

CHAPTER 5

WAGE-LOSS BENEFITS

#33.00 INTRODUCTION

Wage-loss benefits are payable where an injury or disease resulting from a person's employment causes a period of temporary disability from work. These benefits usually commence shortly after the initial acceptance of a claim and may be total (section 29) or partial (section 30). They cease when the worker recovers from the injury or the condition becomes a permanent one. In the latter event, the worker is entitled to be assessed for a permanent partial disability award. This entitlement is dealt with in Chapter 6.

Wage-loss benefits are calculated on the basis of a worker's "average net earnings". The computation of average net earnings is dealt with in Chapter 9.

#34.00 TEMPORARY TOTAL DISABILITY PAYMENTS

Where a temporary total disability results from an injury, section 29(1) provides that the compensation consists of periodic payments to the injured worker equal in amount to 90% of her or his average net earnings.

#34.10 Meaning of Temporary Total

It is obvious that for every claim there must be physical impairment as the result of a work-related injury or occupational disease. It is the instigating factor without which the system never comes into play. Once it is found that a worker has suffered such an impairment it becomes necessary to determine the extent of compensation payable, i.e. the consequences of the impairment. There are, therefore, two considerations on every claim. Firstly, the impairment itself, and secondly, the entitlement to benefits arising from the impairment.

The words "temporary", "permanent", "partial", and "total" found in sections 22, 23, 29 and 30 are applicable only to the impairment component of the claim and are not to be related to its compensable effects. To differentiate between the "temporary" and "permanent" consequences of an impairment is possible only by reference to the impairment itself. Once it has been determined that a worker has a temporary or permanent, partial or total medical impairment, benefits to compensate for the consequences of that impairment shall be paid in accordance with the requirements of the appropriate section of the *Act*.

It follows from the above that in order to be eligible for benefits under section 29(1) a worker must have a temporary total physical impairment as a result of the injury.

A “temporary” physical impairment is one which is likely to improve or become worse and is therefore not stable. Realistically speaking, ongoing change is a natural feature of human physiology. Impairments resulting from an injury commonly deteriorate or improve over a period of years. However, an impairment is not considered temporary simply because it is possible that, as the worker becomes older, the condition may change or the worker may have to undergo further treatment. It only remains temporary when such a change can reasonably be foreseen in the immediate future. (1)

Most compensable injuries and diseases involve an initial period of temporary disability during which wage-loss benefits are paid. This disability will usually improve in time until it disappears entirely or becomes permanent. However, in the case of some diseases there is no initial period of temporary disability; the condition is permanent right from the beginning and no wage loss is payable.

Raynaud’s Phenomenon, is one of these diseases. There are also others, for example, hearing loss caused by exposure to industrial noise. The worker’s only entitlement in these cases is to be assessed for a permanent partial disability award.

Even if a worker is found to have a temporary total physical impairment, no wage-loss payments will be made unless that impairment in fact causes the cessation of regular employment. If the impairment causes only a partial cessation from this work or some alternative light work is taken up, benefits are calculated under section 30.

References to “physical impairment” in the above paragraphs include “psychological impairment” where the worker’s disability is psychological in nature.

#34.11 Selective/Light Employment

STATEMENT OF PRINCIPLE

Selective/light employment is a temporary work alternative, offered by an employer, that is intended to promote a worker’s gradual restoration to the pre-injury level of employment. The arrangement may involve duties different from the pre-injury employment, or some modification of the pre-injury duties and/or hours of work. Selective/light employment arrangements may involve consultation with the worker, employer, the worker’s attending physician or other medical practitioners and the union.

Selective/light employment is typically offered at or soon after the date of injury, generally prior to the Board’s involvement on the claim. Selective/light employment differs from graduated return to work programs which are normally initiated after the worker has participated in some form of medical treatment or rehabilitation program.

The Board supports selective/light employment as an important component of a worker's rehabilitation and recognizes the value of maintaining an injured worker's positive connection to the workplace. It has been amply demonstrated that the earlier a worker is able to safely return to productive employment following an injury, the more likely he or she is of obtaining maximum recovery.

CRITERIA

To ensure that the early return-to-work is appropriate, all selective/light employment arrangements must meet the following conditions:

- While the compensable injury may temporarily disable the worker from performing his or her normal work, the worker must be capable of undertaking some form of suitable employment.
- The work must be safe, that is, it will neither harm the worker nor slow recovery. The work must be within the worker's medical restrictions, physical limitations and abilities. Where there is a disagreement regarding the safety of the selective/light offer and the Board is required to intervene, the Board is responsible for determining the safety of the work after considering the medical evidence and other relevant information.
- The work must be productive. Token or demeaning tasks are considered detrimental to the worker's rehabilitation.
- Within reasonable limits, the worker must agree to the arrangement.

INTERVENTION

The Board recognizes that the successful development of selective/light employment opportunities depends on the cooperation of all parties in the workplace. In the following situations, the Board will intervene to determine if a particular offer of selective/light employment is suitable:

- The worker and/or the worker's attending physician disagree with the employer's position that the work is safe.
- The worker and employer are in disagreement over the terms of the return-to-work.
- There is a request for intervention by either the worker or employer.
- The Board considers that further inquiry is required.

