of sensation, impaired circulation, muscular weakness, and loss of range of movement in the affected part. When rating a type of physical impairment not covered in this schedule, the advice of an appropriate authority should be sought. AMA GUIDES TO EVALUATION OF PERMANENT IMPAIRMENT can be used as a reference. The impairment rating allowed should be consistent with the ratings elsewhere in this schedule.	The following schedule describes the type of impairment involved in the vast majority of compensation claims. When implementing the schedule, the medical examiner will employ judgment, taking into consideration such factors as loss of sensation, impaired circulation, muscular weakness, and loss of range of movement in the affected part. When rating a type of physical impairment not covered in this schedule, the advice of an appropriate authority should be sought. AMA GUIDES TO EVALUATION OF PERMANENT IMPAIRMENT can be used as a reference. The impairment rating allowed should be consistent with the ratings elsewhere in this schedule.	No change.
Section B – Impairment of Brain, Spinal Cord or Peripheral Nerves		
	<u>Introduction</u> An upper extremity impairment of 100% (complete amputation) is equivalent to a 60% Whole Person Impairment (WPI). A lower extremity impairment of 100% (complete amputation) is equivalent to a 40% Whole Person Impairment (WPI).	New: Introductory note on the conversion of 100% limb impairment rating to whole person impairment based on current consensus. The statements are identical to those used later on in sections on impaired function of upper extremity (U/E) and lower extremity

Current Wording	Proposed Wording	Comments/Rationale
		(L/E).
BRAIN AND SPINAL CORD Quadriplegia 100%	**BRAIN AND SPINAL CORD** A. Tetraplegia (Quadriplegia): i. Ventilator Dependant…….100% ii. Requiring an attendant…….. 100% iii. ASIA Impairment Scale A-C a) C4…… 95% b) C5…… 94% c) C6…… 93% d) C7…… 92% e) C8…… 91% f) T1…… 90% iv. ASIA Impairment Scale D a) C4…… 85% b) C5…… 84% c) C6…… 83% d) C7…… 82% e) C8…… 81% f) T1…… 80%	Significant improvement in medical technology has improved outcomes of brain, spinal and nerve injuries since 1982. In 2011, a quadriplegic rarely has 100% impairment. Paraplegics rarely if ever have 100% impairment. The proposed changes address how the physician assesses loss of function. The proposed changes were developed by physiatrists at the Stan Cassidy Centre for Rehabilitation. The American Spinal Injury Association (ASIA) Impairment Scale rating is a standard tool used by the Stan Cassidy Centre for Rehabilitation.

Current Wording	**Proposed Wording**	**Comments/Rationale**
Paraplegia 100%	B. Paraplegia: i. ASIA Impairment Scale A-C a) Any level……85% ii. ASIA Impairment Scale D a) Any level……80% Add 1 point to a maximum of 5 points for: 1. Neurogenic bladder 2. Neurogenic bowel 3. Sexual dysfunction 4. Problematic spasticity 5. Neurogenic pain 6. Other (heterotopic bone, peripheral nerve injury, etc.)	The proposed changes address how the physician assesses loss of function. The proposed changes were developed by physiatrists at the Stan Cassidy Centre for Rehabilitation. ASIA Impairment Scale rating is a standard tool used by the Stan Cassidy Centre for Rehabilitation.
Paraparesis - rated on loss of function Hemiplegia . . . . . 100% Hemiparesis - rated on loss of function Diffuse injury to brain and / or spinal cord - rated on loss of body function	C. Paraparesis – Incomplete: (rate on loss of function) i. MSK function a) Level 1…… 1-10% Walks without assistance but some difficulty with inclines and distances beyond 1000 meters. b) Level 2…… 11-20% Walks without assistance but confined to level surfaces and to distances between 500 and 1000 meters.	A consistent methodology is provided for rating of impairment based on loss of function.

Current Wording	Proposed Wording	Comments/Rationale
	c) Level 3…… 21-40% Requires a walker or physical assistance to ambulate. d) Level 4…….. 41-59% Stands with assistance; minimal ambulation. ii. Bladder function…… 0-30% iii. Sexual function…….. 0-20% iv. Pressure Ulcer…… 0-20% v. Bowel function…….. 0-30% Rate all 5 areas, and then combine for Whole Person Impairment. D. Hemiplegia: i. Either Side……. 88% Combine with any other organ impairments E. Hemiparesis: (rate on loss of function – see Paraparesis) i. Arm…… 1-60% ii. Leg……. 1-40% Combine arm and leg impairments as well as any other organ impairment F. Diffuse Injury to Brain and/or Spinal Cord: (rate on loss of body function) i. Brain…… 1-70%	

Current Wording	Proposed Wording	Comments/Rationale
	Utilize information from: a) formal neuropsychological testing b) mental status exam c) clinical dementia rating ii. Spinal Cord (not covered above) Combine impairment ratings: a) upper extremity b) lower extremity c) respiratory d) bladder e) bowel f) sexual g) vasomotor h) skin	

