

CHAPTER 9

AVERAGE EARNINGS

#64.00 INTRODUCTION

Section 33(1) of the *Act* provides, in part:

The Board must determine the amount of average earnings and the earning capacity of a worker with reference to the worker's average earnings and earning capacity at the time of the worker's injury.

This section provides the general direction for determining a worker's average earnings.

The *Act* provides two general rules for determining average earnings and a number of exceptions for which average earnings is calculated differently. The exceptions relate to a casual worker, a person who purchased coverage under section 2(2) of the *Act*, a worker with no earnings on the date of injury, a worker who is an apprentice or learner, a regular worker who has been employed less than 12 months, and a worker with exceptional circumstances.

In determining a worker's average earnings, the Board must apply one of the general rules unless one of the exceptions in the *Act* applies to a worker. Where more than one exception applies to a worker, the *Act* provides that the Board must determine the section that best reflects the worker's circumstances and apply that section. In making this determination, "best" does not mean the highest rate possible, but rather, the rate that most closely reflects the actual loss incurred.

Set out below are the Board's policies with respect to the calculation of a worker's short-term average earnings; the application of a 10-week average earnings rate review; the calculation of a worker's long-term average earnings; and the composition of average earnings.

#65.00 GENERAL RULE FOR DETERMINING SHORT-TERM AVERAGE EARNINGS

Section 33.1(1) of the *Act* provides as follows:

Subject to sections 33.5 to 33.7, the Board must determine, for the shorter of the following periods, the amount of average earnings of a worker

based on the rate at which the worker was remunerated by each of the employers for whom he or she was employed at the time of injury:

- (a) the initial payment period;
- (b) the period starting on the date of the worker's injury and ending on the date the worker's injury results in a permanent disability, as determined by the Board.

Except for a casual worker, a person who purchased coverage under section 2(2) of the *Act* and a worker with no earnings at the time of injury, the general rule for determining short-term average earnings is to use the worker's rate of pay at the time of injury up to the maximum wage rate permitted by the *Act*.

For workers who receive regular remuneration on a standard five-day work week, the determination of time of injury earnings will be based on the worker's rate of pay on the day of injury.

The Board recognizes that not all workers receive remuneration based on a five-day work week. Policy items #65.01, #65.02, and #65.03 detail how the Board will determine the earnings at the time of injury for workers in other circumstances.

EFFECTIVE DATE: June 1, 2009
CROSS REFERENCE: Policy items #65.01 *Variable Shift Workers*, #65.02 *Worker with Two Jobs*, #65.03 *Fishers*, #67.10 *Casual Pattern of Employment*, #67.20 *Personal Optional Protection* and policy item #67.30 *Workers with No Earnings* of the *Rehabilitation Services & Claims Manual* Volume II.
APPLICATION: To all decisions on or after June 1, 2009.

#65.01 *Variable Earnings*

The Board recognizes that not all workers receive remuneration based on a regular five-day work week. Accordingly, calculating time of injury earnings based on a worker's rate of pay on the day of injury is not always appropriate. The guidelines set out below apply in determining short-term average earnings where a worker is regularly employed with variable earnings.

The Board considers a worker to have variable earnings if the worker:

- works on call for one or more employers at differing rates of pay and does not have a casual pattern of employment;
- has irregular shifts;
- has shifts with no repeating patterns;

- works a shift cycle involving more than five cycles;
- works differing shift hours per cycle;
- is paid shift differentials; or
- is scheduled for a shift cycle change;

For such workers with variable earnings, the Board will usually calculate the short-term average earnings with reference to the worker's earnings in the three month period up to and including the worker's date of injury. However, the Board may use a shorter time period if it determines that the three month time period is not an accurate reflection of the worker's time of injury earnings.

Situations where a shorter time period may be used include:

- where a regularly employed worker with variable earnings has been with an employer for less than three months, the worker's short-term average earnings are based on the worker's earnings from the worker's date of hire up to and including the date of injury.
- where the worker received wage-loss compensation (or wage-loss equivalent rehabilitation allowances/benefits) during the three month period prior to the date of injury.
- where the worker has experienced a significant atypical and/or irregular disruption in the pattern of employment during the three month period prior to the date of injury. This circumstance may arise, for example, if the worker had a lengthy absence due to a non-compensable illness or injury, educational or maternity/paternity reasons.

In such situations, the Board may choose to exclude a portion of the time period over which earnings are averaged if doing so would provide a more accurate reflection of the worker's time of injury earnings. The Board does not generally exclude short absences from work for non-compensable reasons or minor fluctuations in hours worked or rate of pay.

EFFECTIVE DATE: June 1, 2009
CROSS REFERENCE: Policy item #65.00 *General Rule for Determining Short-Term Average Earnings* and policy item #67.10 *Casual Pattern of Employment of the Rehabilitation Services & Claims Manual Volume II.*
APPLICATION: To all decisions on or after June 1, 2009.

#65.02 *Worker with Two Jobs*

If a worker holds two jobs and is disabled from both by an injury arising out of and in the course of one of them, time of injury earnings will be based on the combined earnings of both jobs up to the statutory maximum. This applies whether or not the other job is covered by Part 1 of the *Act* or is self-employment. The total days worked in both jobs are merged to obtain the days worked per week. Both employers, if covered by Part 1 of the *Act*, may be reimbursed by the Board if they continue paying the disabled worker. (1)

Where a worker is engaged in two jobs, one of which is a job for which personal optional protection has been purchased, the income earned in the non-personal optional protection job will be combined with the amount of personal optional protection purchased for the other job, up to the statutory maximum, in order to determine average earnings.

EFFECTIVE DATE: June 1, 2009
CROSS REFERENCE: Policy items #34.40 *Pay Employer Claims*, #65.00 *General Rule for Determining Short-Term Average Earnings*, #67.10 *Casual Pattern of Employment* and policy item #67.20 *Personal Optional Protection of the Rehabilitation Services & Claims Manual Volume II*.
APPLICATION: To all decisions on or after June 1, 2009.

#65.03 *Fishers*

The time of injury earnings for fishers whose remuneration is based on a share of the catch, the value of which may only be determined at a future date, will be based on the earnings over the three month period immediately preceding the date of injury. Where earnings information is not available for that three-month period, the worker's average earnings may be based on the 12-month period immediately preceding the worker's date of injury. See also policy item #68.62 for information on a fisher's composition of average earnings where the fisher deducts equipment and/or operating expenses from gross income for business or taxation purposes and owns a vessel or other equipment used to harvest fish.

EFFECTIVE DATE: June 1, 2009
CROSS REFERENCE: Policy item #65.00 *General Rule for Determining Short-Term Average Earnings* and policy item #68.62 *Fishers of the Rehabilitation Services & Claims Manual Volume II*.
APPLICATION: To all decisions on or after June 1, 2009.

#65.04 *Provisional Rate*

Compensation may be based on a provisional rate if there is a delay in obtaining information required to make a decision about a worker's average net earnings. The worker must be informed that a provisional rate has been set.

The amount of the provisional rate depends on the information available to the Board. While being careful not to set a rate which is higher than the worker's actual earnings, the Board should, as far as is possible, take into consideration the actual circumstances of the worker, for instance, age, occupation, seniority and union status. The Board should also have regard to statements of earnings already on file or on other recent compensation claims.

Where the Board sets a provisional rate, this is a preliminary determination pending receipt of further information required to determine a worker's average net earnings. If sufficient earnings information is received after payments have been made based on a provisional rate, a decision on the worker's average net earnings will then be made.

Section 96(5) of the *Act* provides that the Board may not reconsider a decision on the worker's average net earnings if more than 75 days have passed since the decision was made. The Board may also not reconsider a decision on the worker's average net earnings if a request for review has been made to the Review Division as provided for by section 96.2 of the *Act*.

A preliminary determination to set a provisional rate is not a "decision" for the purposes of section 96(5). Rather, it is a Board action that is intended to provide temporary financial relief to the worker until the Board receives the required information to make a decision on the worker's average net earnings. However, once the Board makes the average net earnings decision, that decision is subject to the provisions of section 96(5).

If insufficient earnings information or no information is received after a reasonable time, the Board will review the rate at least every four weeks from the date of the preliminary determination until the decision on average net earnings is made. In setting a provisional rate, regard will be had to the applicable statutory minimum. See policy item #93.26 regarding a worker's obligation to provide information. (2) Where payments based on a provisional rate have been commenced, and the average net earnings decision sets a rate lower than the provisional rate previously set, no recovery of the payments will be made in the absence of an administrative error, fraud or misrepresentation by the worker. For a definition of an administrative error, refer to policy item #48.41.