ADJUDICATION

On intervention, the Board's evaluation will be based on, but not limited to, a detailed description of the employment being offered, including the physical requirements and detailed medical information outlining the worker's medical restrictions, physical limitations and abilities.

Where a worker refuses to accept the offer, the Board will consider the reasons for refusal and determine if they are reasonable. In making this determination, the Board will give regard to the requirements of the work, medical opinion(s) and other evidence regarding the worker's medical restrictions, physical limitations and abilities. Notwithstanding, the Board has discretion to consider additional factors or evidence relevant to the case, such as transportation (see policy item #82.00) and child-care (see policy item #84A.00).

Should the Board determine that the worker's refusal is unreasonable, benefit entitlement is determined under section 30 of the *Act*. For example, the worker does not provide the selective/light duties to the attending physician or the worker refuses to return to work after the physician has determined the duties are suitable. Benefit entitlement will be adjusted effective the date the selective/light employment was suitable and available, as determined by the Board.

Where a worker accepts suitable selective/light employment, benefit entitlement will be determined under section 30 of the *Act*. Benefit entitlement will be adjusted effective the date the selective/light employment was suitable and available, as determined by the Board.

EFFECTIVE DATE: June 1, 2009 – Delete references to Board officers.
HISTORY: January 1, 2005 – Amendments apply to all injuries on or after January 1, 2005 and include adding a definition of selective/light employment; confirming the Board officer's responsibility for determining whether the selective/light offer is safe for the worker from a review of the medical evidence; and adding a date of when to adjust benefits when it is determined that an employer's selective/light offer is suitable and the worker unreasonably refused to return to work.
APPLICATION: Applies on or after June 1, 2009

#34.12 Worker in Receipt of Permanent Disability Award

Wage-loss benefits are terminated when the worker's condition becomes permanent and prior to the assessment of any permanent disability award. However, they may again become payable because a further work injury or a natural relapse in the condition for which the permanent disability award is being paid causes a further period of temporary disability.

With regard to the latter situation, it is recognized that no condition is ever absolutely stable or permanent; there will commonly be some degree of fluctuation. Nevertheless, a permanent disability award will be granted when, though there may be some changes, the condition will, in the reasonably foreseeable future, remain essentially the same. The fluctuations in the condition of a worker receiving a permanent disability award may be such as to require the worker to stay off work from time to time. The question then arises whether wage-loss benefits should be paid for these periods. If the fluctuations causing the disability are within the range normally to be expected from the condition for which the worker has been granted a permanent disability award, no wage loss is payable. The permanent disability award is intended to cover such fluctuations. Wage loss is only payable in cases where there is medical evidence of a significant deterioration in the worker's condition which not only goes beyond what is normally to be expected, but is also a change of a temporary nature. If the change is a permanent one, the worker's permanent disability award will simply be reassessed.

#34.20 Minimum Amount of Compensation

Wage-loss compensation cannot be less per week than the minimum set out below, unless the worker's average earnings are less than that sum per week, in which case compensation is paid in an amount equal to average earnings. (2)

			\$ Per Week
January 1, 2008	—	December 31, 2008	346.04
January 1, 2009	—	December 31, 2009	355.03

If required, earlier figures may be obtained by contacting the Board.

The minimum is subject to cost of living adjustments as described in policy item #51.20. However, these adjustments only apply to injuries or disablements occurring after they come into force. Existing payments are not automatically increased to a new minimum, although they may be the subject of cost of living adjustments in their own right.

#34.30 Commencement of Payment

Section 5(2) provides that "Where an injury disables a worker from earning full wages at the work at which the worker was employed, compensation is payable . . . from the first working day following the day of the injury; but a health care benefit only is payable . . . in respect of the day of the injury."

While the plain wording of the section would seem clearly to indicate that "day of the injury" means calendar day, the Board finds that the intention of the legislation is not to provide payment for the "shift" on which the worker is injured but to provide payment for any subsequent "shift" on which the worker is

disabled. Payment of compensation, therefore, will commence effective the shift next following the shift on which the worker is injured.

#34.31 *Worker Continues to Work After Injury*

If a worker continues to work beyond the day of the injury, no compensation is payable until it actually causes a lay-off from work. If the worker works or is paid for part of the day on which the lay-off occurs, the amount of compensation paid for that day is as follows:

- (a) if he or she works or is paid for one quarter of the day or less, compensation is paid for the full day;
- (b) if he or she works or is paid for more than one quarter but less than three quarters of the day, compensation is paid for half the day;
- (c) if he or she works or is paid for three quarters of the day or more, compensation is not paid for the day.

Except where section 34(1) is being applied, (3) the employer is not refunded any money paid to the worker for time not worked on the day when he or she lays off work.

The above rules apply equally where the worker becomes disabled from working following a recurrence of a compensable condition.

#34.32 *Strike or Other Lay-Off on Day Following Injury*

In cases where a worker's job would not have been available during a period of disability, or for some reason the worker cannot or will not be returning to the prior job upon recovery, the following general guidelines will apply.

- 1. Where the injury disables the worker beyond the day of the injury and this results in an actual loss of earnings or a potential loss of earnings, the requirement of section 5(2) will be met and wage-loss compensation will be paid.
- 2. Where the disability beyond the day of injury does not result in any actual or potential loss of earnings, the requirements of section 5(2) will be deemed to have not been met.