Current Wording	Proposed Wording	Comments/Rationale
DENERVATION	**DENERVATION** A. Principles of calculation in this section include: i. nerve impairment rating a) which nerve is involved b) motor only, sensory only, or both c) complete vs. partial d) anatomical location ii. This section is <u>not</u> to be used to assess radiculopathy, compressive (entrapment) neuropathy or Complex Regional Pain Syndrome. iii. The distinction of mild, moderate and severe is not applicable to this section. iv. Ratings listed below must be converted to Whole Person Impairment.	New: Introduction added to outline principles and to explain when to use this section. This section has been significantly expanded to reduce dependency on AMA Guides.
Median nerve, complete at elbow …. . . . . 40% Median nerve, complete at wrist. . ... 20% Ulnar nerve, complete at elbow . . . . 10% Ulnar nerve, complete at wrist 8%	B. Upper Extremity (Ratings are given as % of Upper Extremity Impairment) i. Median Nerve above the wrist to the elbow: a) Motor only……. 0-26% b) Sensory only…….. 0-23% c) Combined……. 0-43% ii. Median Nerve at the wrist: a) Motor only…… 0-6%	Expanded and revised. The ratings are consistent with current standards in impairment rating, (e.g., AMA Guides), while respecting copyright that does not allow for direct copying and translation of the AMA Guides. 100% U/E impairment =

Current Wording	**Proposed Wording**	**Comments/Rationale**
	b) Sensory only…… 0-23% c) Combined…… 0-28% iii. Ulnar Nerve above the wrist to the elbow: a) Motor only……. 0-20% b) Sensory only…….. 0-4% c) Combined……. 0-23% iv. Ulnar Nerve at the wrist: a) Motor only…… 0-16% b) Sensory only……. 0-4% c) Combined……. 0-19% v. Radial Nerve – Upper arm: a) Motor only…….. 0-25% b) Sensory only……. 0-4% c) Combined…….. 0-28% vi. Radial Nerve – Forearm: a) Motor only…… 0-21% b) Sensory only……. 0-4% c) Combined…… 0-24% Combine impairments of Median / Ulnar / Radial when applicable	60% WPI.
Peroneal nerve, complete 12.5%	C. Lower Extremity (Ratings are given as % of Lower Extremity Impairment)	

Current Wording	Proposed Wording	Comments/Rationale
	i. Femoral Nerve a) Motor only…… 0-18% b) Sensory only …… 0-1% c) Dysaesthesia …… 0-5% d) Combined ……. 0-20% ii. Sciatic Nerve a) Motor only …… 0-36% b) Sensory only ……. 0-8% c) Combined ……. 0-40% iii. Common Peroneal Nerve a) Motor only …… 0-10% b) Sensory only ……. 0-2% c) Combined …….. 0-12% iv. Superficial Peroneal Nerve ……. 0-2% v. Sural Nerve ……. 0-1% vi. Medial Plantar a) Motor only ……. 0-2% b) Sensory only …….. 0-2% c) Combined …….. 0-5% vii. Lateral Plantar a) Motor only ……. 0-2% b) Sensory ……. 0-2%	

Current Wording	Proposed Wording	Comments/Rationale
	c) Combined ……. 0-5%	
Section C – Impairment of Special Senses		
SENSE OF SMELL Complete loss of sense of smell (including impairment of sense of taste)……3%	**<u>Sense Of Smell</u>** Complete loss of sense of smell (including impairment of sense of taste)……3%	No change.
LOSS OF VISION Complete loss of one eye. . . . . 18% Total loss of vision, one eye . . . . . 16% Cataract or aphakia, one eye . . . . . 6% Double aphakia . . . . . 10% Hemianopsis, right field. . . . . 25% Hemianopsis, left field. . . . . 20% Diplopia, all fields . . . . . 10% Scotoma, depending on location and extent 0-16% Total loss of vision, both eyes 100%	**<u>Loss Of Vision</u>** Enucleation one eye…….....35% WPI This rating covers the impact of loss of binocular vision and cosmetic disfigurement. Total loss of vision, one eye……. .....28% WPI This rating covers the impact of loss of binocular vision. Cataract or aphakia, one eye . . . . . .6% Double aphakia . . . . . .10% Hemianopsis, right field. . . . . .25% Hemianopsis, left field. . . . . .20% Diplopia, all fields . . . . . 10% Scotoma, depending on location and extent . . . . 0-16% Total loss of vision, both eyes .....85% WPI	Realignment of rating to be consistent with current standards on impairment rating – e.g. AMA Guides. Loss of one eye means same as enucleation of one eye.
PARTIAL LOSS OF VISION Best Corrected vision 20/30 ……0% Best Corrected vision 20/40 ……1% Best Corrected vision 20/50 ……2% Best Corrected vision 20/60 ……4% Best Corrected vision 20/80 ……6% Best Corrected vision 20/100 ……..8% Best Corrected vision 20/200 ……14%	**<u>Partial Loss of Vision</u>** Best Corrected vision 20/30 ……..…… 0% Best Corrected vision 20/40 ……..…..……1% Best Corrected vision 20/50 ……2% Best Corrected vision 20/60 ……4% Best Corrected vision 20/80 ……6% Best Corrected vision 20/100 ……..8% Best Corrected vision 20/200 ……...……14%	No change.