EFFECTIVE DATE: June 1, 2009 – Delete references to Board officers.
HISTORY: March 3, 2003 – Amendments to provide that where the Board sets a provisional rate, this is a preliminary determination pending receipt of further information.

Policy also provides that a preliminary determination is not a decision for the purposes of the time limits for reconsideration.

APPLICATION: Applies on or after June 1, 2009

#65.05 *Workers Participating in Non-Board Sponsored Return to Work Programs*

Where a worker is participating in a non-Board sponsored Return to Work program, insurance proceeds may be considered earnings for the purposes of determining short-term average earnings. Generally, for insurance proceeds to be considered earnings, payment must relate to the work being performed.

For example, if a worker is only in the workplace for four hours, but receives a top up in insurance proceeds for an additional four hours not related to the work being performed, the insurance proceeds are not considered to be earnings for the purposes of determining short-term average earnings. Conversely, if the worker is in the workplace for eight hours, and the worker receives half of his or her wages through payment of insurance proceeds, the insurance proceeds may be considered earnings for the purposes of determining short-term average earnings.

Evidence which demonstrates that payment of insurance proceeds relate to the work being performed includes, but is not limited to:

- Continued payment of insurance proceeds is dependent upon active participation in the Return to Work program.
- The employer funds the insurance program as a wage replacement scheme.
- The Return to Work program is integrated into the normal production activities of the host employer.

See policy item #67.60 to determine the long-term average earnings for a worker participating in a non-Board sponsored Return to Work program.

EFFECTIVE DATE: March 1, 2009

APPLICATION: Applies to all decisions made on or after the effective date.

#66.00 GENERAL RULE FOR DETERMINING LONG-TERM AVERAGE EARNINGS

Section 33.1(2) of the *Act* provides:

Subject to sections 33.2 to 33.7, if a worker's disability continues after the end of the period referred to in subsection (1) (a) and (b) that is shorter for the worker, the Board must, for the period starting after the end of that shorter period, determine the amount of average earnings of the worker based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of the injury.

After a claim has lasted five weeks, the Board considers whether it is likely to last for ten weeks and, if the Board has not done so already, sets in motion any enquiries necessary for a possible 10-week average earnings review.

As part of the Board's enquiries, information will be obtained as to the worker's earnings for the 12-month period immediately preceding the date of injury. Information will also be obtained about the worker's tax status for the previous year.

If not supplied by the employer, earnings and tax status information for the required period of time prior to the injury must be provided by the worker. The information provided must be verified information from an independent source such as wage stubs, T-4's, or letters from the Income Tax Authorities or employers.

If, at the earlier of: the day after 10 cumulative weeks of benefits have been paid to the worker; or the effective date of a permanent disability award there is insufficient information on which to complete the 10-week rate review, a provisional rate may be set until sufficient information is received. (3)

In situations where a worker is being maintained on full salary by the employer, the Board will still be required to carry out a rate review of this kind and, if a reduction is warranted, to make the necessary adjustment. If the worker's long-term earnings average out in excess of the rate set at the time of the injury and the figure being paid by the employer, it is conceivable that the worker could be in a less advantageous position than other workers with a similar earnings pattern. As such, a rate increase can be initiated and the difference between the new rate and what is being refunded to the employer made payable to the worker. This would not apply if the employer is paying the worker at the maximum applicable to the claim. If an employer ceases to make payments to a worker, the Board will begin to pay the worker directly.

No refunds are made to the employer when workers covered under the *Government Employees Compensation Act* are maintained on full salary, no 10-week rate review is carried out and no payments are made to the worker. If payments made by the employer are discontinued at any time beyond ten weeks of disability and a worker is still disabled, a 10-week rate review is carried out at that time. Long-term earnings data is normally obtained where there is an indication that a permanent partial disability pension may be payable.

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

#67.00 EXCEPTIONS TO THE GENERAL RULES FOR DETERMINING AVERAGE EARNINGS

The *Act* provides a number of exceptions to the general rules in setting a worker's short-term and long-term average earnings. The Board's policies with respect to each of these exceptions are presented below. If a worker's circumstances do not fit within any of the exceptions, the applicable general rule for determining a worker's average earnings applies.

Section 33.1(3), the *Act* provides that if two or more exceptions to the general rules for determining average earnings apply to a worker, the Board must determine and apply the section that best reflects the worker's circumstances. In making this determination, "best" does not mean the highest rate possible, but rather, the rate that most closely reflects the actual loss incurred. This situation could arise if, for example, a worker was an apprentice (section 33.2) who had been employed less than 12 months (section 33.3). In this situation, the Board would apply the section that most accurately reflects the worker's average earnings and earning capacity at the time of injury.

#67.10 Casual Pattern of Employment

Section 33.5 of the *Act* provides:

If a worker's pattern of employment at the time of the injury is casual in nature, the Board's determination of the amount of average earnings under section 33.1 from the date of the injury must be based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury.

This is an exception to both general rules for determining a worker's average earnings. The Board must use the worker's gross earnings for the 12-month period immediately before the date of the injury to establish the worker's average earnings. There is no 10-week average earnings review. Thus, the worker's average earnings determined at the outset of the casual worker's claim are also the worker's long-term average earnings.

This provision is applied in those situations where, due to the unpredictable, sporadic and/or transitory pattern of the worker's employment, the initial rate general rule would not provide an appropriate representation of a worker's loss of earnings. In these situations, it is considered that earnings over the 12-month period immediately before the date of injury more appropriately reflect the worker's loss of earnings.

Determination of whether a worker's pattern of employment is casual in nature involves a two-step investigation.

1. The first step involves a consideration of the nature of the worker's job at the time of the injury. This will identify:
 - (a) those workers to whom the section 33.1 general rule should apply;
 - (b) those workers who are an apprentice or learner, to whom the section 33.2 exception applies;
 - (c) those workers who are employed, on other than a casual or temporary basis, by the employer for less than 12 months immediately preceding the date of the injury, to whom the section 33.3 exception applies; and
 - (d) those workers who have purchased coverage under section 2(2) of the *Act*, to whom the section 33.6 exception applies.

Certain workers will not clearly fall within the above categories. An indicator that a worker may fall within the section 33.5 exception is that their job at the time of injury was not permanent and/or was scheduled to last less than three months. However, this is not conclusive of the issue and the second step of the investigation must then be undertaken.

2. Where a worker does not clearly fall within the above categories, the second step involves consideration of the worker's pattern of employment over a longer period of time. In order to determine whether the worker's pattern of employment is casual, it may be necessary to consider the worker's employment activities in the period prior to the injury. Normally, one year would be the maximum period of inquiry.

The following are factors or characteristics that may favour categorization of a worker's pattern of employment as casual in nature:

- The worker has uncertain or unpredictable working hours.
- The worker has a significant variation in weekly earnings.

- The worker has the option to accept or reject requests to work without penalty.
- The worker works “on call” for one or more employers. In certain cases, however, a worker who works on call for one or more employers may have predictable, consistent working hours which may reflect a regular pattern of employment for which the section 33.1 general rule might apply.

An employer’s reference to a worker as a “casual worker” is not conclusive of the worker’s categorization. All relevant factors must be considered and no single factor is determinative. Relevant factors not listed in policy may also be considered.

After the Board has considered the worker’s attachment to employment, the evidence is weighed to determine whether the worker’s pattern of employment at the time of the injury was casual in nature.

EFFECTIVE DATE: June 1, 2009 – Delete references to Board officer and decision-maker.

HISTORY: January 1, 2006 – Amendments clarify that, when determining whether a worker’s pattern of employment was casual in nature, the decision-maker should consider both the job at the time of the injury and the worker’s pattern of employment. Policy also amended to include the types of factors decision-makers should consider.

APPLICATION: Applies on or after June 1, 2009

#67.20 Personal Optional Protection

Section 33.6 of the *Act* provides:

If an independent operator or employer, to whom the Board directs that this Part applies under section 2(2), has purchased coverage under this *Act*, the Board must determine the amount of average earnings under section 33.1 from the date of injury based on the gross earnings for which coverage is purchased.

This is an exception to both general rules for determining average earnings. The average earnings of a person entitled to personal optional protection under section 2(2) of the *Act* (4) are the earnings for which coverage has been purchased. There is no 10-week average earnings review.

The maximum and minimum amount of earnings for which coverage can be purchased may be obtained by contacting the Board.

