

## STAKEHOLDER SUBMISSIONS TABLE

### VARIABLE SHIFT WORKERS

**JANUARY 9 – FEBRUARY 23, 2009 CONSULTATION PERIOD**

The Policy and Research Division has reproduced, as received, the comments below

No.	Organization	Feedback from a worker or employer perspective?	Preferred Option  [Answers in square brackets are inferred from Explanation]	Comments
1	COCA	Employer	None stated	<p>I am responding on behalf of COCA, which represents 17 construction associations, with members from all parts of British Columbia, from every sector and from every size of company. The new version responds to our previous concerns and provides clarity on the nature of the changes proposed, the industries affected and the probably number of workers affected. This Discussion Paper deals with on call workers who are employed with one or more employers on a regular basis at variable rates of pay.</p> <p>The new Discussion Paper makes it clear that the proposed changes do not apply to the Construction Industry. Two primary examples are provided in the new Discussion Paper – film workers and nurses. For nurses, in almost all cases, the average earnings are determined by the earnings from the previous 12 month period. For film workers, the determination of average earnings is less clear. This Paper is primarily intended to clarify the process for setting average earnings for film workers. The policy would affect about 50 claims per year from film workers.</p> <p>The Paper also provides clarity by citing an example of how average earnings are determined for construction workers.</p> <p>For regularly employed workers who are remunerated on a standard five-day work week, average earnings are based on the worker's rate of pay at the date of injury. For example, a construction worker who is regularly employed in a series of short-term contracts with different employers at the same rate on each job would fall into this category.</p> <p>As a result of this clarification, we have only one recommendation to make. We</p>

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				<p>recommend that the above example be changed to read (change underlined):</p> <p>For regularly employed workers who are remunerated on a standard five-day work week, average earnings are based on the worker's rate of pay at the date of injury. For example, a construction worker who is regularly employed in a series of short-term contracts with different employers at the same or <u>approximately similar rate</u> on each job would fall into this category.<sup>1</sup></p> <p>The reason for this recommendation is that a construction worker may move from one job to another for approximately the same wage – but it may not be exactly the same wage in every case. We therefore wish to ensure that the policy continues to establish the worker's earnings based on the worker's rate of pay at the date of injury. It is understood that the worker's compensation benefits will be adjusted as needed, up or down, at 10 weeks into the claim. This 10 week determination is based on the worker's longer term pattern of earnings, as required by the Workers' Compensation Act and Policy.</p> <p>As an adjunct to this proposal, we recommend that you link your database with Revenue Canada's so that you can readily obtain the worker's earnings for the previous year. (Similar to the links that you now have with respect to employer information.) We leave it to the film industry and the health care sector to offer their comments on the Discussion Paper as it may apply to them.</p>

<sup>1</sup> This suggestion is incorporated into the discussion paper presented to the Board of Directors.

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2	<b>BC Maritime Employers Association</b>	Employer	Option 1 (Status Quo)	<p>Please see our December 18, 2008 submission for a detailed explanation. Our position is that a more "flexible" approach will result in inconsistent application of policy and inequalities. While obtaining one year's earnings may be more difficult, it is preferable to the inaccuracies which would result from either of the suggested changes.</p> <p><i>December 18, 2008 submission reads:</i></p> <p>Our concern regarding the options for change identified is that either option could result in a less representative earnings rate for an injured worker. As a result we do not support either proposal for change. The Worker's Compensation Act Section #33.5 provides the law pertaining to this issue and we agree with the Employer's Advisors position that the " ..... Board is attempting to do indirectly that which it is prohibited directly." We also concur with the position of COCA and believe their recommendation regarding a link with Revenue Canada for securing earnings information should be considered.</p> <p>In our Industry there are seasonal adjustments in work availability as well economic trends which affect work availability which can be very volatile. Using either option proposed could lead to a worker who has worked only a few days in the last three months being paid the maximum rate of compensation for 10 weeks due to the fact that workers in our industry are paid very high hourly wages. This would be gross overcompensation for a worker who would, depending on seniority and economic condition, have access to only a few days work availability over that 10 week period. A full year's earnings record would be much more reliable and representative of a worker's</p>