Current Wording	**Proposed Wording**	**Comments/Rationale**
Best Corrected vision 20/400 ……16% Partial loss of vision in both eyes will be calculated according to the above schedule employing enhancement factor 84/16 for the better eye, i.e., the poorer eye is rated according to the above schedule and the better eye is rated according to the same schedule but multiplied by 84/16 and the sum of the two gives the combined rating.	Best Corrected vision 20/400 ……....16% Partial loss of vision in both eyes will be calculated according to the above schedule employing enhancement factor 84/16 for the better eye, i.e., the poorer eye is rated according to the above schedule and the better eye is rated according to the same schedule but multiplied by 84/16 and the sum of the two gives the combined rating.	
LOSS OF HEARING 2000-35 When calculating impairment due to loss of hearing, the ANSI audiometric calibration will be used and the hearing loss will be averaged at 500, 1,000, 2,000 and 3,000 hertz. No presbycusis will be deducted. Audiometers shall be calibrated according to ANSI audiometric specifications and audiograms must be performed by an ear, nose and throat specialist or audiologist under standardized conditions. A preliminary audiogram must be performed within 12 hours after significant noise exposure with a second audiogram being performed within 48 hours after the preliminary audiogram. In the event that	**<u>Loss Of Hearing</u>** When calculating impairment ratings for loss of hearing, the ANSI audiometric calibration will be used and hearing thresholds will be averaged at 500, 1000, 2000 and 3000 Hertz. Audiograms must be performed by an otorhinologist or a registered audiologist under standardized conditions to be valid for impairment rating. In the absence of an audiogram by an otorhinologist or registered audiologist, the physician assigning the rating may use audiograms performed by the employer. The physician should be confident that the person doing the audiograms for the employer has been certified, equipment properly calibrated and that testing was done under standard conditions. Impairment ratings and awards for noise-related hearing loss must be based on valid audiograms performed while still employed in a job where there is significant risk of noise exposure or within three months of leaving such employment. However testing should allow adequate time for recovery of any	Rewritten for clarity. Provided for circumstance where only the employer audiogram is available at the time when the worker retires. No difference in rating for slow versus fast loss of hearing – complete loss is complete loss.

Current Wording	Proposed Wording	Comments/Rationale
significant noise exposure occurs elsewhere than at work between the preliminary audiogram and the second scheduled audiogram, the second audiogram shall be performed 48 hours after the intervening significant noise exposure. Interim reassessments for noise-induced hearing impairment shall be performed no sooner than every 5 years after the initial assessment while the worker is still exposed to significant levels of noise. A final permanent physical impairment award for loss of hearing due to noise shall be based on an audiogram performed within 1 to 3 months after permanently leaving a job with significant noise exposure. In order to merit an award, there must be an average hearing loss of at least 30 decibels in one ear. A hearing loss averaging 80 decibels is considered to be total loss of hearing in that ear, based on ANSI rating. Deafness, complete one ear . . . . . 5% Deafness, complete both ears . . . . . 30% Deafness, complete in both ears occurring as a sudden and complete traumatic loss of hearing ……...60% 2000-35	temporary threshold shift where there has been recent acute noise exposure. Interim reassessments for noise-induced hearing impairment shall be performed no sooner than every 5 years after the initial assessment while the worker is still exposed to significant levels of noise. A final permanent physical impairment award for loss of hearing due to noise shall be based on an audiogram performed within 1 to 3 months after permanently leaving a job with significant noise exposure. In order to merit an award the average hearing threshold must be at least 35dB in one ear. A hearing threshold of 80dB is considered total loss of hearing and is the maximum threshold that will be used in calculating the average threshold in the 500 to 3000 Hertz range. Complete hearing loss in one ear ..... 5% Complete hearing loss in both ears 30%	
UNILATERAL HEARING LOSS When dealing with unilateral hearing loss, the chief cause of impairment is due to loss of stereocusis.	**Partial hearing loss:** 1. Unilateral partial hearing loss	Notes on calculation rewritten. No change in ratings.