Where an applicant is applying for personal optional protection in an amount which exceeds the maximum per month, proof of gross earnings must be provided. If verification of earnings is not provided, the Board automatically reduces coverage to the maximum per month. Proof of gross earnings must be in the form of a certified copy of the applicant's previous year's tax return or a declaration must be completed by a professional accountant (C.A., C.G.A., or C.M.A.), lawyer or notary public. This declaration must certify that the self-employed earnings of the applicant for the previous year were equal to or exceeded the coverage requested.

Because of frequent changes in the maximum wage rate, where coverage at the maximum has been granted, the Board permits an application for personal optional protection at the "maximum wage rate" with coverage and assessment to be adjusted automatically from time to time.

Where a claim is made in respect of an injury, a disablement from an occupational disease, or a death from either cause occurring on or after January 1, 1978, the minimum amounts of compensation provided for in sections 22(2), 23(4), 29(2) and 30(2) have no application to persons who have purchased personal optional protection. (5) However, the minimum average earnings provided for in section 17(3)(g) does apply. (6)

The amount of personal optional protection purchased will be used to calculate a person's average net earnings. Compensation will be based on 90% of the person's average net earnings calculated as set out in policy item #71.00.

Compensation payable to persons entitled to personal optional protection is subject to the same cost of living adjustments as compensation payable to other persons.

EFFECTIVE DATE: March 18, 2003 (as to where the maximum and minimum wage rate figures may be obtained)
APPLICATION: Not applicable.

#67.30 Workers with No Earnings

Section 33.7 of the *Act* provides:

If a worker had no earnings at the time of injury, the Board must determine the amount of average earnings of a worker under section 33.1 from the date of injury in a manner that the Board considers appropriate.

This is an exception to both general rules for determining average earnings. There is no 10-week average earnings review.

Persons working without pay are not generally considered as "workers" under the *Act*. However, there are some exceptional situations of this type which are covered and for which the *Act* or the Board has specified the earnings on which

compensation is to be based. These situations are described in policy items #67.31 - #67.34.

#67.31 *Volunteer Workers Admitted by the Board under Section 3(5)*

Where a person who is deemed to be a worker under section 3(5) of the *Act* is not regularly employed, and having regard to all the circumstances, including income, the Board may fix the worker's average earnings at not less than the amount set out below per week nor more than the maximum wage rate provided under section 33 of the *Act*.

January 1, 2008	—	December 31, 2008	\$115.36
January 1, 2009	—	December 31, 2009	\$118.36

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

The minimum wage set out above is subject to cost of living adjustments as described in policy item #51.20.

#67.32 *Volunteer Firefighters and Ambulance Drivers and Attendants*

The average earnings of volunteer ambulance drivers and attendants and members of fire brigades working without remuneration is deemed to be the same in amount as the average earnings in their regular employment or employments, not, however, to be less than the amount on which the employer has been assessed. (7)

In order to provide a minimum level of coverage to volunteers who have no attachment to the labour force, the employer is assessed \$75.00 per month (\$17.30 per week) for each person, unless the municipality concerned has arranged with the Board for, or pays the claimant, a higher amount. Compensation is based on this rate unless or until wages are confirmed as being lost at another job. In the latter case, the rate can be increased to the rate on the job, but the \$17.30 cannot be combined with it. If the volunteer is unemployed, but has an attachment to the labour force in the sense that the volunteer is seeking employment, wage-loss benefits are determined on the average earnings from the last regular employment. The fact that the volunteer is collecting Employment Insurance benefits confirms for compensation purposes an attachment to the labour force. The 12 months immediately preceding the volunteer's date of injury will be used to determine the level of benefits. See policy item #68.40 with respect to employment insurance income and the composition of average earnings. If a firefighter is paid wages by the fire brigade

these can be combined with earnings from another job, but not to exceed the maximum wage rate.

Volunteer firefighters who have no attachment to the labour force such as a retired person or someone in receipt of welfare payments would not generally have a loss of wages as a result of an injury. Claims for these individuals are paid on the basis of a \$75.00 per month assessment figure or greater where the municipality arranges a higher valuation on the volunteer services.

There will be circumstances which do not fall squarely within these guidelines. When that occurs, the decision on what best represents the loss of earnings must be decided upon by the Board according to the merits and justice of the particular case.

Firefighters, other than those referred to in the policies in Items AP1-1-5 and AP1-38-3 of the *Assessment Manual* or firefighters whose employers are not covered by Part 1 of the *Act*, but to whom personal optional protection has been given, are to be assessed and paid on the same basis as above.

EFFECTIVE DATE: June 1, 2009 – Delete reference to Board officer.
HISTORY: March 18, 2003 – Insert references to Items AP1-1-5 and AP1-38-3 in the *Assessment Manual*.
APPLICATION: Applies on or after June 1, 2009

#67.33 *Sisters in Catholic Institutions*

Claims are occasionally received for teaching or nursing sisters of Catholic institutions. If they are being paid wages they are treated as regular workers and compensated on the basis of their actual earnings. If no wages are being paid, their earnings are deemed to equal the amount on which their employers are assessed. This amount is \$75.00 per month (\$17.30 per week) for each person.

#67.34 *Emergency Services Workers*

Average earnings used in claims by Emergency Services Workers are based on the earnings in the worker's ordinary employment but where the worker has no regular employment are fixed by the Board at a figure not less than \$25.00 per week nor more than the maximum under the *Act*. (8)

#67.40 **Apprentice or Learner**

Section 33.2 of the *Act* provides:

If a worker at the time of injury is an apprentice in a trade, an occupation or a profession or is a person referred to in paragraph (b) of the definition of "worker", the Board's determination of the amount of average earnings under section 33.1(2) must be based on the gross earnings, as

determined by the Board, for the 12 month period immediately preceding the date of injury, of a qualified person employed at the starting rate in the same trade, occupation or profession

- (a) by the same employer, or
- (b) if no person is so employed, by an employer in the same region.

This is an exception to the general rule for determining long-term average earnings.

The Board considers that an “apprentice in a trade” is an apprentice as defined under the terms and conditions in the provincial *Industry Training and Apprenticeship Act* or equivalent statute. The *Industry Training and Apprenticeship Regulation* or equivalent provides a list of trades that require compulsory certification.

The Board considers that an “apprentice in an occupation or profession” is a worker who must complete an “apprenticeship” in order to obtain the license or professional designation required to work in the occupation.

Section 33.2 of the *Act* includes a worker referred to in paragraph (b) of the section 1 definition of “worker”. Paragraph (b) of the definition of “worker” provides that a worker includes:

a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry within the scope of Part 1 for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment.

The Board considers that a learner is a person who is undergoing training or probationary work that is preliminary to employment. The training or probationary work must be required by the employer and makes the person subject to the hazards of an industry covered by Part 1 of the *Act*. A person is not a learner when the person is under a contract or an apprenticeship.

To determine a worker’s average earnings under section 33.2 of the *Act*, the Board will contact the injury employer to determine what a qualified person employed at the starting rate in the same trade, occupation or profession earns or would earn with the injury employer.

Where this information is not available, the Board will contact an employer similar to the injury employer, in the same region as the injury employer, to determine what a qualified person employed at the starting rate in the same trade, occupation or profession earns.

The Board is not limited to obtaining wage rate information from a single employer. As such, the Board may use relevant information from employers in the region on the average starting rate of various trades, occupations and professions. This information may be used to determine the average earnings of an apprentice or learner where relevant information is not available from the worker's employer.

#67.50 Workers Employed with their Employer for Less than 12 Months

Section 33.3 of the *Act* provides:

In the case of a worker employed, on other than a casual or temporary basis, by the employer for less than 12 months immediately preceding the date of the injury, the Board's determination of the amount of average earnings under section 33.1(2) must be based on the gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury, of a person of similar status employed in the same type and classification of employment

- (a) by the same employer, or
- (b) if no person is so employed, by an employer in the same region.

This is a mandatory exception to the general rule for determining long-term average earnings and applies a worker with permanent employment.

To determine a worker's average earnings under section 33.3 of the *Act*, the Board will contact the injury employer to determine what the average earnings are or would be of a person of similar status employed in the same type and classification of employment.

Where this information is not available, the Board will contact an employer similar to the injury employer, in the same region as the injury employer, to determine what the average earnings are of a person of similar status employed in the same type and classification of employment.

The Board is not limited to obtaining wage rate information from a single employer. As such, the Board may use relevant information from employers in the region on the average earnings of a person of similar status employed in the same type and classification of employment. This information may be used to determine the average earnings of a worker who has worked less than 12 months for the injury employer where relevant information is not available from the worker's employer.