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				<p>earning pattern and accordingly, his most likely actual loss.</p> <p>Section 33.5 of the Act was specifically enacted to most fairly reflect the "casual worker's" short term earnings loss. While it may be administratively more difficult to obtain one year's earnings, it is certainly preferably to the "flexibility" of the random selection of almost any period of time that is felt to be representative. This sword could also cut both ways if a worker was injured the first day that work had been available for months. Using the one year earnings prior to date of injury is going to pick up and average the seasonal and economic patterns as well as differing rates of pay.</p> <p>The BCMEA does not feel that any change to the existing policy contained in the RSCM Volume II Item #65.01 is warranted.</p>
3	<b>BC Federation of Labour</b>	Worker	Option 2	<p>The B.C. Federation of Labour (the Federation) and its affiliates represent many workers who do not work a standard five day work week.</p> <p>In our view, the "historic compromise" demands that the WCB implement policies which allow for an adequate amount of flexibility to ensure that the average earnings calculated for an injured worker best reflect the actual loss of income due to the injury. The Federation supports the amendment to Policy #65.01 Variable Earnings. Option 2 increases the flexibility in assessing the short-term average earnings for workers who are not paid on a five day work week.</p> <p>The Federation recommends that Option 2 go further by ensuring that for day call workers there should be flexibility to calculate average earnings and earning capacity on</p>

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				<p>the daily, weekly or monthly remuneration which the worker was receiving at the time of injury or on the probable yearly earning capacity of the worker at the time of injury, whichever would best reflect the actual loss of earnings suffered by the worker. There should be flexibility to consider any other wage loss from the time of injury from any other source or employer.</p> <p>The Federation agrees with the recent policy change to exclude prior periods of compensable wage loss from average earnings for long-term wage rates. This policy should apply when determining short-term wage rates. The exclusion should be expanded to include non-compensable absences where the absence does not reflect the actual loss. We agree with the good examples provided in the original submission by the BC Nurses Union (BCNU) in regard to maternity/parental and education leave as examples of non-compensable leaves that are not likely to continue into the future and should be excluded. Section 4.2 discusses the use of the time of injury in the Workers Compensation Act (WCA) to determine a worker's short-term average earnings and the use of date of injury in some of the policies. There is no explanation of the differences between these terms so the Federation would encourage the WCB to use terminology for interpreting times and dates of injury that best reflect the true loss of earnings and earning capacity of the injured worker.</p>
4	<b>BC Nurses' Union</b>	Worker	Option 3	<p>This submission is in response to the second discussion paper on the topic of Variable Earners. It is requested that our previous submission of September 30, 2008 also be referenced. It is our position that option 3 in the second discussion paper is the most appropriate. This option is most in line with the Act and the policy for determining short term wage rates for other categories of workers.</p>

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				<p>As per our previous submission we believe that the practices set out in policy item #34.32 have relevance to variable earners. In this policy item it is provided that if the worker would have been on layoff or strike the day after injury it is presumed that they would have sought employment but for the injury. The same presumption should apply to variable earners. It should be presumed the worker would have looked for and found other work and the earnings should continue based on the earnings in the position on the day of injury.</p> <p>We do wish to reiterate that there needs to be some degree of flexibility in setting wage rates. There will be many circumstances where the policy may not accurately reflect the worker's actual loss of earnings due to the injury. When establishing wage rates the top priority needs to be that the rates best reflect that loss. Flexibility as opposed to arbitrariness best serves this purpose.</p> <p>In regards to excluding periods of absence from calculating wage rates the use of earnings on the day of injury would alleviate the need to gather 3 months earnings except in exceptional circumstances where there is evidence that the earnings on the date of injury does not accurately reflect the loss of earnings resulting from the injury. In those rare circumstances: where it would be appropriate to base the short term earnings rate on the earnings in a period prior to the date of injury any absence outside a norm expected for the worker should be excluded from the calculation of the earnings. This results in the most accurate reflection of the actual loss of earnings due to the injury. Please refer to our September 30, 2008 submission on this issue.</p>