Current Wording	Proposed Wording	Comments/Rationale
For partial, unilateral hearing loss, therefore, the average hearing loss in the unaffected ear is subtracted from the average hearing loss in the affected ear and the difference determines the impairment rating. Difference of 30 - 39 dbs . . . . . 1% Difference of 40 - 49 dbs . . . . . 2% Difference of 50 - 59 dbs . . . . . 3% Difference of 60 - 69 dbs . . . . . 4% Difference of 70 dbs or greater 5%	The average hearing loss in the unaffected ear is subtracted from the average hearing loss in the affected ear and the difference determines the impairment rating.	
BILATERAL, PARTIAL HEARING LOSS 35 dbs, in single ear . . . . . 0.4% 40 dbs, in single ear . . . . . 0.7% 45 dbs, in single ear . . . . . 1.0% 50 dbs, in single ear . . . . . 1.4% 55 dbs, in single ear . . . . . 1.8% 60 dbs, in single ear . . . . . 2.3% 65 dbs, in single ear . . . . . 2.8% 70 dbs, in single ear . . . . . 3.4% 75 dbs, in single ear . . . . . 4.0% 80 dbs, in single ear . . . . . 5.0% In calculating the impairment for a bilateral hearing loss, the poorer ear is rated according to the above scale, the better ear according to the same scale but multiplied by 5. The sum of the two gives the combined rating.	2. Bilateral partial hearing loss The poorer ear is rated according to the scale and the better ear is rated according to the same scale multiplied by a factor of 5. The sum of the two gives the combined rating.	Notes on calculation rewritten. No change in ratings.
TINNITUS In cases of longstanding distressing tinnitus, an additional rating of up to 5% total body impairment	**TINNITUS** i. Without evidence of cochlear damage .....0% WPI	Simplified determination of rating. The ratings are consistent

Current Wording	Proposed Wording	Comments/Rationale
may be added. Tinnitus is a subjective experience for which there is no objective measurement. In order to merit an award, the rating physician must be convinced that the tinnitus has been continuous for at least two years and that it is distressing to the claimant. If it is distressing, it is almost certain that the attending physician, the consultant otolaryngologist, and the audiologist will have mentioned it in their reports. It is exceedingly rare for tinnitus due to either direct trauma or acoustic trauma to be sufficiently distressing to warrant a 5% rating.	ii. With evidence of cochlear damage ..... 5% WPI	with current standards in impairment rating (e.g., AMA Guides), while respecting copyright that does not allow for direct copying and translation of the AMA Guides.
Section D – Impaired Function of the Upper Extremity		
	<u>Introduction</u> An upper extremity impairment of 100% (complete amputation) is equivalent to a 60% WPI. Hand impairment of 100% is equivalent to 90% upper extremity impairment. Thumb impairment of 100% is equivalent to 40% hand impairment.	New: Sets out relational principles for U/E. WPI equivalent is consistent with current standards in impairment rating (e.g., AMA Guides).
JUDGMENT RATINGS While loss of tissue and loss of range of movement at a joint is readily measured and easily rated in impairment rating schedules, circulation, and muscle power are equally important. Especially when dealing with fingers, sensation is of utmost importance to the extent that a digit with complete loss of sensation results in impairment approaching the impairment caused by amputation. Similarly,	<u>Judgement Ratings</u> Query is this part necessary	No change. Typo corrected in title.

Current Wording	Proposed Wording	Comments/Rationale
with impaired circulation and muscle power. The examining physician must take impairment of sensation, circulation, and power into consideration on a judgement basis. It is often necessary to think in terms of retained function as well as lost function in order to ensure that the impairment rating is appropriate for the part.		
AMPUTATIONS Proximal third of humerus or disarticulation at shoulder . . . . . .70% Middle third of humerus . . . . . 65% Distal third of humerus to biceps insertion 60% Biceps insertion to wrist (depending on usefulness of stump) . . . . . 50 - 60% Thumb, including first metacarpal . . . . . 20% Thumb, at MP joint . . . . . .15% Thumb, at IP joint . . . . . .10% Thumb, one-half distal phalanx. . . . . 5% Thumb, at least one-quarter of distal phalanx 2.5%	<u>Amputations (% WPI)</u> Scapulothoracic (forequarter) amputation encompasses and extends beyond an upper extremity amputation ……. 70% Proximal third of humerus or disarticulation at shoulder …….. 60% Middle third of humerus……. 57% Distal third of humerus to biceps insertion… 56% Biceps insertion to wrist (depending on usefulness of stump)…… 54 - 56% Remainder as per 1982 schedule (revised 2000)	Some ratings changed based on 100% U/E impairment equating to 60% WPI. Explains that a scapulothoracic amputation is more than an upper extremity amputation.
Finger Amputations Fingers will be rated according to the detailed finger chart (Page D-3) Corrective shaping of the head of the next phalanx	<u>Finger Amputations</u> Fingers will be rated according to the detailed finger chart (Page D-3) Corrective shaping of the head of the next phalanx or	No change.