In interpreting "potential loss" no rigid rules can be established since every case will have to be determined on the information received. In situations where there is a lay-off due to lack of work, a worker would normally be considered as having suffered a potential loss. The position would be similar where a partially disabled worker has continued work on light work and has been laid off due to a lack of work, but payments on such a claim would be considered under section 30 of the

Act. The general expectation in those situations is that the worker would, if not injured, have immediately sought new employment and the Board should not speculate as to if and when it would have been found. If, however, there is evidence to rebut this general expectation, the Board may conclude in a particular situation that there was no actual or potential loss. For example, suppose a homemaker has been injured in the course of a single day's work at a polling station during an election and has no other attachment to the labour force whatsoever. The homemaker would not normally be available on the general labour market beyond the one day of work at the polling station.

There are other situations where, immediately following the lay-off, it would not normally be expected that the worker would seek other work, for example, strikes, a statutory holiday, weekends or normal days off, vacations or absences required for medical treatment unrelated to the work injury. It will normally be considered that there is no loss or potential loss in such cases. Again, however, the opposite conclusion may be reached if there is evidence that the worker would have undertaken other work but the injury prevented it.

It should be made clear that the above rules only apply at the point of the original lay-off. Once the Board has commenced the payment of temporary disability benefits, it does not normally discontinue them simply because, irrespective of the injury, the worker would not have been working for some period of time. This applies even in cases where the worker recovers from the initial disability and benefits are terminated but the worker subsequently suffers a recurrence within three years of the compensable condition. The fact that the worker is, for example, on strike at the time of the recurrence does not bar the payment of benefits for temporary total disability.

See policy item #35.30 for policy on the duration of temporary disability benefits.

#34.40 Pay Employer Claims

Section 34(1) provides that "In fixing the amount of a periodic payment of compensation, consideration must be had to payments, allowances or benefits which the worker may receive from the worker's employer during the period of the disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer, and a sum deducted under this section from the compensation otherwise payable may be paid to the employer . . ."

The section does not provide that any payment made by the employer shall be deducted from the compensation, or that any compensation deducted shall be paid to the employer. It requires that the Board must consider the matter, and that any compensation deducted under this section may be paid to the employer. The section is permissive, not mandatory, and the question is, therefore, in what circumstances a deduction should be made.

In practice, employers who continue paying full wages to disabled workers are reimbursed in amounts equal to the compensation that would normally be paid to their employees. No refund is made for the difference between the amount of compensation and the worker's regular salary. If an employer continues to pay 25% of a worker's salary or less, full wage-loss payments are made to the worker and no refund made to the employer.

Refunds are made to all employers except for the Federal Government. However, in any case where the Federal Government is not continuing to pay full salary, the Board must pay the wage-loss benefits to the worker.

If a claim is reopened and the worker is carried on full salary by a different employer from the employer at the time of the original injury, the new employer is reimbursed to the same extent as the original employer would have been. This applies even though the original or new employer is an agency or department of the Federal Government.

If an employer has any outstanding liability to the Board for assessments the amount of the liability is deducted from any payments made to the employer.

#34.41 *Vacation Pay*

If a vacation period or statutory holiday occurs while a worker is receiving wage-loss benefits, the Board continues to pay those benefits or, in the case of a pay employer claim, to the employer.

#34.42 *Termination Pay*

The language of section 34(1) is broad enough to cover termination pay.

In a Board decision, the worker suffered a compensable injury on October 28. On October 30, the employer terminated the service of the worker, and pursuant to section 19 of the *Mines Act*, the worker received a termination payment roughly equivalent to wages for one month. The Board rejected an application that the compensation payments attributable to the month of November should be paid to the employer under section 34(1).

This was not a voluntary payment by the employer. It was termination pay required by law. If the worker had been fit to do so, he would have been free in early November to take any other job that he could find, receive full wages in respect of that job and still be entitled to the termination pay. In other words, by the law of the Province, he was entitled to be paid twice over the month of November. Given his disability, he could not do that. But upon being fit again to return to work, he is in the position of one who must find new employment. Termination pay is intended to allow for his being in that position.

This relates only to termination pay under the *Mines Act*. Other arguments may be relevant with regard to other kinds of termination payments. However where the payment is of a similar type or category in that it results from a legislative requirement or a contractual agreement, it will likely be treated in the same manner as that described above.

#34.50 Duration of Wage-Loss Payments

See policy item #35.30 for the rules related to the duration of temporary disability benefits.

#34.51 Other Factors Prevent Return to Employment

Where a worker has not attained the age at which compensation payments are terminated under section 23.1 of the *Act* and the temporary total disability remains, wage-loss payments continue to be paid even though some event occurs after their commencement which would in any event have meant that the worker would not be working. Therefore such benefits are not terminated just because there is a strike, vacation, or lay-off. On the other hand, as pointed out in policy item #34.32, on a recurrence of a compensable condition occurring more than three years after the injury, wage loss will not be paid for any temporary total disability where there is at that time no actual or potential loss of earnings.