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5	<b>Atlas Anchor Systems Ltd.</b>	Employer	None stated	I have thoroughly read complete Proposed Amendments and Discussion Papers and find the submissions disclosed as pertinent and of value.
6	<b>Workers' Advisers Office</b>	Worker	Option 2	<p>We are writing to provide further comments on the above proposed amendments. Please note that we originally provided a submission on October 5, 2008 in response to the July 24, 2008 discussion paper on this issue. We are attaching the submission for your reference. We are concerned that our comments are not reflected in Appendix A of the current discussion paper along with the other stakeholder comments.<sup>2</sup></p> <p>As discussed in our October 5, 2008 submission, we generally support the amendment of Policy Item #65.01 Variable Shift Workers (the Policy) and view the amendment as providing a much needed flexibility in assessing the short term average earnings of an increasing number of workers who do not receive remuneration based on a standard five day work week.</p> <p>We are pleased that the new proposal incorporates an important aspect of policy item #67.00 allowing for increased flexibility in the assessment of short-term earnings. We note however a further need for a mechanism to address diminished future career options'. We would also like to see the inclusion of an explicit statement similar to the wording of policy item #67.60 that the 'list is not exhaustive'.</p> <p><b>4.2 "Date of Injury of Earnings" and "Time of Earnings" 4.4 Time period for</b></p>

<sup>2</sup> Although the submission was faxed by the stakeholder, the PRD did not receive it. The October 7, 2008 submission is set out below.

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				<p><b>calculating the short-term average earnings</b></p> <p>We have reservations about whether the change from "date of injury" to "time of injury" provides greater clarity to the policy. Whatever the wording used, we suggest that the point that should be emphasized is that there is flexibility in the policy to use a shorter or longer period than three months; whichever provides the most accurate reflection of the worker's time of injury earnings or earning capacity (section 33(1) of the Act). We suggest that Section 33(1) provides the general direction for determining average earnings and section 33.1(1) provides the general rule for short-term average earnings. The combined effect of these legislated provisions provides for flexibility which should be reflected in the policy.</p> <p><i>October 7, 2008 submission reads:</i></p> <p>The Workers' Advisers Office (WAO) supports the amendment of Policy Item #65.01 <i>Variable Shift Workers</i> (the Policy). We agree that the amendment provides much needed flexibility in assessing the short-term average earnings of an increasing number of workers who do not receive remuneration based on a standard five day work week. Consequently, we endorse Option 2 as set out in the discussion paper subject to the clarification discussed below.</p> <p><b>4.3 Exclusion of Prior Periods of Compensable Wage Loss from Average Earnings Calculations</b></p> <p>The amendment discussed at page 4 of the policy discussion paper appears to limit the</p>

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				<p>application of the delineated exceptional circumstances in Policy Item #67.60 <i>Exceptional Circumstances</i> (Policy Item #67.60). Specifically, the policy discussion paper refers to only one of many potential exceptional circumstances, namely, the exclusion of prior periods of compensable wage loss. In our view, all of the applicable exclusions in Policy Item #67.60 should be available in assessing short-term wage rates. For example, we suggest that other exceptional circumstances such as the ability to consider a worker's earning history in order to address atypical earnings variations, apply equally to the assessment of short-term wage rate and should be explicitly referenced in the Policy.</p>
7	<b>Employers' Advisers Office</b>	Employer	None stated	<p>While our office takes no position regarding the acceptability / appropriateness of the above noted document on behalf of the employer community, we provide the following comment outlining the impact we see the proposed amendments having on the system as a whole. Our feedback on the initial draft was as follows:</p> <ol style="list-style-type: none"> <li>1. We had no objection to the phrase "time of injury" rather than "date of injury" in policy. We agreed that "time of injury" reflects the statutory language, although this is not a defined term.</li> <li>2. We agreed the Board has the discretion to provide a definition of "time of injury" in policy.</li> <li>3. Although we acknowledged the Board has the authority to define "exceptional circumstances" to be applied to long-term average earnings (as per section 33.4 of the Act), we submitted that "exceptional circumstances" apply only to long term average rates. The headings for all exceptions (including the exceptions for apprentices/learners and those employed for less than 12 months) specifically refer</li> </ol>