Current Wording	Proposed Wording	Comments/Rationale
or metacarpal, done to improve the shape of the stump, does not increase the rating. If a single finger is involved, the single finger chart will be used. In multiple finger amputations, use the chart corresponding to the number of fingers having impaired function at, or proximal to, a specific level. Begin at the DIP joint and assign values to the distal phalanx from the chart corresponding to the number of fingers having impairment to or proximal to the distal joint. Then proceed to the PIP joint and assign values to the middle phalanx from the chart corresponding to the number of fingers having impairment at or proximal to the middle phalanx. Then proceed to the MP joint, and in a similar fashion assign values to the proximal phalanges. Impairment ratings for finger injury must take consideration loss of movement as well as amputation. Please refer to the appropriate section of this guide.	metacarpal, done to improve the shape of the stump, does not increase the rating. If a single finger is involved, the single finger chart will be used. In multiple finger amputations, use the chart corresponding to the number of fingers having impaired function at, or proximal to, a specific level. Begin at the DIP joint and assign values to the distal phalanx from the chart corresponding to the number of fingers having impairment to or proximal to the distal joint. Then proceed to the PIP joint and assign values to the middle phalanx from the chart corresponding to the number of fingers having impairment at or proximal to the middle phalanx. Then proceed to the MP joint, and in a similar fashion assign values to the proximal phalanges. Impairment ratings for finger injury must take into consideration loss of movement as well as amputation. Please refer to the appropriate section of this guide.	
IMPAIRMENT OF MOBILITY IN UPPER EXTREMITY Shoulder, ankylosed without either articular or scapular movement 35%	<u>Loss of Mobility (% WPI)</u> A. Shoulder ankylosed in an acceptable position without either articular or scapular movement……. 30% B. Shoulder replacement, depending on loss of mobility…… 0-30%	Some ratings changed based on 100% U/E impairment equating to 60% WPI.

Current Wording	Proposed Wording	Comments/Rationale
Elbow, completely ankylosed in position of function . . . . . 20% Wrist, completely ankylosed in position of function . . . . . 12.5% Pronation and supination, complete immobility in mid position . . . . . 10% Thumb, both joints ankylosed in position of function. . . . . 7.5% Thumb, distal joint ankylosed in position of function 5%	C. Elbow ankylosed in acceptable position…. 30% D. Elbow replacement, depending on loss of mobility …… 0-30% E. Remainder…as per 1982 schedule (revised 2000)	
Fingers Fingers will be rated according to the detailed finger chart (see Page D-3). When a finger joint is ankylosed in the position of ideal function, the rating is one half of what it would be for an amputation at that level. If a joint is ankylosed in a position that is not ideal, and there is some good reason why surgical correction will not be done, the rating could equal up to the rating for amputation of that joint.	<u>Fingers</u> Fingers will be rated according to the detailed finger chart (see Page D-3). When a finger joint is ankylosed in the position of ideal function, the rating is one half of what it would be for an amputation at that level. If a joint is ankylosed in a position that is not ideal, and there is some good reason why surgical correction will not be done, the rating could equal up to the rating for amputation of that joint.	No change.
Partial Loss of Movement The impairment rating for partial loss of movement will be proportional to the amount of movement that is lost. Inasmuch as there are great variations from person to person in ranges of movement, when there is a completely normal extremity to compare with, loss of movement can be determined by comparing the movement in the joint being examined with the movement in the normal joint on the opposite extremity.	<u>Partial Loss of Movement</u> The impairment rating for partial loss of movement will be proportional to the amount of movement that is lost. Inasmuch as there are great variations from person to person in ranges of movement, when there is a completely normal extremity to compare with, loss of movement can be determined by comparing the movement in the joint being examined with the movement in the normal joint on the opposite extremity.	No change.

Current Wording	**Proposed Wording**	**Comments/Rationale**
When there is not a normal extremity to compare with, the following will be considered to be normal ranges of movement for upper extremity joints: Shoulder: Forward Elevation 160° Backward Elevation -50° Abduction 170° Abduction -50° Internal Rotation -70° External Rotation 90°	When there is not a normal extremity to compare with, the following will be considered to be normal ranges of movement for upper extremity joints: Shoulder: Forward Elevation 160° Backward Elevation -50° Abduction 170° Abduction -50° Internal Rotation -70° External Rotation 90°	
Partial Loss of Movement of Fingers For partial loss of movement at a joint, the lost range of movement, in degrees, is divided by the normal range of movement and multiplied by one half of the amputation rating at that joint. If there has been amputation at a point distal to the joint, only the values of the retained phalanx or phalanges are employed in the calculation for loss of movement.	<u>Partial Loss of Movement of Fingers</u> For partial loss of movement at a joint, the lost range of movement, in degrees, is divided by the normal range of movement and multiplied by one half of the amputation rating at that joint. If there has been amputation at a point distal to the joint, only the values of the retained phalanx or phalanges are employed in the calculation for loss of movement.	No change.
Section E – Impaired Function of the Lower Extremity		
	<u>Introduction</u> A lower extremity impairment of 100% (complete amputation) is equivalent to a 40% Whole Person Impairment (WPI).	New introduction sets out relational principles for L/E. WPI equivalent is consistent with current standards in impairment rating (e.g., AMA Guides).
AMPUTATIONS Hip – disarticulation or short stump requiring	<u>Amputation Ratings (% WPI)</u>	Some ratings changed based