#67.60 Exceptional Circumstances

Section 33.4 of the *Act* provides:

- (1) If exceptional circumstances exist such that the Board considers that the application of section 33.1(2) would be inequitable, the Board's determination of the amount of average earnings of a worker may be based on an amount that the Board considers best reflects the worker's loss of earnings.
- (2) Subsection (1) does not apply in the circumstances described in sections 33.2, 33.3, 33.5 or 33.6.

As stated in section 33.4(2), this provision does not apply to the following:

- a worker determined by the Board to be an apprentice or a learner;
- a permanently employed worker who has been employed by the employer for less than 12 months;
- a casual worker; or
- a person who purchased coverage under section 2(2) of the *Act*.

Section 33.4 is a discretionary provision and an exception to the application of section 33.1(2) for determining a worker's long-term average earnings. As such, it will only be applied where the Board determines that, due to exceptional circumstances, the application of section 33.1(2) is inequitable.

The purpose of this policy is to assist in identifying inequities where due to exceptional circumstances the level of compensation calculated using the general rule does not best reflect the worker's long-term loss of earnings.

In making this determination, "best" does not mean the highest level of compensation possible, but rather, that the level of compensation reflects the actual loss incurred by the worker.

The general rule uses one year of a worker's earnings history to account for typical variations in earnings. Short absences from work for non-compensable reasons, minor fluctuations in hours worked or rate of pay, or similar reasons for changes to earnings are typical and will not be considered exceptional circumstances.

The following are circumstances that are generally accepted as being exceptional. This list is not exhaustive. The Board may consider other reasons to find that exceptional circumstances exist, if those reasons are consistent with the *Act* and the purpose of this policy:

- (a) An exceptional circumstance affecting a worker's average earnings is any prior period(s) when a worker received wage-loss compensation (or wage-loss equivalent rehabilitation allowances/benefits) during the 12 month period immediately preceding the worker's date of injury. It would be inequitable to reduce a worker's average earnings by including periods of compensable wage-loss (or wage-loss equivalent rehabilitation allowances/benefits) in the average earnings calculation.
- This circumstance may arise, for example, if a worker has received temporary total disability benefits, temporary partial disability benefits, a vocational rehabilitation training allowance or other types of wage replacement benefits.

The Board excludes any periods during which the worker received wage-loss compensation (or wage-loss equivalent rehabilitation allowances/benefits) from the total period over which earnings are averaged. In some cases, the Board may use a shorter or longer period of the worker's employment history to determine what best reflects the worker's average earnings.

- (b) Where the Board determines that the worker has a regular pattern of employment, and the worker's earnings in the 12-month period immediately preceding the date of the injury do not reflect the worker's historical earnings because of a significant atypical and/or irregular disruption in the pattern of employment during that period of time.
- This circumstance may arise, for example, if the worker has had an absence of more than six consecutive weeks in the 12-month period immediately preceding the date of injury and the absence was due to a non-compensable illness or injury, educational or maternity/paternity reasons.

In such cases, the Board may deduct the period of the absence. In addition, the Board may use a shorter or longer period of the worker's employment history (e.g., 24-month period) to determine long-term average earnings.

- (c) Where the Board is satisfied that the worker's earnings in the 12-months immediately preceding the date of injury do not address the worker's diminished future career options because of the nature and degree of the injury.

- This circumstance may arise, for example, where the worker is a student on a designated path of study at a provincially recognized training or educational institution and was in temporary employment unrelated to his or her field of study (e.g. a part-time or seasonal job) at the time of the injury. Due to the nature and degree of the injury, the student is unable to continue in his or her chosen field of study.

In such cases, the Board may determine the worker's long-term average earnings with reference to the class average of a qualified person in an occupation directly related to the worker's field of study.

- This circumstance may also arise where the worker is under the age of 25 (BC Stats defines youths as individuals aged 15 to 24) and has completed a designated course of study at a provincially recognized training or educational institution in the two years immediately preceding the date of injury. Due to the worker's young age, the employment at the time of injury may not be representative of the worker's career path, as provided for by the worker's recent course of study.

In such cases, the Board may determine the worker's long-term average earnings with reference to the class average of a qualified person in an occupation related to the young worker's previous field of study.

(d) Where deductions must be made from the worker's gross income to derive the labour component of the worker's average earnings.

- This circumstance may arise where the worker is self-employed and receives remuneration based, in part, on operating costs or expenses that must be deducted from the worker's gross business income to obtain the worker's average earnings (e.g., costs for purchasing, operating or maintaining major equipment).

In such cases, the Board may consider the worker's earnings history for a longer time period in order to incorporate information required to accurately determine the worker's long-term average earnings.

EFFECTIVE DATE: May 1, 2008

APPLICATION: Applies to all decisions including appellate decisions made on or after May 1, 2008.

#68.00 COMPOSITION OF AVERAGE EARNINGS

A worker's average earnings is normally composed of wages or salary. However, the Board recognizes that a worker may receive other types of payments. Board policy on the treatment of specific types of payments is set out in policy items #68.10 to #68.80.

#68.10 Extraordinary or Irregular Wage Payments

Such items as commission, piecework, bonus, tips and gratuities must be included in a worker's average earnings where the Board can verify the information provided to the Board through independent sources. Where wages paid to a worker are supplemented by an additional amount representing statutory holiday payments or vacation allowances, these additional amounts are included in setting the wage rate on a claim.

#68.11 *Overtime*

Only regular overtime is included in the calculation of a worker's average earnings.

#68.12 *Severance or Termination Pay*

Severance or termination pay received by a worker is not included in the calculation of average earnings.

#68.13 *Salary Increases*

In calculating average earnings, no regard will normally be paid to salary increases or promotions which a worker might have received if the injury had not occurred. The only exception is where a salary increase is awarded which is retroactive to before the injury.

#68.20 Employment Benefits

#68.21 *Benefit Plans*

Section 33(3.1) of the *Act* provides:

The Board must not include the following in determining the amount of average earnings of a worker:

- (a) the employer's payments on behalf of the worker for
 - (i) contributions payable under the *Canada Pension Plan*,
 - (ii) premiums payable under the *Employment Insurance Act* (Canada), and
 - (iii) contributions to a retirement, pension, health and welfare, life insurance or another benefit plan for the worker or the worker's dependants....

The Board does not include these employment benefits as a component of average earnings.

#68.22 *Room and Board*

The dollar value of room and board is included in average earnings, unless the worker continues to receive room and board during the disability. However, any payment by the worker for the continuation of room and board while disabled can be included in average earnings.

A distinction should be made between room and board which is provided in total or in part by an employer as the remuneration for services rendered and a situation where a worker incurs a refundable expense. An example of the latter type of situation occurs where an official of a company has to make a business visit out of town and incurs the cost of an hotel and meals. On return, the official submits an expense account and the actual expenses are refunded by the employer. In such situations the Board does not consider the expenses when computing a worker's wage rate.

These principles apply to resident caretakers of apartment buildings. The value of any free or subsidized apartment provided with the job must be considered when determining average earnings. Where specific evidence is not available, section 17 of the *Employment Standards Regulation* may be referred to when valuing an apartment. Where a worker continues to be provided with room and

board during the disability without extra charge and the worker's salary is continued by the employer, any reimbursement to the employer carried out by the Board will, subject to the maximum wage rate under the *Act*, include the value of room and board as well as the worker's salary. Where, however, during a period of disability, the worker is provided with free room and board but is not being paid full salary, there will be no reimbursement made to the employer for the value of the room and board. (9)

#68.23 *Special Expenses or Allowances*

Section 33(3.1) of the *Act* provides, in part:

The Board must not include the following in determining the amount of average earnings of a worker:

- (a) ...
- (b) special expenses or allowances paid to the worker because of the nature of the worker's employment.

Although a worker may receive payments in respect of work-related expenses or allowances, these payments will not be included in the calculation of average earnings.

Examples of special expenses or allowances include:

- tool allowances paid to tradespersons;
- safety boot allowances provided to workers required to wear safety boots due to the nature of their work;
- clothing allowances for workers required to wear special apparel for their work;
- dry-cleaning allowances;
- vehicle allowances; and
- travel allowances.

#68.30 **Strike Pay**

Strike pay is not included when calculating a worker's earnings.

#68.40 Employment Insurance Payments

Section 33(3.2) of the *Act* provides:

The Board may include, in determining the amount of average earnings of a worker, income from employment benefits payable to the worker under the *Employment Insurance Act (Canada)* during the period for which average earnings are determined only if, in the Board's opinion, the worker's employment during that period was in an occupation or industry that results in recurring seasonal or recurring temporary interruptions of employment.

This is a discretionary provision and will be applied only where there is verified evidence from an independent source that the worker received employment insurance benefits due to the worker's employment in an occupation or industry that results in recurring seasonal or temporary interruptions of employment.