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				<p>to section 31.1 (2) of the Act and apply only to long-term average earnings and argued there is no discretion for the Board to create "exceptional circumstances" for short-term average earnings.</p> <p>4. Finally, we suggested there is no need to amend the variable shift workers policy to include those with variable rates of pay and recommended careful adjudication to determine if the worker has a casual pattern of employment or a regular pattern of employment would address the Board's concerns in most instances.</p> <p>In the redrafted discussion paper and policy item, point 4 was addressed. The redrafted policy now refers to those "regularly" employed (to clarify that it does not apply to those with a casual pattern of employment). We agree with this change.</p> <p>However, the Employers' Advisers Office fundamentally disagrees with the addition of a list of exceptional circumstances to be used to determine short-term earnings. We note the redrafted policy actually expands the list of exceptional circumstances first proposed.</p> <p>It is our submission that the changes to the <i>Act</i> introduced in 2002 as a result of the Winter Report had the effect of making the <i>Act</i> prescriptive with respect to initial wage rates. The purpose of this change was to limit the Board's discretion and to provide a consistent method for determining initial wage rates.</p> <p>With this context in mind, we are still of the view that the legislative scheme contained in sections 33, 33.1 to 33.7 and 33.8 of the <i>Act</i> leaves little room for Board discretion regarding short term average earnings. It remains our submission that these sections, taken as a whole, set out a detailed and prescriptive method of determining average earnings. The legislation goes so far as to provide a list of deductions made in every</p>

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				<p>instance to arrive at net short-term average earnings. It is our submission these detailed provisions leave no room for the Board to read in a list of exceptional circumstances in the initial rate setting process.</p> <p>We are concerned that your proposal attempts to undue what the Legislature developed after significant consultation with stakeholders. By introducing a list of "exceptional circumstances" for short-term average earnings, the proposed policy changes erode the certainty the legislature provided.</p>

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1	<b>University of Victoria</b>	Employer	Option 2	With a number of on call workers with varying work patterns, flexibility is necessary to ensure fairness.
2	<b>Central Interior Logging Association</b>	Employer	Option 2	The CILA supports WorkSafeBC in the proposed policy amendment to allow WorkSafeBC increased flexibility to more accurately determine earnings for workers that have variable earnings as outlined in Appendix A (#65.01). The CILA also supports the proposed policy amendment (#65.02) to determine time of injury earnings for workers with two jobs. We support the concept of determining the time of injury earnings based on the combined earnings of both jobs. We have no comments on proposed policy amendment #65.03 pertaining to Fishers.
3	<b>BC Construction Association</b>	Employer	None	<p>The BC Construction Association represents approximately 2000 construction companies from across British Columbia active in all areas of the sector. We are in complete agreement with the concerns expressed by COCA, particularly around the complexity and uncertainty that the current proposals create. We also echo the concern that the "more flexible approach" may result in unjustified, higher short-term wage loss payments.</p> <p>We urge you to consider COCA's potential solution which provides a more fair and balanced approach. We agree with their recommendation that WorkSafeBC use the worker's earnings for the previous year. WorkSafeBC could develop criteria to identify these exceptional cases. The average earnings for these very exceptional cases could then be determined by your senior adjudicative staff.</p>

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4	BC Nurses' Union	Worker	Option 2	<p>Members of the BC Nurses' Union may be affected by the Board's policy regarding variable earners. A large part of the BCND membership works non-standard shifts. There are also members that may work on successive contracts of service. It is our view that there should be a sufficient amount of flexibility in policy in order to ensure that the average earnings calculated for the worker will best reflect the actual loss of income due to the injury. The proposed Option 2 to increase the flexibility under policy to address certain circumstances moves in the right direction but needs to go further in order to fairly reflect the earning capacity at the time of the injury.</p> <p>We will address the four specific items in the Discussion paper in the order they appear in the paper.</p> <p><b>4.1 Day Call Workers</b></p> <p>There should be flexibility to set the rate on what best reflects the actual loss. If there is evidence the worker is a regular earner in a day call circumstance the rate should be set based on the date of injury earnings. The worker would have had the opportunity to have regular earnings after the injury and would not be able to do so due to the injury. Their short term wage rate should be set the same way it would be for any other regular worker. If the worker is disabled they lose the opportunity to take employment. In order to ensure fairness the short term wage rate should be set based on the wage rate on the date of injury (DOI).</p> <p>If there is evidence the worker would not work in day call employment on a regular basis then it would be appropriate to use a period longer than the rate on the date of injury.</p>