Current Wording	Proposed Wording	Comments/Rationale
ischial bearing prosthesis . . . . . .65% Thigh, seat of election . . . . . 50% End bearing of short below-knee stump not suitable for conventional B.K. prosthesis . . . 45% Leg, suitable for B.K. prosthesis . . . . 35% Leg, at ankle, end bearing . . . . . 25% Through foot . . . . . …10 – 25% Great toe, both phalanges . . . . . 5% Great toe, one phalanx. . . . . 2% All toes, total amputation 7.5%	Hip – disarticulation or short stump requiring ischial bearing prosthesis…… 40% Thigh, seat of election ……... 31% End bearing or short below-knee stump not suitable for conventional B.K. prosthesis…….. 28% Leg, suitable for B.K. prosthesis…… 22% Leg at ankle, end bearing…… 15% Through foot…….. 6-15% Remainder…….as per 1982 schedule (revised 2000)	on 100% L/E impairment equating to 40% WPI.
LOSS OF MOBILITY OF LOWER EXTREMITY Hip, ankylosed in acceptable position. . . . . 30% Knee, ankylosed in acceptable position. . . . . 25% Ankle, ankylosed in acceptable position . . . . . 15% Triple arthrodesis. . . . . 5 – 12% Subtalar arthrodesis . . . . . 0 – 10% Great toe, ankylosis both joints . . . . . 2% Great toe, ankylosis distal joint 0%	<u>Loss of Mobility (% WPI)</u> A. Hip, ankylosed in acceptable position… 20% i. Hip replacement, depending on the loss of mobility…… 0-20% B. Knee, ankylosed in acceptable position… 20% i. Knee replacement, depending on the loss of mobility …… 0-20% C. Remainder…as per 1982 schedule (revised 2000)	Some ratings changed based on 100% L/E impairment equating to 40% WPI.
SHORTENING OF THE LEG 1 inch (2.5 cm) …… 1.5% 1½ inches (4 cm) …… 3%	<u>Shortening of the Leg</u> 1 inch (2.5 cm) …… 1.5% 1½ inches (4 cm) …… 3%	No change.

Current Wording	Proposed Wording	Comments/Rationale
2 inches (5 cm) …… 6% 3 inches (7.5 cm) …… 15%	2 inches (5 cm) …… 6% 3 inches (7.5 cm) …… 15%	
LENGTHENING OF THE LEG 1 inch (2.5 cm) …… 1.5% 1½ inches (4 cm) …… 3% 2 inches (5 cm) …… 6% 3 inches (7.5 cm) …… 15%	<u>Lengthening of the Leg</u> 1 inch (2.5 cm) …….. 1.5% 1½ inches (4 cm) …… 3% 2 inches (5 cm) …… 6% 3 inches (7.5 cm) …… 15%	No change.
Section F – Impaired Function of the Spine		
Introduction The assessment of physical impairment due to spinal diseases and injuries is primarily a judgment rating. Such factors as muscle spasm, limitation of movement ranges and muscle wasting, among other things, should be taken into consideration. Since these are largely judgment ratings, the lowest rating for spinal disease or injury will be 2.5% total body impairment and all other ratings will be in multiples of 2.5%. Because of the amount of judgment involved in rating impairment due to spinal disease or injury, a rigid rating schedule is not possible, however it is important that consistency of rating be achieved. The methodology to be employed in determining the physical impairment is as follows: 1. The physician shall ensure that there is an average of three consecutive range of motion	<u>Introduction</u> General consensus on rating spinal impairment has shifted from an approach based on loss of range of motion to one based on diagnosis that is determined by the history, physical findings, and results of appropriate clinical tests. An impairment range is assigned based on diagnosis. The rating selected within an impairment range is determined by the severity of the diagnosed condition. Severity is determined based on: 1) functional history including ADLs and validated functional questionnaires where available, 2) the degree of pathology demonstrated on clinical tests (e.g. 20% compression fracture vs. a 50% compression fracture), and 3) severity of objective, medically compatible physical findings. Subjective symptoms that cannot be verified with objective tests or physical findings are not rated. As per the general introduction, impairment rating	The AMA 5th edition began the shift away from using range of motion (ROM) to diagnosis-related estimates (DRE) because ROM can be influenced by effort and motivation. The AMA 6th edition has expanded and extended the use of DREs. WorkSafeNB policy and directive requires the medical advisor to evaluate whether the method outlined in the current regulations provides a rating consistent with current consensus models and if not to discard the rating derived from the regulation and use the rating from the AMA Guides.