The Board may collect the necessary data to compile a list of industries and occupations that result in recurring seasonal or temporary interruptions of employment. The list must give regard to regional considerations and may adopt information from sources such as British Columbia Statistics, Statistics Canada or Human Resources and Skills Development Canada.

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

APPLICATION: Applies on or after June 1, 2009

#68.50 Property Value Losses

No account will be taken of losses in property values alleged to be the result of the work injury, for example, where the injured person is disabled from working on and improving land which the person owns or there is a loss of goodwill in the business because of an inability to work in it.

#68.60 Payments in Respect of Equipment

Any portion of the wages paid to a worker which represents rental of equipment supplied by her or him is excluded from average earnings.

#68.61 Workers Deducting Business and/or Equipment Expenses

Section 33(1) of the *Act* provides that the Board must determine a worker's average earnings with reference to the "worker's average earnings and earning capacity at the time of the worker's injury."

A worker's earnings may include payment for business expenses or costs associated with equipment. Such a worker's average earnings are calculated based on the labour component of the worker's earnings, which is the portion of the earnings that remains after deductions for business expenses and/or costs associated with equipment.

This policy enables the Board to determine the labour component of a worker's earnings where the worker receives payment for providing services, out of which the worker must pay for any business expenses and/or costs associated with equipment that is a required component of the contract of service. Such equipment is normally required to fulfill the contract, and represents a portion of the worker's costs in providing the service.

Generally, where a worker may deduct business expenses and/or costs associated with equipment from his or her earnings for business or tax purposes, this suggests that the worker's earnings include payment in respect of such costs and/or expenses. This policy does not apply to a worker receiving separate special expense reimbursements or allowances from an employer; the Board considers such payments under policy item #68.23 *Special Expenses or Allowances*.

(a) Short-Term Average Earnings

Business expenses (that is, expenses not associated with equipment) are generally not considered in a worker's short-term average earnings.

To calculate short-term average earnings for a worker who for business or taxation purposes deducts costs associated with equipment, the Board does not consider the worker's actual costs at the time of the injury.

The Board determines the labour component of such a worker's short-term average earnings by applying a percentage that represents the costs of supplying the appropriate category of equipment from the worker's date of injury earnings, set out as follows:

(i) Light Equipment

Where light equipment is supplied, the gross figure will be converted to gross wages by applying the following percentages.

Equipment	Wages
15%	85%

Examples of light equipment include chain saws, lawn mowers, and portable welding equipment and compressors not permanently mounted on vehicles.

(ii) Medium Equipment

Where medium equipment is supplied, the gross figure will be converted to gross wages by applying the following percentages.

Equipment	Wages
40%	60%

Examples of medium equipment include motor vehicles used for pilot car or local delivery services, and minor excavating equipment (e.g. two-wheel drive agriculture-type tractors, complete with backhoe attachments and/or front-end loader attachment).

(iii) Heavy Equipment

Where heavy equipment is supplied, the gross figure will be converted to gross wages by applying the following percentages.

Equipment	Wages
75%	25%

Examples of heavy equipment include logging trucks, skidders, bulldozers, and line haul trucks.

(b) Long-Term Average Earnings

In calculating the long-term average earnings of a worker who for business or taxation purposes deducts business expenses and/or costs associated with equipment, the Board decides which costs and/or expenses will be deducted from gross earnings to determine the labour component of the worker's gross earnings.

In determining whether the Board will deduct a business expense or a cost associated with equipment from a worker's gross earnings, the Board considers the following questions as appropriate:

- 1) Did the worker's gross earnings for the time period under review include payment in respect of the expense?
- 2) Did the worker incur the expense directly as a result of supplying equipment and/or materials to the employer?
- 3) Did the expense result from the worker operating his or her business?
- 4) Would the worker incur the expense regardless of the nature of the employment?

To calculate the amount the Board will deduct as an expense for equipment depreciation, the worker will be asked to provide the purchase price for any equipment that is a required component of the contract of service. The purchase price of such equipment is usually the invoiced value of the asset(s), including applicable taxes. Where a worker trades in another asset in order to purchase a new asset, the trade does not reduce the value of the acquired asset for the purposes of determining the purchase price.

The capital cost allowance or depreciation amount for equipment that is a required component of the contract of service will be deducted from gross earnings where it does not exceed 15 percent of the purchase price of the equipment.

Where the capital cost allowance or depreciation amount exceeds 15 percent of the purchase price, 15 percent of the purchase price will be deducted from gross earnings instead of the capital cost allowance or depreciation amount.

Where the worker does not declare a capital cost allowance or a depreciation amount for equipment that is a required component of the contract of service, the Board will not make a deduction for equipment depreciation from gross earnings for that equipment.

Interest accrued (whether paid or not) as the result of debt in respect of equipment owned by a worker that is a required component of the contract of service is considered a business expense. The accrued interest is deducted from gross income.

EFFECTIVE DATE: August 1, 2006

APPLICATION: The revised policy applies to injuries that occur on or after August 1, 2006.

#68.62 *Fishers*

Generally, where a fisher may deduct business expenses and/or costs associated with equipment from his or her earnings for business or tax purposes, this suggests that the fisher's earnings include payment in respect of such costs. In calculating the earnings of a fisher who, for business or taxation purposes, deducts business expenses and/or costs associated with equipment, the Board decides which costs and/or expenses will be deducted from gross earnings to determine the labour component of the fisher's gross earnings. This policy does not apply to a fisher receiving separate special expense reimbursements or allowances from an employer; the Board considers such payments under policy item #68.23 *Special Expenses or Allowances*.

In determining whether the Board will deduct a business expense or a cost associated with equipment from a fisher's gross earnings, the Board considers the following questions as appropriate:

- 1) Did the fisher's gross earnings for the time period under review include payment in respect of the expense?
- 2) Did the fisher incur the expense directly as a result of supplying equipment and/or materials for fishing activities?
- 3) Did the expense result from the fisher operating his or her business?
- 4) Would the fisher incur the expense regardless of the nature of the employment?

To calculate the amount the Board will deduct as an expense for equipment depreciation, the fisher will be asked to list the purchase price of the vessel or the other equipment used to harvest fish. The purchase price of a vessel or equipment used to harvest fish is the invoiced value of the asset(s), including applicable taxes. Where a fisher trades in an equipment asset in order to purchase a new equipment asset, the trade does not reduce the value of the acquired equipment asset for the purposes of determining the purchase price.

The capital cost allowance or depreciation amount for a vessel or equipment used to harvest fish will be deducted from gross earnings where it does not exceed 15 percent of the purchase price of the equipment.

Where the capital cost allowance or depreciation amount exceeds 15 percent of the purchase price, 15 percent of the purchase price will be deducted from gross earnings instead of the capital cost allowance or depreciation amount.

Where the fisher does not take a capital cost allowance or a depreciation amount for a vessel or equipment used to harvest fish, the Board will not perform a deduction for equipment depreciation from gross earnings for that equipment.

Interest accrued (whether paid or not) as the result of debt in respect of a fishing vessel used and owned by a commercial fisher is considered a business expense. The accrued interest is deducted from gross income.

The purchase of food as a business expense is not deducted from gross income as it is considered a direct benefit to the fisher and is a measurable return from the activities of fishing. The costs of maintenance for the vessel or other equipment used to harvest fish, fuel, fishing nets, and other appropriate costs are deducted from gross income as costs associated with equipment. See also policy item #65.03.

EFFECTIVE DATE: August 1, 2006

APPLICATION: The revised policy applies to injuries that occur on or after August 1, 2006.

#68.70 Payments to Substitutes

A worker may be partially able to perform the normal work or work full-time at other types of work, but pay a substitute to carry out jobs which the worker is unable to do. Compensation will still be paid in respect of the payment to the substitute but only to the extent of the difference between the value of the work being performed by the worker and the lesser of the worker's average net earnings and the statutory maximum. Where the value of that work exceeds the worker's average net earnings or the statutory maximum, no compensation is paid.

Where the worker is a principal of a limited company, the amount paid to a substitute may be one indication of the principal's pre-injury earnings level if these earnings are not otherwise clearly ascertainable because, for example, earnings have consisted of sporadic withdrawals from the income or profits of the corporation. If the principal continues to work in the business after the injury while employing a substitute to carry on part of the pre-injury functions, the amount paid to the substitute may, in comparison with the pre-injury earnings, be a factor in computing the value of the principal's post-injury work. Regard would, however, also have to be had to the nature and extent of the principal's activities after the injury compared with before the injury and the continued income received from the business after allowing for the costs of operation.