Where a worker in receipt of wage-loss benefits wishes to travel to another place as part of a vacation or for other reasons, the worker should notify the Board. The Board will then consider the following matters:

- (a) If travelling outside the province, the worker should be advised that the Board will not pay in excess of the rates paid for medical treatment in this province.
- (b) If there is to be a period with no treatment which may protract recovery, the worker will be advised not to discontinue treatment and that if the worker does so, it may affect entitlement to benefits. The Board will normally seek medical advice before doing this.
- (c) The activities planned for the vacation may suggest that the worker is not disabled or may protract recovery. The Board will seek medical advice on this and advise the worker accordingly.

There is in general no objection to wage-loss benefits being continued while a worker is travelling on vacation where that vacation will not hinder or protract recovery. (4)

If a worker's physical impairment has disappeared or stabilized, wage loss must be terminated even though the worker, to prevent further occurrences of his or her condition, remains off work. Compensation is not payable for preventive

measures. Alternatively, if the worker's continuing unemployment is due to factors such as fire hazard, seasonal closure, strike or lock-out, benefits are also not payable. Where, however, there is a delay in return to work due to the travelling required back to the place of employment, such as a previously injured worker returning to the home community from a treatment centre elsewhere or a few days until a company doctor clears the worker to return to work, the Board may extend full wage-loss benefits for a few days beyond the time when the disability ceased. This extension will not be granted if it is concluded that the worker is unnecessarily delaying the return to work.

EFFECTIVE DATE: June 1, 2009 – Delete references to Board officers.
APPLICATION: Applies on or after June 1, 2009

#34.52 Workers Undergoing Educational or Training Program

Where a worker who has been receiving payments for temporary total or partial disability commences an educational or training program, the question arises as to the continuation of payments by the Board during the course of the program.

There appear to be three different situations:

1. Retraining or Educational Program Covered by policy C11-88.50

In certain cases, as outlined in policy C11-88.50, the Board supports retraining or educational programs needed wholly or partly as rehabilitation for a worker's compensable injury. This applies when a worker is no longer disabled from working and temporary disability payments have terminated, but before she or he can return to work some retraining or educational program is required. Policy item #34.52, however, is intended to deal with a worker who undertakes a course of training while receiving compensation for temporary disability under section 29 or 30 of the *Act* and does not affect the operation of policy C11-88.50.

2. Retraining or Educational Program Arranged Prior to Injury

Prior to injury, a worker may have arranged to undertake a retraining or educational course as part of career development or to become established in some new career. Where the course involves time off work, the worker could be anticipating a period when there will be no earnings save for training allowances payable by Human Resources and Skills Development Canada or a similar agency. Since this training allowance will continue to be paid whether or not there is a compensable injury, the worker's financial position while taking the course is no worse because of the injury than if there had been no injury. Therefore, the Board considers that a worker is not disabled as a result of the compensable injury and no wage-loss compensation is payable while undertaking a training or educational program arranged prior to the injury.

Under the terms of some collective agreements, a worker continues to receive full wages while undertaking a training program. In such cases, an arrangement is normally made with Human Resources and Skills Development Canada for any training allowance to be paid to the employer. The Board would expect that an employer would continue a worker's salary while taking the course, regardless of the fact that the worker had previously received a compensable injury. In this case, the worker suffers no financial loss because of the injury while taking the course and no wage-loss compensation is payable. Nor is the employer refunded the continuation of salary paid to the worker during the course.

In some circumstances, Human Resources and Skills Development Canada will "top up" a training allowance to bring it up to the amount of a normal Employment Insurance payment. If the Board makes no payment of wage loss to a worker while taking a training course, it is understood that any entitlement of the worker to have the training allowances "topped up" by Human Resources and Skills Development Canada will be unaffected by the occurrence of the compensable injury. There is, therefore, no justification for the payment of wage-loss benefits during the course.

It is not necessary for all the details of the course as to time, place, subject matter, etc. to have been settled prior to the injury for it to be considered as "pre-arranged". For example, an apprentice may be required to spend some part of each year of the apprenticeship in school. While the exact dates may not be known at the date of injury, the worker must, at that time, clearly anticipate a period at school to be undergone in the near future. It is, therefore, reasonable to apply the rules set out above.

3. Retraining or Education Program Arranged After the Injury

A worker may decide after the injury to utilize the time in which he or she is disabled from work to improve education or work skills by undertaking a retraining or educational program. The worker is losing time from work because of the injury and is "disabled" for the purposes of section 29 or 30. It cannot be said that even if the worker had not been injured he or she would have been taking the program at that particular time and, as a result, suffering a loss of income. The worker is only taking the program at that particular time because of the injury. Therefore, wage-loss payments will be continued in full in addition to any training allowances which the worker is entitled to receive from another government agency.

EFFECTIVE DATE: June 1, 2009 – Update references to Human Resources and Skills Development Canada.

HISTORY: November 1, 2002 – Amendments to update policy cross-references and housekeeping changes.
APPLICATION: Applies on or after June 1, 2009

#34.53 *Termination at a Future Date*

A worker is not entitled to place absolute reliance on a doctor's probable return to work date. Wage-loss benefits are only payable when the worker actually has a temporary disability. They cannot be paid because, although the worker has no such disability, the doctor some time previously predicted that he or she would be disabled at that time. A doctor's prediction is of assistance to the worker, the employer and the Board to plan their future actions, but there is no guarantee that the prediction will be accurate. A worker who has been told by the doctor that he or she can probably return to work on some future date has a responsibility to monitor the improvement in his or her condition and to return to work before the predicted date if the condition allows it. If the worker is in any doubt, an earlier appointment can always be arranged with the doctor.