Current Wording	Proposed Wording	Comments/Rationale
measurements for a given direction for the spinal area being assessed. 2. If the average of the three consecutive measurements is under 50 degrees, then all three measurements must fall within 5 degrees of the average. 3. If the average of the three consecutive measurements is over 50 degrees, then all three measurements must fall within 10 degrees of the average. 4. If the examining physician cannot get a consistent and realistic measurement in six tries for a given direction of the spinal area being assessed, then he or she shall declare this part of the assessment to be invalid and recommend that no award be made for the area being assessed. 5. Where an extent of loss category as set out in the tables below differs across the given directions for a spinal area, a physician shall select the category with the greatest validated restriction on the range of motion to classify the overall loss of movement. 6. The extent of loss shall be determined by using the greatest degree of range of movement (ROM) lost as set out in the tables below. 7. Once the extent of loss is determined, the	for pain is included in the impairment ratings for all specific diagnoses. Spinal conditions for which the generally accepted medical literature does not indicate there to be an expected physical impairment will have a Whole Person Impairment (WPI) rating of zero, unless there is objective clinical and investigative findings to the contrary; Common degenerative findings such as annular tears, facet arthropathy, osteophyte formation, and degenerative discs (bulging) do not correlate well with symptoms, physical findings or causation analysis and are therefore not rateable. Developmental anomalies including spondylolysis, scoliosis, kyphosis, excessive lordosis, or spondylolisthesis (in the absence of fracture), are not rateable. Corticospinal injuries are rated in the CNS section. The spine is divided into three regions: I. Cervical II. Thoracic III. Lumbar If more than 1 region is impaired, the impairment of each region is first determined and then combined with other affected regions.	The change in this section would bring the regulations up to date with current general practice in evaluating impairment of the spine. The ratings are consistent with current standards in impairment rating (e.g., AMA Guides), while respecting copyright that does not allow for direct copying and translation of the AMA Guides.

Current Wording	Proposed Wording	Comments/Rationale
physician shall use it in conjunction with the presence or absence of the signs found in the table of signs to determine the percentage rating of the impairment.		
CERVICAL SPINE **Cervical Forward and Lateral Flexion** **Extent of Loss Measured Range Degrees ROM Lost** Minor 30 to 45 0 to 15 Moderate 15 to 29 16 to 30 Moderate to severe 0 to 14 31 to 45 **Cervical Extension** **Extent of Loss Measured Range Degrees ROM Lost** Minor 40 to 60 0 to 20 Moderate 20 to 39 21 to 40 Moderate to severe 0 to 19 41 to 60 **Cervical Rotation** **Extent of Loss Measured Range Degrees ROM Lost** Minor 60 to 80 0 to 20 Moderate 40 to 59 21 to 40 Moderate to severe 0 to 39 41 to 80 **Table of Signs** **Extent of Loss Signs Impairment Rating** Minor Minor loss of movement.	<u>Impairment Ratings</u> I. Cervical 1. The following impairment ratings apply to: i) Disc herniation ii) AOMS (Alteration of Motion Segment Integrity) iii) Spinal Stenosis At: i) <u>Single level</u> a. Resolved.....4-8% b. Unresolved .....9-14% ii) <u>Multiple level or bilateral</u> a. Resolved.....4-8% b. Unresolved at i. Single level .....9-14% ii. Multiple levels or bilateral.15-30%	

Current Wording	Proposed Wording	Comments/Rationale
No muscular spasm. 0 - 5% Moderate Moderate loss of movement. Some flattening of lordotic curve. No nerve root signs. 5 - 10% Moderate to severe Moderate to severe loss of movement. Muscular spasm of neck. Motor and sensory neurological changes. 10 - 20%	2. Fracture-dislocations i) Less than 25% compression; with or without pedicle and/or posterior element fracture of less than 5 mm displacement; and resolved radiculopathy ..... 2-6% ii) 25-50% compression; with or without pedicle and/or posterior element fracture of 5 mm displacement; and with or without radiculopathy a. Without radiculopathy ..... 7-11% b. With radiculopathy..... 12-16% iii) More than 50% compression; with or without pedicle and/or posterior element fracture of greater than 5 mm displacement; and radiculopathy at a. 1 level..... 17-25% b. Multiple levels or bilateral 27-32%	
THORACIC SPINE **Thoracic Flexion** **Extent of Loss Measured Range Degrees ROM Lost** Minor 30 to 60 0 to 30 Moderate 15 to 29 31 to 45 Moderate to severe 0 to 14 46 to 60 **Thoracic Rotation** **Extent of Loss Measured Range** Minor 20 to 30 Moderate 10 to 19 Moderate to severe 0 to 9	II. Thoracic 1. The following impairment ratings apply to: i) Disc herniation ii) AOMS (Alteration of Motion Segment Integrity) At: i) <u>Single level</u> a. Resolved..... 2-6% b. Unresolved ..... 7-16% ii) <u>Multiple level or bilateral</u>	