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				<p>Relevant evidence would include the period the day call worker was expected to be offered such work and the earning of other workers in the same or similar positions.</p> <p>There should not be a presumption against a worker having or seeking day call work. The practices as set out in policy item #34.32 regarding potential loss should be applied to day call workers. There should be a presumption that the worker would take or seek work after the date of injury unless there is evidence to rebut that presumption. In circumstances where there is evidence to rebut the presumption a longer period could be used to establish the initial wage rate. There should be flexibility to use 3 month or one year prior earnings where those earnings would best reflect the actual loss.</p> <p><b>4.2 More flexible approach to setting short term average earnings for Variable Shift Workers.</b></p> <p>The example provided in the discussion paper of going from part time to full time is a good example of where a flexible approach should be used. If there has been a change in employment status and there is good evidence that the 3 month rate will not accurately represent the actual loss there should be the flexibility to use the period from the time the employment status changed. As an example a worker may have been in a 0.5 FTE variable shift position until one month before her injury. She changes to a 1.0 FTE Variable shift position one month prior to DOI. It would be most accurate to use the earning as of the date of the beginning of the actual change to the 1.0 FTE position. Where there is a change in circumstance within the period of the three months that is now used to use the earnings in the period immediately after there was a change in the employment status.</p>

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				<p>Periods of compensable or non compensable illness should be deducted from the short term wage rate unless they are less than 5%, which could be considered an average absenteeism rate. Deducting larger periods of absenteeism should take place because the rate would not reflect the actual loss if the reason for the prior absence(s) were no longer present.</p> <p><i>Exclusion of Periods of Compensable Wage Loss</i></p> <p>We agree with the recent change to policy made by the Board of Directors that prior periods of compensation should be excluded from average earnings for long term wage rates. This exclusion should be made for short tem wage rate. There is no logic to accepting the exclusion for long term but not short term.</p> <p>The exclusion should be expanded to include non compensable absences where the evidence would lead to a conclusion the absence does not reflect the actual loss. As an example a worker may have been on maternity/parental leave prior to their injury. They returned to work one month prior to the injury. They would have continued to work on a regular basis but for the injury but due to the use of the month or other period to calculate average earnings for short term wage loss due to their employment status the average earnings is set at only one third of what the actual rate this worker would have earned for the entire period of short term wage loss. In order to ensure that the average earnings most accurately reflect the actual loss resulting from the injury any period of absence that can not be shown to likely continue into the future should be excluded from average earnings. This would apply to other circumstances such as education leaves, or illnesses that were not likely to result in significant future absences. Only where it can</p>

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				<p>be shown that it is likely the absence is greater than an average absenteeism rate of 5% and the absenteeism would likely continue into the future should the period not be excluded. For example a worker may have a chronic medical condition that has resulted in fairly consistent absences from work. Those periods of absences should not be excluded. Another worker may have suffered a broken limb in a non-work related sporting incident. That disabled them from working for two of the three months prior to the date of injury. The limb has healed and it is not likely to result in ongoing disability. That period should be excluded from the calculation of the average earnings.</p> <p>As in item 4.2 above any period of absence greater than 5% representing an average absenteeism should be removed from the calculation of the wage rate where doing so would best reflect the actual loss.</p> <p><b>4.3 Consistent terminology</b></p> <p>The discussion paper states that the terms "date of injury" and "time of injury" are not synonymous. The paper does not describe the differences between the two terms. A telephone inquiry to the Policy and Research Division did not result in much more clarity of the difference between the two terms or the need for changing this in policy. As best as we can understand the difference between the terms the date of the injury would mean the actual day that the injury occurred. The time of the injury would be a looser term that could encompass the day, the month prior, three months prior, etc. It is our view that this more ill-defined term of the time if the injury is not necessary. The policy makes it fairly clear that for calculating short term average earnings at the date of injury in most circumstances is based on the earnings on that date but in other specific</p>