If a doctor's prediction of the duration of a worker's disability were accepted as conclusive, it would mean that if a worker continued to be disabled after a predicted return to work date, he or she should nevertheless return to work. Regardless of a doctor's prediction of the length of a disability, wage-loss benefits are paid for as long as a worker continues to be disabled because of the injury or until the worker has attained the age at which compensation is terminated under section 23.1 of the *Act*. A doctor's prediction of a worker's return to work can be in error by setting a date either too early or too late. It cannot therefore be regarded as the sole criterion for the payment of benefits and is only one factor to be considered.

As a general rule, decisions relating to compensation should relate to the past and the present, and to continuing situations. A termination date should not normally be set for the future. But there are exceptional cases in which a decision of this kind is justified. The responsibilities of the Board relate not only to claims decisions, but also to rehabilitation. Effective rehabilitation requires that different people should be treated in different ways. All people are not motivated by the same approach. It is possible to conceive of cases in which the Board might feel that a worker has reached a point of recovery at which he or she is very close to returning to work. The worker may have a psychological impairment that persuades the Board to continue a convalescent period to enable the worker to adapt. But a judgment might rationally be made that the worker is more likely to adapt his or her thinking to a return to work if told of a specified date at which compensation benefits will terminate. But if, at or after that date, no request for review by the Review Division has been filed and it is within the 75-day period for Board reconsiderations, there is evidence that the worker is still unfit, then the decision can be reconsidered.

EFFECTIVE DATE: March 3, 2003 (as to reference to Review Division and 75-day period for the Board reconsiderations)
APPLICATION: Not applicable.

#34.54 *When is the Worker's Condition Stabilized*

When a worker is medically examined to assess the degree of impairment, the examining doctor must first determine whether the worker's condition has stabilized. The examining doctor will decide whether:

- (a) the condition has definitely stabilized;
- (b) the condition has definitely not yet stabilized;
- (c) he or she is unable to state whether or not the condition has definitely stabilized and
 - (i) there is a likelihood of minimal change; or
 - (ii) there is a likelihood of significant change.

Having regard to the examining doctor's report and any other relevant medical evidence, the Board will then decide whether or not the worker's condition is permanent to the extent that a permanent disability award should be assessed.

In the case of (a), the condition is considered permanent and the permanent disability award is immediately assessed. A condition will be deemed to have plateaued or become stable where there is little potential for improvement or where any potential changes are in keeping with the normal fluctuations in the condition which can be expected with that kind of disability. In the case of (b), the condition is still temporary and the worker will be maintained on temporary wage-loss benefits under section 29 or 30 of the *Act*.

In the situations where the examining doctor in (c)(i) above feels there is only a potential for minimal change, the condition will usually be considered as permanent and the permanent disability award established immediately on the basis of the prognosis. This approach will be particularly helpful where the disability is itself minor.

The following guidelines operate in (c)(ii) above where there is a potential for significant change in the condition.

1. If the potential change is likely to resolve relatively quickly (generally within 12 months), the condition will be considered temporary and the worker maintained on temporary wage-loss benefits under section 29 or section 30 of the *Act*, and a further examination will be scheduled.

2. If the potential change is likely to be protracted (generally over 12 months), the condition will be considered permanent and the permanent disability award assessed and paid immediately on the worker's present degree of disability and the claim scheduled for future review.

The examining doctor may be unable to fit the worker's condition exactly into one of the categories discussed above. In such a case, the doctor should simply state the findings in terms of the categories as well as possible and the question whether the condition is temporary or permanent will have to be dealt with by the Board on the merits of the case.

EFFECTIVE DATE: June 1, 2009 – Delete references to Board officers.
HISTORY: March 3, 2003 – Deletion of reference to pension review.
APPLICATION: Applies on or after June 1, 2009

#34.60 Payment Procedures

The decision whether wage-loss benefits are payable, the duration of those payments, and their amount, is made by the Board. The procedures followed in making this decision, including the rules of evidence followed, are dealt with in Chapter 12.

Payments of wage-loss benefits are usually made every two weeks. Cheques may be mailed to the worker. When a payment has been lost or stolen, or otherwise not received or cashed by the worker, the worker may request a reissue of the payment, but the Board will require a written and signed declaration of this from the worker before a reissue will take place.

Where a worker disagrees with the amount of wage-loss or permanent disability award and returns the cheque, or refuses to accept the cheque, the Board will not negotiate regarding the acceptance of the cheque. In such circumstances the worker is notified of the right to request a review from the Review Division with regard to the matter on the claim to which there is an objection. This policy also applies to those cases where a worker has elected to receive his or her permanent disability award cheque by electronic funds transfer.

Where, following a Board medical examination or the receipt of other reports, it is concluded that the worker is capable of resuming employment immediately, she or he will be notified as soon as possible. The Board recognizes that it would not be fair to delay the notification when the worker might be looking for employment in the meantime.

EFFECTIVE DATE: June 1, 2009 – Delete references to Board officers and inclusion of reference to funds transfer.