Where a worker has personal optional protection, benefits are calculated without regard to the fact that the worker is employing a substitute to do all the pre-injury work.

#68.80 Government Sponsored Work Programs

A variety of payment systems are currently in use for work programs, such as:

1. The simple continuation of Employment Insurance, Welfare or other benefits.
2. A "top-up" of Employment Insurance, Welfare or other benefits. Full payment by the employer, subsidized either in whole or in part from Employment Insurance, Welfare or other government funds.

In cases of this type, the composition of average earnings is made up of the total dollar amount being paid to the worker either by the employer or the sponsoring government agency or a combination of either.

#68.90 Principals – Composition of Earnings

The *Assessment Manual* sets out who may be a principal, and criteria for determining whether a principal is a worker. Principals' average earnings are calculated based on earnings from employment, including earnings shown on official statements issued by the firm for income tax purposes and management fees. When determining the composition of a principal's average earnings, the Board may consider dividends and the repayment of a principal's loan to the employer as earnings in cases where it is shown that the amount received by the principal represents payment for the principal's labour.

If reported earnings are being received by a principal's spouse or child, then it should normally be considered for compensation purposes that the earnings belong to the spouse or child and not the principal. The same applies if information of this nature has been provided on Income Tax Reports.

In making reports of this nature for Income Tax purposes, the company is asserting that the principal's spouse or child did work in the business and did earn the money paid. The Board is required to consider any evidence which may show that this assertion is incorrect and to make its own determination. However, the Board is entitled to rely upon this assertion unless there is good evidence to the contrary. Even if, upon investigation, the evidence shows that the spouse or child did not work for the company, that in itself does not mean that the payments to the spouse or child were earnings of the principal. There could be any number of other reasons why the company might make payments to the spouse or child.

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.

EFFECTIVE DATE: January 1, 2008

APPLICATION: This policy applies to the calculation of average earnings for principals with injuries that occur on or after January 1, 2008.

#69.00 MAXIMUM AMOUNT OF AVERAGE EARNINGS

Section 33(3) provides that a worker's average earnings cannot exceed the "maximum wage rate".

The *Act* contains a special procedure for determining the maximum wage rate in force in any year. Section 33(7) provides that "Prior to the end of each calendar year, the board must determine the maximum wage rate to be applicable for the

following calendar year.” The maximum wage rate to be determined under subsection (7) is an amount that the Board thinks represents the same relationship to the sum of \$40,000 as the annual average of wages and salaries in the province for the year preceding that in which the determination is made bears to the annual average of wages and salaries for the year 1984; and the resulting figure is rounded to the nearest \$100. (10) For the purpose of determining annual average of wages and salaries under subsection (8), the Board may use data published or supplied by Statistics Canada. (11) Prior to 1986, the *Act* referred to \$11,200 and 1972 as the factors in the formula for calculating the maximum.

For the maximum wage rates in force used to calculate temporary and permanent disability payments, see below.

	Yearly Applicable
January 1, 2008 – December 31, 2008	\$66,500.00
January 1, 2009 – December 31, 2009	\$68,500.00

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

The maximum wage rate is not subject to consumer price index adjustments. Nor can a worker who is in receipt of the current maximum compensation benefits receive the benefit of such adjustments. However, if the maximum wage rate is increased in any year, workers injured in a prior year who were limited by the maximum compensation for that year can receive the benefit of any applicable cost of living adjustments occurring after the increase. Such adjustments are calculated using the previous maximum as a base and cannot at any time increase the worker’s compensation above the current maximum.

Increases in the maximum wage rate do not have the effect of increasing the existing compensation being paid to workers whose payments have been limited by the lower maximum existing in a previous year. An exception to this rule may occur when, on a reopening occurring more than three years after the injury, the Board exercises its authority under section 32 to base compensation payments on the worker’s earnings at the time of the reopening. (12)

Authority to approve increases in the maximum wage rate under section 33 has been assigned to the President.

#69.10 Deduction of Permanent Disability Periodic Payments from Wage Loss

Section 31(1) provides as follows:

Where a worker is receiving compensation for a permanent or temporary disability, the worker must not receive compensation for a further or other disability in an amount that would result in the worker receiving in the aggregate compensation in excess of the maximum payable for total disability.

Where a worker is entitled to wage-loss payments at the current maximum, and is in receipt of a permanent disability award under a previous claim, the permanent disability award is deducted from the wage-loss payments. If the wage-loss payments are less than the current maximum only the amount in excess of the maximum when the permanent disability award and wage loss are added together is deducted.

For calculating the amount of a deduction, the daily rate of the permanent disability award must be determined and then deducted from the daily rate of wage-loss compensation in the manner set out in policy item #70.10.

The deduction made under section 31 must be reviewed on each January 1 following the injury. This is to allow for possible cost of living adjustments to the amount of the permanent disability award and the wage loss and, with regard to January 1, changes in the maximum wage rate. For the purpose of section 31, the relevant maximum is the one applying in the year in which the wage-loss payment is being made.

For the deduction from wage loss of permanent disability awards under the same claim, reference should be made to policy items #70.00, #70.10, and #70.20.

#69.11 *Permanent Disability Award Cash Awards and Term Permanent Disability Awards*

Section 31(2) provides:

Where a worker has received a lump sum in lieu of the periodic payments that otherwise would have been payable for a permanent disability, the worker is, for the purposes of subsection (1), deemed to be still in receipt of the periodic payments.

Where a worker is entitled to receive wage-loss benefits on a new claim and has received a lump-sum payment on any prior claim (in lieu of a monthly permanent disability periodic payment), the permanent disability award will be deducted only

to the extent that it is necessary to ensure that the worker does not receive in the aggregate more than the current maximum.

In the case of a reopening of the same claim within three years, any previous lump-sum payment (in lieu of a permanent disability periodic payment) will be deducted from the current daily wage-loss payments. The same position exists in respect of reopenings of the same claim after three years where the claimant's pre-injury earnings are used to calculate benefits. Where, however, in the case of a reopening after three years, current earnings are used under the terms of section 32(1), any previous lump-sum payment (in lieu of a permanent disability periodic payment) will be deducted in accordance with section 32(2).

Where there is a recurrence after three years and a term permanent disability award remains applicable and is being considered for its significance under section 32(2), the term permanent disability award should be converted to a notional life value for that purpose.

While the question whether a lump-sum payment is deducted is determined by its monthly equivalent at the time of the commutation, the amount actually deducted is the monthly equivalent at the time the deduction is made. The amount available for deduction includes cost of living adjustments which have occurred since the commutation was granted.

#70.00 AVERAGE EARNINGS ON REOPENED CLAIMS

#70.10 Disability Occurring Within Three Years of Injury

Where a claim is reopened for temporary total or temporary partial disability within three years of the date of injury (or the equivalent date in the case of occupational diseases), the wage rate set on the claim at the time of the injury is the rate to be used. In applying this policy, where the wage rate was set before June 30, 2002, the wage rate for a recurrence must be reset in order to convert it from a rate based on 75% of gross average earnings to a rate based on 90% of average net earnings. This conversion will involve using wage information from the time of the injury plus applicable cost of living adjustments and the relevant tax provisions at the time of recurrence.

This could be either the original rate or the rate review figure if such an adjustment has occurred.

Any permanent disability award granted under the same claim is deducted from the amount of the payments. A permanent disability award that has been granted on another claim is deducted only to the extent that the combined total of wage-loss and permanent disability periodic payments exceeds the current maximum. Cost of living adjustments are made if applicable.

Where a permanent partial disability award is being paid on the same claim, the wage-loss payments are calculated as the difference between the total compensation benefits and the permanent partial disability periodic payments in the following manner:

1. The annual permanent disability payment amount is calculated by multiplying the monthly figure by 12.
2. The annual permanent disability payment amount is divided by the working days per year to obtain a daily rate.

5-day week = 261 days

5-1/2-day week = 287 days

6-day week = 313 days

7-day week = 365 days

3. The daily permanent disability payment amount is deducted from the daily wage-loss payment. (13)

Where required under the *Act*, if a 10-week rate review has not already been carried out on the claim, it will be done by the Board officer following the reopening at the earlier of: when the total wage loss paid on the claim adds up to ten weeks or the effective date of a permanent disability award.

EFFECTIVE DATE: October 16, 2002

APPLICATION: To all adjudication decisions made on or after the effective date.

#70.20 Reopenings Over Three Years

Section 32 of the *Act* provides:

- (1) For the purpose of determining the amount of compensation payable where there is a recurrence of temporary total disability or temporary partial disability after a lapse of 3 years following the occurrence of the injury, the Board may calculate the compensation as if the recurrence were the happening of the injury if it considers that by doing so the compensation payable would more nearly represent the percentage of actual loss of earnings suffered by the worker by reason of the recurrence of the injury.