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				<p>circumstances may be calculated using longer periods. In our view this change in language is unnecessary and may actually lead to more confusion in regards to the terms.</p> <p><b>Conclusion</b></p> <p>Option 2 is preferred as a flexible approach is needed to set a wage rate that best reflects the actual loss due to the injury.</p> <p>In addition to the changes currently proposed in the discussion paper period of absence for other than compensable injuries should be deducted from the calculation of the wage rate whenever that absence would result in a rate that does not best reflecting the actual loss under section 33 of the Act.</p>
5	<p><b>COCA</b> (two identical submissions – one from COCA’s Chairman and one from COCA’s President)</p>	Employer	None Stated	<p>I am responding on behalf of COCA, which represents 17 construction associations, with members from all parts of British Columbia, from every sector and from every size of company.</p> <p>This Discussion Paper deals with "Day or on call workers" who are defined as "those who "Work under a series of very short successive contracts of service." The Paper further explains: "These workers are often employed under a series of short-term employment contracts punctuated by breaks in employment." This description encompasses a substantial number of workers within the Construction Industry as well as many other industries.</p>

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				<p>The Paper deals with the establishment of short-term average earnings. The vast majority of workers' compensation claims are short term, so the Paper is widespread in its impact. We have serious concerns about the proposals made within this Paper. We believe that the proposals are overly complex and provide too much uncertainty as to how wage rates will be established. We also believe that there is a significant risk that the "more flexible approach" will result in unjustified, higher short-term wage loss payments.</p> <p>The problem occurs because the Paper proposes more "flexibility" in setting short-term average earnings." The Paper states:</p> <p>"Generally, the three month period is an appropriate amount of time to use to determine short-term average earnings. However, there are instances when a shorter time period would be a better reflection of the worker's loss. For example, in the instance of a worker who made a permanent switch from part time to full-time hours one month prior to the date of injury, using their earnings in the one month preceding their injury date would provide a more accurate picture of the worker's loss at the time of injury. Conversely, there are instances when a longer time period would be a better reflection of the worker's loss. For example, in the instance of a worker who was unable to work the majority of the three month period due to a non-compensable illness, a longer period of time may better reflect the worker's loss at the time of injury.</p> <p>Policy does not currently contemplate using a shorter or longer amount of time regardless that it might better reflect the worker's actual loss. To accommodate such</p>

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				<p>an approach, policy would have to be revised to introduce some flexibility in determining an appropriate period of time to use to set time of injury earnings.</p> <p>The benefits of introducing a more flexible approach would have to be balanced against the WCB's desire for consistent application of policy." (pages 3-4)</p> <p>Our concern is that this approach will lead to the choice of the highest average earnings, not the most representative. We believe that there is a better and simpler solution that provides a more fair and balanced approach. The three month period that is described in the above paragraph requires the Claim Manager to research and determine the worker's earnings for that three month period.</p> <p>Instead, we recommend that WorkSafeBC use the worker's earnings for the previous year. In all but very exceptional cases this would produce the most representative average earnings. WorkSafeBC could develop criteria to identify these exceptional cases. The average earnings for these very exceptional cases could then be determined by your senior adjudicative staff.</p> <p>Our proposal would result in the use of a longer-term history of wages and this would give the fairest representation of what workers' compensation is designed to do - replace 90% of the net loss of earnings when a worker suffers an occupational injury or disease.</p> <p>As an adjunct to this proposal, we recommend that you link your database with Revenue Canada's so that you can readily obtain the worker's earnings for the previous year. (Similar to the links that you now have with respect to employer information.)</p>