HISTORY: March 3, 2003 – Inclusion of reference to the Review Division.
APPLICATION: Applies on or after June 1, 2009

#35.00 TEMPORARY PARTIAL DISABILITY PAYMENTS

Section 30(1) provides that:

Subject to sections 34(1) and 35(1), (4) and (5), if a temporary partial disability results from a worker's injury, the Board must pay the worker compensation that is a periodic payment that equals 90% of the difference between

- (a) the worker's average net earnings before the injury, and
- (b) whichever of the following amounts the Board considers better represents the worker's loss of earnings:
 - (i) the average net earnings that the worker is earning after the injury;
 - (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

#35.10 Meaning of Temporary Partial

The meaning of "temporary partial" is governed by the principles set out in policy item #34.10. The result is that in order to be eligible for benefits under section 30(1) a worker must have a temporary partial physical impairment as a result of the injury.

Workers will also be considered to have a temporary partial disability when, even though they would ordinarily be considered as temporarily totally disabled, they do in fact continue to carry out their previous jobs in part or perform some other type of light work.

#35.11 *Procedure for Determining Whether Worker is Temporarily Partially Disabled*

The decision as to whether a disability has resolved to a point of recovery where it is deemed to be only "partial" shall be made by the Board on the best evidence available. In many cases it may be appropriate to rely solely upon reports of the worker's attending physician or a consulting specialist. Medical advice on the contents of such reports should be sought and it may be prudent to contact the attending physician for further discussion.

In other cases, it might well be necessary for the Board to have the worker medically examined.

In either case, what must be determined is whether the worker's medical condition has resolved to the point where he or she is no longer to be considered "totally" disabled and it would be to his or her advantage to begin to consider re-entry into the work force. It will not be necessary for the Board to wait passively for notification by an attending physician or consulting specialist before proceeding to deal with the worker's condition as a "partial" rather than "total" condition. There may be cases where the Board should instigate an examination of the worker in order to determine the extent of the condition, particularly where recovery from the injury appears to be unusually protracted, or it appears that other health or social problems are complicating the potential for re-employment, or where medical reports tend to indicate considerable improvement in the worker's medical condition without specifically recommending a return to some form of employment.

In any case where it is deemed necessary to have the worker medically examined, claims will be referred promptly for that purpose and the examination will be given priority. Where such an examination is conducted, the report will indicate whether the worker is:

- (a) still totally disabled;
- (b) fully recovered;
- (c) temporarily partially disabled;
- (d) suffering from a residual permanent disability which shows no reasonable likelihood of change.

Where it is found that the worker is temporarily partially disabled, the medical examination report will include:

- (a) an estimate of the period required for full recovery or stability;
- (b) a recommendation for a future examination;
- (c) any medical restrictions to re-employment, such as limitations on lifting activities, with the reason for such restrictions;
- (d) any medical or other factors found in the examination which are considered significant in the determination of the worker's recovery process.

Where the Board intends to rely upon a report from the worker's attending physician or consulting specialist, these same general questions should be clarified through contact with that physician before any further action is taken.

Where a worker is medically judged to be only partially disabled and the condition remains temporary, any further wage-loss payments should then be processed under section 30 of the *Act*. In cases where the Board is able to arrange a return to work in a suitable occupation, a referral for vocational rehabilitation assistance may not be required. However, immediate referral for vocational rehabilitation assistance is made if a suitable return to work cannot be arranged, or if a comprehensive employability assessment needs to be completed.

The Board must send a letter to the worker, with a copy to the employer and doctor, advising:

- (a) that the worker is considered to be only partially disabled;
- (b) that further wage-loss benefits will be paid on the basis of the difference between the earnings before the injury and what the worker is then earning, or will be able to earn, whichever is considered appropriate;
- (c) in cases where vocational rehabilitation assistance is required, that the worker will be contacted and interviewed by the Board to assist in efforts to return to work;
- (d) the proposed date of the next examination and therefore the length of time for that phase of payments under section 30.

EFFECTIVE DATE: June 1, 2009 – Delete references to Board officers, Board Medical Advisors and Vocational Rehabilitation Services.

HISTORY: November 1, 2002 – Amendments to clarify that a Board officer may make a referral to Vocational Rehabilitation Services to assist with arranging a return to work.

APPLICATION: Applies on or after June 1, 2009

#35.20 Amount of Payment

Section 30 provides for payment of partial or total wage-loss benefits where a worker is only partially disabled. Once the determination is made, on medical grounds, that a worker is no longer totally disabled but in fact has reached a point in the recovery process where he or she is deemed to be only partially disabled, section 30 requires that compensation be paid at 90% of the difference between:

- (a) the worker's average net earnings before the injury, and
- (b) whichever of the following amounts the Board considers better represents the worker's loss of earnings:
 - (i) the average net earnings that the worker is earning after the injury;
 - (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

Compensation paid under section 30, represents a worker's post-injury wage loss over the short-term and is based on the worker's post-injury earning capacity. Accordingly, in making this determination, the Board considers what a worker is estimated to be capable of earning in a suitable occupation. This requires an employability assessment. (See policy C11-89.00, "Employability Assessments – Temporary Partial Disability and Permanent Partial Disability").