- (2) Where a worker has been awarded compensation for permanent partial disability for the original injury and compensation for recurrence of temporary total disability under subsection (1) is calculated by reference to the average earnings of the worker at the date of the recurrence, the compensation must be without deduction of the compensation payable for the permanent partial disability; but the total compensation payable must not exceed the maximum payable under this Part at the date of the recurrence.
- (3) Where more than three years after an injury a permanent disability or an increased degree of permanent disability occurs, the compensation payable for the permanent disability or increased degree of permanent disability may be calculated by reference to the average earnings of the worker at the date of the occurrence of the permanent disability or increased degree of permanent disability.

Section 32 of the *Act* gives the Board discretion to determine compensation benefits on a reopening of a claim more than three years after an injury by reference to the worker's current earnings.

The guidelines set out below apply in situations where there is a recurrence of temporary disability or an occurrence of or increase in a permanent disability over three years after an injury or disablement from occupational disease.

In applying this policy, where the original wage rate was set before June 30, 2002, the wage rate must be reset in order to convert it from a rate based on 75% of gross average earnings to a rate based on 90% of average net earnings. This conversion will involve using information from the time of the original injury plus applicable cost of living adjustments, and the relevant tax provisions at the time of recurrence. A second wage rate calculation based on the worker's earnings at the time of the recurrence must be done in accordance with the *Act*. This enables the Board to determine which average earnings calculation best represents the worker's loss of earnings.

Where a worker does not fall within any of the exceptions provided for in sections 33.5 to 33.7 of the *Act* and it is determined that compensation is payable as if the recurrence were the happening of the injury such that a new wage rate is established based on the earnings at the time of recurrence, the initial payment period provided in section 33.1(1) of the *Act* will recommence.

1. **Temporary Disability Recurring After Three Years Where the Worker Is Employed**

(a) **Worker's Current Earnings Exceed the Rate Originally Set On the Claim**

Where the worker's earnings at the time of the recurrence of disability exceed the earnings rate originally set on the claim (or the review rate, if applicable) plus cost of living adjustments, section 32(1) is normally applied so as to treat the recurrence of disability as the happening of the injury. Wage-loss compensation is based on the worker's earnings immediately prior to the recurrence and, where there is an existing permanent partial disability award granted in respect of the original injury, section 32(2) applies. Therefore, the permanent disability periodic payment is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. (14) Where required under the *Act*, a 10-week rate review will be carried out. Any cost of living adjustments following the recurrence will be applied in accordance with section 25 of the *Act*.

(b) **Worker Is Employed at the Same Rate as Originally Set On the Claim**

Where the worker is employed at the same rate as originally set on the claim (or review rate, if applicable), the previous rate will be used plus applicable cost of living adjustments. The discretion contained in section 32(1) will not be exercised.

(c) **Worker Is Employed at a Lower Rate than Originally Set On the Claim**

Where the worker is employed at a lower rate than the rate originally set on the claim (or review rate, if applicable) plus applicable cost of living adjustments, a determination will be made as to the reason for the lower figure.

(i) **Reduced Earnings Due to Effects of the Injury or Disease Accepted On the Claim**

If it is determined that the reduced earnings level is due to the effects of the injury or disease accepted on the claim, the rate originally set on the claim (or review rate, if applicable) plus applicable cost of living

adjustments will be used on the reopening. Care must be exercised in making this determination to ensure that consistency is maintained with prior decisions reached on the claim. If, for example, a prior decision has been reached that a permanent disability award or higher award which the worker asked for should not be awarded because the worker was capable of undertaking certain occupations, it will not now be possible to conclude that the worker's not being employed in those occupations is due to the effects of the injury.

(ii) **Reduced Earnings Due to Personal Choice**

If it is determined that the lower earnings level is due to a matter of personal choice on the part of the worker, such as, for example, a voluntary change in lifestyle, the reduced earnings figure will be used on reopening to calculate the worker's wage rate. Section 32 will be applied and the rules set out in (a) above will apply in relation to the reduced figure.

(iii) **Reduced Earnings Due to Employment Situation**

If it is determined that the reduced earnings at the time of the reopening are due to employment difficulties occasioned by economic circumstances, section 32 applies and the recurrence of disability is treated as the happening of the injury. Where there is an existing permanent partial disability award granted in respect of the original injury, section 32(2) applies and the award is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. The current rate of earnings will be used. When required by the *Act*, a 10-week rate review is carried out. Since the 10-week review generally permits a consideration of the 12 months immediately preceding the date of injury, it will have the effect of adjusting for the long term any temporary aberrations in earnings capacity caused by economic fluctuations.

Any cost of living adjustments occurring in the twelve months following the recurrence will, by virtue of section 25(3), not be applicable to the wage-loss payments being made.

2. **Temporary Disability Recurring After Three Years Where the Worker Is Unemployed**

Where the worker is unemployed at the time of the reopening, a determination will be made of the reasons for this.

(a) **Where Unemployed Status Is Due to the Effects of the Injury or Disease**

If it is determined that the unemployed status prior to the recurrence is due to the effects of the injury or disease accepted on the claim, the wage rate originally set on the claim (or the review rate, if applicable) plus applicable cost of living adjustments will be used. The discretion in section 32 will not be exercised. As in 1(c)(i) above, care must be exercised to ensure that the determination is consistent with prior decisions on the claim.

(b) **Where Unemployed Status Is Not Due to Effects of the Injury or Disease**

If it is determined that the worker's unemployed status prior to the recurrence is not due to the effects of the injury or disease accepted on the claim, no wage-loss benefits are payable unless the disability following reopening will produce a potential for loss of income by removing the worker as a viable entity in the labour force. In the latter case, benefits will be paid on the basis of the wage rate originally set on the claim (or the review rate, if applicable) plus applicable cost of living adjustments. In determining whether there is a "potential loss", the following are among the questions that might be considered.

- (i) Was the worker's unemployment a matter of personal choice?
- (ii) Does the worker's lifestyle render it unlikely that he or she will, in practice, obtain employment? For example, if the worker has moved to a remote area where there are virtually no employment opportunities, this would indicate that there was no potential loss.
- (iii) Are there any other health conditions or personal problems that limit the possibility of employment?

- (iv) Was the worker being paid Employment Insurance benefits? Since the payment of such benefits requires a confirmation that the worker is fit for work, this would be an indicator that there was a potential loss.
- (v) Has the worker been making an active, ongoing, job search? Has the worker registered with the Human Resources and Development Commission?
- (vi) Has the worker maintained union status, remained available for dispatch to jobs, been dispatched to jobs or declined offers of dispatch?
- (vii) Was the worker listed as seeking employment by the Ministry of Human Resources?

3. **Permanent Disability Occurring or Increasing More Than Three Years After Injury**

The rules set out above in relation to wage-loss benefits are, in general, equally applicable to permanent disability awards. These rules have the effect that in one situation no wage-loss benefits are paid, notably when the worker is unemployed otherwise than through the effects of the injury and it is determined that there is no potential loss of earnings. A permanent disability award assessed on a loss of function basis under section 23(1) of the *Act* should, however, be paid in that situation and (subject to any appropriate wage rate review being carried out) calculated on the basis of the wage rate originally set on the claim plus applicable cost of living adjustments. Permanent disability awards are distinguishable from wage-loss benefits since the awards concern the long term situation as opposed to the current situation. Refer to Chapter 6, Permanent Disability Awards, for a discussion regarding the methods of assessing permanent disability awards. A permanent disability award is payable under section 23(1) for significant impairments even though the worker has returned to work with no loss of earnings and may not have a loss of earnings in the future. Even though a person is unemployed at the time of a section 23(1) assessment, and does not now foreseeably have an actual loss of earnings, it does not mean that the person should not receive an award under section 23(1). However, the situation is different for projected loss of earnings awards under section 23(3). Since that assessment aims to predict the worker's actual loss of earnings over the future, no award can be made when the worker is unemployed for reasons unrelated to the injury and it is determined that there will not be a potential loss of earnings.

4. **Prior Occasion When Section 32 Was Applied**

Where, on a previous reopening of the claim, section 32 or its predecessor has been used to base compensation on the current earnings, any rate resulting from the application of that section is ignored for the purposes of a later reopening.

Where, according to the guidelines set out above, compensation would normally be based on the worker's pre-injury earnings, but it is found impossible or impractical to obtain those earnings, section 32(1) or (3) may be applied, unless this will result in a rate of compensation significantly less than that to which the pre-injury earnings would probably have entitled the worker.