Current Wording	Proposed Wording	Comments/Rationale
Table of Signs **Extent of Loss Rating** — **Signs** — **Impairment** Minor — Minor loss of movement. No neurological signs. — 0 - 5% Moderate — Moderate loss of movement. No neurological signs. — 5 - 10% Moderate to severe — Moderate to severe loss of movement. Paravertebral muscle spasm. — 10 - 20%	a. Resolved.....2-6% b. Unresolved at i. Single level .....17-22% ii. Multiple levels or bilateral 23-33% 2. Fracture-Dislocation i) Less than 25% compression; with or without pedicle and/or posterior element fracture of less than 5 mm displacement; and resolved radiculopathy .....2-6% ii) 25-50% compression; with or without pedicle and/or posterior element fracture of 5 mm displacement; and with or without radiculopathy a. Without radiculopathy .....7-8% b. With radiculopathy .....9-11% iii) More than 50% compression; with or without pedicle and/or posterior element fracture of greater than 5 mm displacement; and radiculopathy at a. 1 level.....12-16% b. Multiple levels or bilateral....17-22%	
LUMBAR SPINE **Lumbar Flexion** **Extent of Loss Measured Range Degrees ROM Lost** Minor — 45 to 60 — 0 to 15 Moderate — 30 to 44 — 16 to 30 Moderate to severe — 15 to 29 — 31 to 45	III. Lumbar 1. The following impairment ratings apply to: i) Disc herniation ii) AOMS (Alteration of Motion Segment Integrity)	

Current Wording			Proposed Wording	Comments/Rationale
Severe	0 to 14	46 to 60	iii) Spinal Stenosis	
Lumbar Extension and Lateral Flexion			iv) Traumatic Spondylolisthesis	
Extent of Loss	**Measured Range**	**Degrees ROM Lost**	At:	
Minor	20 to 25	0 to 5	i) <u>Single level</u>	
Moderate	15 to 19	6 to 10	a. Resolved.....5-9%	
Moderate to severe	10 to 14	11 to 15	b. Unresolved 10-14%	
Severe	0 to 9	16 to 25	ii) <u>Multiple level or bilateral</u>	
			a. Resolved.....5-9%	
			b. Unresolved at	
Table of Signs			i. Single level 5-24%	
Extent of Loss Rating	**Signs**	**Impairment**	ii. Multiple levels or bilateral....25-33%	
Minor	Mild loss of movement. No spasm. No neurological changes.	0 - 5%	2. Fracture-dislocations	
			i) Less than 25% compression; with or without pedicle and/or posterior element fracture of less than 5 mm displacement; and resolved radiculopathy 5-9%	
Moderate	Moderate loss of movement. No persisting muscle spasm. Only minor neurological changes, that is, sensory.	5 - 10%	ii) 25-50% compression; with or without pedicle and/or posterior element fracture of 5 mm displacement; and with or without radiculopathy	
			a. Without radiculopathy 10-11%	
			b. With radiculopathy 12-14%	
Moderate to severe	Moderate to severe loss of movement. Intermittent muscle spasm. Mild to moderate neurological changes.	10 - 20%	iii) More than 50% compression; with or without pedicle and/or posterior element fracture of greater than 5 mm displacement; and radiculopathy at	
Severe	Severe restrictions of movement.			

Current Wording	Proposed Wording	Comments/Rationale
Persisting muscular spasm. Moderate to severe neurological changes including muscle wasting and weakness. 20 - 50%	a. 1 level.....15-24% b. Multiple levels or bilateral....25-33%	
Section G – GENERAL IMPAIRMENT The assessment of physical impairment requiring individual consideration will be dealt with on the merits of the case. Heart attacks. . . . . 0 - 50% Loss of one kidney . . . . . 10% Total knee replacement . . . . . 10 - 25% Total hip replacement. . . . . 25 - 50% Head injuries - individual consideration Loss of abdominal organs - individual consideration	<u>General Impairment</u> The assessment of physical impairment requiring individual consideration will be dealt with on the merits of the case. Heart attacks. . . . . .0 - 50% Loss of one kidney . . . . . 10% Total knee replacement . . . . . 0 - 20% Total hip replacement. . . . . 0 - 20% Head injuries - individual consideration Loss of abdominal organs - individual consideration	Significant advances have been made in total hip and knee replacement since 1982. Ratings are set to values used in section on impaired function of L/E.
Section H – TIMING OF PERMANENT IMPAIRMENT ASSESSMENT	<u>Timing of Permanent Impairment Assessment</u>	No change.