Post-injury earning capacity may be equal to the worker's actual earnings unless the Board determines that the worker is capable of earning more than what is actually being earned. In these cases, what the worker is estimated to be capable of earning is deducted from the pre-injury earnings to arrive at the worker's post-injury wage loss.

A worker's post-injury wage loss will be based on estimated earnings rather than on actual earnings in the following cases:

- The worker is employable but does not have a job; or
- The worker has a job but is not maximizing his or her earning capacity up to the pre-injury wage rate; or
- The worker has, for personal reasons, withdrawn from the workforce; or
- The worker fails to co-operate with the rehabilitation process.

The compensation rate established under section 30 is subject to periodic review. The review may include a vocational rehabilitation assessment regarding what the worker actually earned in the intervening period, if anything, and will estimate what the worker could have earned in the opinion of the Board. Payments by the Board will be based upon this information and on any other evidence considered significant.

In determining temporary partial disability entitlement under section 30 of the *Act*, no earnings losses incurred are considered where such losses are in excess of the amount of personal optional protection purchased.

The Board shall, in all cases, make the worker aware of the reasons for the payments being made under section 30 and more particularly, when only partial payments are made.

- EFFECTIVE DATE:** June 1, 2009 – Delete references to Board officers, Compensation Services and Vocational Rehabilitation Services.
- HISTORY:** November 1, 2002 – Amendments set out section 30 and provides that compensation paid under section 30 represents a worker's post-injury wage loss over the short term and is based on the worker's post-injury earning capacity. Policy also provides cases where post-injury wage-loss will be based on estimated earnings rather than on actual earnings.
- APPLICATION:** Applies on or after June 1, 2009

#35.21 Suitable Occupation

A suitable occupation is one that:

- does not endanger a worker's recovery or the health and safety of the worker and/or others;
- the worker has the skills, education and functional abilities that the occupation requires;
- is reasonably available over the short-term in the worker's community or, where appropriate, in the Province at large; and
- a worker is medically capable of performing.

Once a suitable occupation is identified, the Board will estimate what the worker is capable of earning in that occupation. In calculating what the worker is capable of earning in the suitable occupation, there may be situations where the Board should also consider other factors. These factors include:

- any personal limitations upon re-employment, such as age or language;
- any external limitations upon re-employment, such as the possibility of loss of pension entitlement or seniority;
- limitations through the worker's own efforts and cooperation in becoming re-employed;
- general or local depressed economic conditions which limits the worker's re-employment irrespective of the occurrence of the injury.

There must be objective evidence that these factors either alone or in combination would make it unreasonable for the Board to consider that occupation as suitable for the purpose of establishing what the worker is estimated capable of earning. These factors must be balanced against the goal of minimizing post-injury wage-loss.

With regard to economic conditions, the Board has to determine whether the worker's employment problem is primarily due to a residual temporary disability or is more likely to be due to the lack of suitable employment occasioned by economic circumstances.

Where the economy is the major factor in a worker's post-injury wage loss, compensation under section 30 is based on the difference between the worker's pre-injury wage rate and the wage rate of the jobs that would otherwise have been available were it not for the economic down-turn. However, where the worker's remaining disability makes him or her less viable as a potential candidate for employment in the labour force in competition with other non-disabled workers, the worker may be paid full benefits on the basis that the work is not reasonably available.

If economic conditions are such that had the worker not been injured, he or she also would have continued to be employed, then, even though alternative jobs are not available due to economic factors, the primary cause of the worker's loss is considered to stem from the injury. The worker is entitled to section 30 benefits up to and including full wage-loss benefits if there are no jobs reasonably available in the period being considered.

If a worker is working towards an employment objective under a rehabilitation plan, the worker is not expected to accept a lower paying alternative job in the interim, if the worker is cooperating in good faith and taking the job would negatively compromise the rehabilitation plan.

In all cases, the employment opportunity or opportunities should be available immediately or within the period under review (two weeks, one month) and there should be some certainty that workers would have these opportunities open to them should they choose to apply.

EFFECTIVE DATE: November 1, 2002
APPLICATION: To decisions made on or after November 1, 2002 on claims adjudicated under the *Act*, as amended by the *Workers Compensation Amendment Act, 2002*.

#35.22 Calculation of Earnings for Workers with Two Jobs

Where, prior to the injury, the worker was engaged in two occupations, but the injury only disables the worker from one, the pre-injury earnings are calculated by adding the earnings in both, subject to the statutory maximum. The post-injury earnings are calculated by combining the earnings in the job the worker continues to carry on, with the earnings (if any) which the worker is able to earn in some other suitable and available job in the time that would have otherwise been spent in performing the other pre-injury job.

#35.23 Minimum Amount of Compensation

The minimum amount of compensation is calculated in the manner set out in policy item #34.20 for temporary total disability but to the extent only of the partial disability. (5)

Where a worker's average earnings are less than the minimum, he or she will receive compensation equal in amount to his or her loss of earnings in any case where section 30 applies. Compensation in these situations will not be based upon 90% of average net earnings. Consequently, there will be no deductions from the worker's average earnings to produce average net earnings.

#35.24 Workers Engaged in Own Business

Where the worker is self-employed, the worker will often continue to work following a compensable injury. Though unable to perform the former heavier work, the worker can still perform administrative and other light work. Full wage-loss benefits will not be paid by the Board just because the worker cannot perform the heavier work. As the worker is doing some remunerative work, section 30 requires that it be taken into account, and that only partial wage-loss benefits be paid.