5. **Re-openings for Persons with Personal Optional Protection**

In the case of a reopening over three years from the date of injury:

- Where the person has maintained personal optional protection coverage at the time of reopening, the Board will determine the person's average earnings based on the current rate of coverage.
- Where the person no longer has personal optional protection, the Board will determine average earnings based on the initial personal optional protection rate plus the appropriate cost of living adjustments.
- Where the person is now employed in circumstances where there is compulsory coverage for worker so that the person is considered to be a worker under the *Act*, the rate on reopening will be based on the worker's current average earnings. An evaluation is required as to the impact of the original injury on the worker's current average earnings where the worker's average earnings are lower than the amount of personal optional protection the worker had at the time of the injury.

EFFECTIVE DATE: March 3, 2003 (as to deletion of references to recurrence and new injury)

APPLICATION: Not applicable.

#70.30 Permanent Disability Awards

The Board's policy with respect to a reopening of claims after three years, where a pension cash award or term pension is involved, is as described in policy item #69.11.

#71.00 AVERAGE NET EARNINGS

Effective June 30, 2002, compensation is based upon 90% of a worker's average net earnings.

Before calculating a worker's average net earnings, the Board determines the worker's average earnings. The process for determining a worker's average earnings is described in Chapter 9.

The Board establishes a worker's average net earnings by deducting the following items from the worker's average earnings:

- (a) probable EI premiums;
- (b) probable CPP contributions; and
- (c) probable income taxes.

The Board does not consider the actual amounts deducted from a worker's pay cheque for the items listed in (a) – (c) above. Instead, the Board considers the probable deductions for these items.

Under sections 33.8 and 33.9 of the *Act*, the Board calculates a worker's average net earnings at two stages in the claim process as described below.

#71.10 Short-term Average Net Earnings

Under section 33.8 of the *Act*, short-term average net earnings apply to the period that begins on the date of the worker's injury and ends on the earlier of:

- (a) the date temporary disability benefits have been payable to the worker for a cumulative period of 10 weeks; or
- (b) the effective date of a permanent disability award.

Schedule of Deductions

Effective January 1st each year, the Board implements a schedule of deductions ("Schedule") for earning levels up to the statutory maximum. The Schedule reflects the federal and provincial income tax rates and the levels of CPP contributions and EI premiums in effect for the immediately preceding calendar year. As a result, any changes to these items during a calendar year are not reflected in the Schedule until January 1st of the following year.

The Board uses the Schedule to determine the CPP contributions, EI premiums and income taxes applicable to a worker's average earnings. As a result, all

workers with the same average earnings have the same deductions made for CPP contributions, EI premiums and income taxes.

When calculating a worker's short-term average net earnings, the applicable Schedule is that which is in effect on the date of the worker's injury.

Probable CPP and EI

Deductions for probable CPP contributions and EI premiums are based on the requirements of the *Canada Pension Plan Act* and the *Employment Insurance Act*. When determining these deductions, the Board considers the contributions and premiums required under those *Acts* for the worker's average earnings. The Board does not consider the actual CPP contributions and EI premiums deducted from the worker's pay cheque.

Probable Income Taxes

In estimating probable income taxes for short-term average net earnings, the Board applies only the following tax credits under the *Income Tax Act* and the *Income Tax Act (Canada)*:

- (a) credits based on the basic personal amounts, multiplied by 1.5; and
- (b) credits for the probable CPP contributions and EI premiums payable for the worker's average earnings.

All workers receive tax credits equaling 1.5 times the basic personal amounts, regardless of actual tax status. As well, deductions for probable income taxes are made regardless of whether the worker is required to pay taxes under the *Income Tax Act* and the *Income Tax Act (Canada)*.

#71.20 Long-term Average Net Earnings

Under section 33.9 of the *Act*, long-term average net earnings apply to the period commencing on the earlier of:

- (a) the first day after the date temporary disability benefits have been payable to the worker for a cumulative period of 10 weeks; or
- (b) the effective date of a worker's permanent disability award.

Formulas for Deductions

Effective January 1st each year, the Board implements formulas, based on those used by the Canada Revenue Agency, to calculate long-term average net

earnings. The formulas reflect the federal and provincial income tax rates and the levels of CPP contributions and EI premiums in effect for the immediately preceding calendar year. As a result, any changes to these items during a calendar year are not incorporated into the formulas until January 1st of the following year.

When calculating long-term average net earnings, the Board uses the formulas to determine the CPP contributions, EI premiums and income taxes applicable to a worker's average earnings.

When calculating a worker's long-term average net earnings, the Board uses the formulas in effect on the earlier of the first day after the date temporary disability benefits have been payable to the worker for a cumulative period of 10 weeks; or the effective date of a worker's permanent disability award.

Probable CPP and EI

Deductions for probable CPP contributions and EI premiums are determined in a similar manner as for short-term average net earnings. When determining these deductions, the Board considers the contributions and premiums required under the *Canada Pension Plan Act* and the *Employment Insurance Act* for the worker's average earnings. The Board does not consider the actual CPP contributions and EI premiums deducted from the worker's paycheque.

Probable Income Taxes

In estimating the worker's probable income taxes, the Board allows only the following tax credits as determined under the *Income Tax Act* and the *Income Tax Act (Canada)*:

- (a) credits based on the basic personal amounts;
- (b) credits for EI premiums and CPP contributions; and
- (c) spousal credit or wholly dependent person credit and/or infirm dependant credit.

When establishing income tax credits for dependants, the Board will assume that the dependants have no income. As a result, where the worker qualifies for any of the credits under item (c) above, the worker will receive the maximum amount under the *Income Tax Act* or the *Income Tax Act (Canada)* for that credit.

Exceptions

Workers who are not required to pay CPP contributions under the *Canada Pension Plan Act* or EI premiums under the *Employment Insurance Act* do not have these probable contributions or premiums deducted from their average earnings when long-term average net earnings are established. For instance,

workers under the age of 18 years do not have probable CPP contributions deducted, as these workers do not contribute under the *Canada Pension Plan Act*. As well, independent operators who do not pay into the EI scheme do not have probable EI premiums deducted when long-term average net earnings are calculated.

Workers who are not required to pay income taxes under the *Income Tax Act* or the *Income Tax Act (Canada)* do not have probable income taxes deducted when the Board calculates their long-term average net earnings. For example, workers who have Registered Indian Status under the *Indian Act (Canada)* and work on a reserve do not pay taxes on their employment income. As a result, no deductions for probable income taxes will be made when calculating the long-term average net earnings of these workers.

EFFECTIVE DATE: June 1, 2009 – Update reference to Canada Revenue Agency.

APPLICATION: Applies on or after June 1, 2009

#71.30 Insufficient Information

A worker has an obligation under section 57.1 of the *Act* to provide the Board with the information that the Board considers necessary to administer the worker's claim. Where a worker fails to comply with this obligation, the Board may reduce or suspend payments to the worker until the worker complies. The worker's obligation to provide information is discussed in policy item #93.26.

Where the Board has insufficient information about a worker's tax status at the time that long-term average net earnings are calculated, the Board will assume that only the basic personal credits under the *Income Tax Act* and the *Income Tax Act (Canada)* apply.

In addition, where the Board has insufficient information about whether a worker is required to pay contributions under the *Canada Pension Plan Act* or premiums under the *Employment Insurance Act*, the Board will assume that the worker is required to pay those contributions or premiums.

#71.40 Adjustments

The Board may adjust a worker's average earnings subject to reconsideration rules set out in section 96(5) of the *Act*, where they were based upon incorrect information. If the adjustment results in a decrease in the value of the worker's earnings, the Board will consider policy item #48.41 in determining whether to declare an overpayment. If it results in an increase, a retroactive adjustment may be made.

EFFECTIVE DATE: June 1, 2009 – Delete reference to Board officer.
HISTORY: October 1, 2007 – Amendments to include reference to section 96(5) of the *Act* and to delete the term net.
APPLICATION: Applies on or after June 1, 2009

NOTES

- (1) See policy item #34.40
- (2) See policy item #34.20
- (3) See policy item #65.04
- (4) See policy items #34.20; #35.23; #37.20; #39.60
- (5) See Item AP1-2-3 of the *Assessment Manual*
- (6) See Item C8-56.00 and Item C8-56.40
- (7) See Item AP1-1-5 of the *Assessment Manual*
- (8) See Item AP1-3-1 of the *Assessment Manual*
- (9) See policy item #34.40
- (10) s.33(10)
- (11) s.33(9)
- (12) See policy item #70.20
- (13) See policy item #69.00
- (14) See policy item #69.10