## STAKEHOLDER SUBMISSIONS TABLE

### VARIABLE SHIFT WORKERS

#### AUGUST 13 – OCTOBER 19, 2008 CONSULTATION PERIOD

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				We believe that our proposal would be simpler to administer and would result in the payment of the appropriate level of wage loss compensation.
6	<b>Employers' Advisers Office</b>	Employer	None	<p>While our office takes no position regarding the acceptability/appropriateness of the above noted document on behalf of the employer community, we provide the following comment outlining the impact we see the proposed amendments having on the system as a whole.</p> <p>There are four distinct proposals related to setting short term average earnings, as follows:</p> <ul style="list-style-type: none"> <li>• to expand the variable earners policy to include on-call workers who have an ongoing employment relationship with one or more employers;</li> <li>• to provide more flexibility in determining an appropriate period upon which to base a worker's average earnings;</li> <li>• to exclude periods when the worker is on wage loss compensation benefits; and</li> <li>• to provide consistent terminology throughout the policy documents whenever possible.</li> </ul> <p>We will begin with the last issue. We have no concern with the proposed changes to "time of injury" throughout the documents.</p> <p>With respect to other changes in policy item #65.00, the change from "actual earnings</p>

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				<p>on the day of injury" to "rate of pay on the day of injury" is a substantive change which was not addressed in the discussion paper. "Actual earnings" could refer to the amount of money the employer paid the worker on the day of injury, while "rate of pay" more specifically refers to the hourly, daily or monthly rate agreed upon by the parties. We take no issue with this change and believe it provides clarification, but recommend you provide some discussion of this change in your discussion paper.</p> <p>With respect to the proposed changes to policy item #65.01, we have no concerns with changing the name of policy.</p> <p>However, we have concerns both with adding on-call workers to the list of variable earners and with the creation of "exceptional circumstances" for determining short-term average earnings. We do not believe that section 33.1(1) of the Act does allow the Board the flexibility to create these exceptions.</p> <p>Section 33.1 states that when setting the initial rate, the average earnings of a worker are 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 the injury. The only exceptions to this general method of determining initial average earnings are set out in sections 33.5 <i>casual workers</i>, 33.6 <i>persons with coverage under section 2(2)</i> and 33.7 <i>persons without earnings</i>. For each exception, a different method of calculating initial average earnings is specified. Initial average earnings for casual workers are based on earnings in the 12 months prior to the date of injury; for those with coverage under section 2(2) initial average earnings are based on the amount of coverage purchased; and for those without earnings, average earnings are determined in a manner the Board considers</p>

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				<p>appropriate.</p> <p>Regarding "on call" workers, under the current legislation it is the pattern of employment that determines how a worker's average earnings will be determined. If a worker has a regular pattern of employment, section 31.1(1) determined their average earnings. If they have a casual pattern of employment, section 33.5 applies. Since "pattern of employment" is not a defined term under the Act, the Board can and has established a definition by policy.</p> <p>The examples used in the discussion paper to argue in favour of adding on-call workers to the list of variable earners addresses issues such as working under a series of very short successive contracts of service, making a significant amount of money in a few days, not working every day, earning wages that vary from one job to another and having breaks in employment. The paper then states that these workers are categorized as "regular" workers and their average earnings are determined pursuant to section 31.1, yet these same factors are listed in policy item #67.10 as indicia of a casual pattern of employment.</p> <p>It is our submission that the Board does not need to amend the variable shift workers policy in order to average the wages of on-call workers over a greater period of time. The Board can simply apply policy #67.10 in a more considered manner and achieve the same result. There will certainly be on-call workers who, after careful consideration, meet the requirements of a regular worker (for example, nurses who work on call for the same employer for extended periods of time), and those whose employment reflects a casual connection to the workplace. If adjudication staff apply the casual pattern of</p>

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				<p>employment policy in a considered manner, the concern regarding inflated short term average earnings would be addressed at the outset of a claim.</p> <p>Regarding the proposal to exclude periods of time when a variable earner is in receipt of compensable wage replacement benefits, we submit this is, in effect, creating an exceptional circumstance. With respect, the only exceptions to section 33.1(1) are sections 33.5, 33.6 and 33.7. The "exceptional circumstances" provisions set out in section 33.4 are specifically excluded from consideration for initial average earnings.</p> <p>We appreciate that the proposed revision is an attempt to treat workers who work other than a 5 day work week in a fair and equitable manner, however, we believe that Board is attempting to do indirectly that which is prohibited directly. The legislature has specifically provided "exceptional circumstances" for long term average earnings only. We submit that the Board cannot now create a policy to establish exceptional circumstances for initial average earnings.</p>