In compensating the principal of a small limited company, the Board's obligations extend only to the losses suffered in the capacity of employee. Wage-loss compensation cannot be paid to reflect any detrimental effect that the injury may have on the company's business.

Where the worker was not engaged in his or her own business prior to the injury, and the worker commences a business after the injury, the following applies. Being in control of the business, the worker determines what personal salary is paid. The worker can, and will commonly, take no earnings at all, or very low earnings, out of the business when it is starting up in the expectation that he or she will reap the benefit later. Yet, the worker may be doing a substantial amount of work that, under normal circumstances, would command a significant

wage. In such a situation, the only way the Board can determine the worker's real earnings is to estimate the value of the work the worker does.

#35.30 Duration of Temporary Disability Benefits

Section 31.1 of the *Act* provides that:

Despite section 23.1, the Board may not make a periodic payment to a worker under section 22(1), 23(1) or (3), 29(1) or 30(1) if the worker ceases to have the disability for which the periodic payment is to be made.

As a result, the Board will terminate temporary total or temporary partial wage loss benefits under section 29(1) or 30(1) once the worker's temporary disability ceases. A temporary disability ceases when it either resolves entirely or stabilizes as a permanent impairment, entitling the worker to be assessed for a permanent disability award under section 22 or 23 of the *Act*.

The nature of a temporary disability may also change, affecting a worker's entitlement under the *Act*. Benefits payable under section 29(1), will be terminated if the worker's medical condition has resolved to the point where he or she is no longer considered temporarily totally disabled and becomes temporarily partially disabled. In these situations, the worker may be entitled to compensation under section 30(1) of the *Act*.

Similarly, benefits payable under section 30(1) will be terminated if the worker's compensable medical condition ceases to be "temporary partial" and becomes "temporary total". The worker in such circumstances may be entitled to compensation under section 29(1) of the *Act*.

In all cases, benefits will be terminated under sections 29(1) and 30(1) where, notwithstanding the existence of a temporary total or temporary partial impairment, the worker is suffering no loss of earnings as a result of the work injury.

Finally, the duration of temporary benefits may be affected by the worker's age at the date of injury.

Section 23.1 of the *Act* provides that compensation under section 22(1), 23(1) or (3), 29(1) or 30(1) may be paid to a worker, only:

- (a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:
 - (i) the date the worker reaches 65 years of age; or

- (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board.
- (b) if the worker is 63 years of age or older on the date of the injury, until the later of the following:
 - (i) two years after the date of the injury; or
 - (ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.

Section 23.1 of the *Act* recognizes age 65 as the standard retirement age for workers. Confirmation of age 65 as the standard retirement age may also be found in the contractual terms of some employer sponsored pension plans and collective agreements. As well, Statistics Canada information lends weight to the general view that, on average, workers retire at or before 65 years of age. (6)

Section 23.1 also permits the Board to continue to pay benefits where the Board is satisfied that the worker would retire after the age of 65 if the worker had not been injured.

The standard of proof under the *Act* is on a balance of probabilities as described in policy item #97.00, Evidence. However, as age 65 is considered to be the standard retirement age, the Board requires evidence that is verified by an independent source to confirm the worker's subjective statement regarding his or her intent to work past age 65. Evidence is also required so that the Board can establish the worker's new retirement date for the purposes of concluding wage loss benefits. If the worker's statement is not independently verifiable, the Board will make a determination based on the evidence available, including information provided by the worker.

Examples of the kinds of independent verifiable evidence that may support a worker's statement that he or she intended to work past age 65, and to establish the date of retirement, include the following:

- names of the employer or employers the worker intended to work for after age 65, a description of the type of employment the worker was going to perform, and the expected duration of employment
- information from the identified employer or employers to confirm that he or she intended to employ the worker after the worker reached age 65 and that employment was available
- information provided from the worker's pre-injury employer, union or professional association to confirm the normal retirement age for workers in the same pre-injury occupation

- information from the pre-injury employer about whether the worker was covered under a pension plan provided by the employer, and the terms of that plan information from the pre-injury employer or union on whether there was a collective agreement in place setting out the normal retirement age

This is not a conclusive list of the types of evidence that may be considered. The Board will consider any other relevant information in determining whether a worker would have worked past age 65 and at what date the worker would have retired.

Where the Board is satisfied that a worker would have continued to work past age 65 if the injury had not occurred, wage loss payments may continue past that age until the date the Board has established as the worker's retirement date. At the worker's age of retirement, as determined by the Board, wage loss payments will conclude even if the worker's temporary disability remains.

EFFECTIVE DATE: June 1, 2009 – Delete references to Board officers.

APPLICATION: Applies on or after June 1, 2009

#35.40 Manner of Payment

Temporary partial disability payments are made in the same manner as temporary total disability payments. (7)

NOTES

- (1) See policy item #34.54
- (2) s.29(2)
- (3) See policy item #34.40
- (4) See policy items #73.50; #78.00
- (5) s.30(2)
- (6) Earnings and Employment Trends, Jan/Feb 2001, BC Statistics, Ministry of Finance and Corporate Relations, Province of British Columbia.
- (7) See policy item #34.60

