

Resolution of the Panel of Administrators

Number: 2002/07/16-04

Date: July 16, 2002

Subject: Average Earnings — Exceptional Circumstances

WHEREAS:

Pursuant to section 82 of the *Workers Compensation Act*, R.S.B.C. 1996, Chapter 492 and amendments thereto ("Act"), the Panel of Administrators ("Panel") must approve and superintend the policies and direction of the Workers' Compensation Board ("Board"), including policies respecting compensation, assessment, rehabilitation and occupational safety and health, and must review and approve the operating policies of the Board;

AND WHEREAS:

Section 33.4 of the Act provides, in part, that if exceptional circumstances exist such that the Board considers 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;

AND WHEREAS:

The Board's policy regarding exceptional circumstances is provided in policy item #67.60 of the *Rehabilitation Services and Claims Manual Volume II* ("RS&CM II");

AND WHEREAS:

Clarification is required to indicate in what respect the application of section 33.1(2) may be considered inequitable, and to provide criteria for determining if a worker's circumstances may be considered exceptional;

THE PANEL OF ADMINISTRATORS RESOLVES THAT:

1. Policy item #67.60 of the RS&CM II is amended to specify in what respect the application of section 33.1(2) may be considered inequitable.

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2. Policy item #67.60 of the RS&CM II is also amended to provide specific criteria for determining exceptional circumstances.
 3. The amendments to policy item #67.60 of the RS&CM II, as set out in Appendix "A" are approved.
 4. This resolution is effective on July 16, 2002, and the new policy and policy changes apply to all decisions made on or after that date.

DATED at Richmond, British Columbia, July 16, 2002.

APPENDIX A

Additions in **bold**; deletions in ~~strikethrough~~

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

~~This provision applies where a worker does not fall under any of the exceptions and using the general rule for determining a worker's long-term average earnings would be inequitable. The following circumstances warrant the application of section 33.4:~~

- ~~The worker is a student on a designated path of study at a provincially recognized 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. As a result, the worker's average earnings in the 12-month period immediately preceding the date of injury~~

do not equitably represent his or her loss of earnings. In this case, the Board will determine the worker's long-term average earnings with reference to the worker's probable yearly earning capacity.

- The worker is under the age of 25 and had attended a provincially recognized institution full-time in the two years immediately preceding the date of injury. Unless there is evidence to the contrary, the Board will assume that, due to the worker's young age, the employment at the time of injury was not of a permanent nature. As a result, the worker's average earnings in the 12-month period immediately preceding the date of injury do not equitably represent his or her loss of earnings. In this case, the Board will determine the worker's long-term average earnings with reference to the worker's probable yearly earning capacity.
- 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 an illness, education leave, or maternity/paternity leave. Where the Board determines that the worker had a history of regular employment, the worker's average earnings in the 12-month period immediately preceding the date of injury will not equitably represent his or her loss of earnings. In determining the worker's long-term average earnings, the Board may deduct the period of an absence or use a longer period of the worker's employment history (e.g., 24-month period).
- 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 (for example, revenue generating equipment, employee wages). The Board will consider the worker's earnings over a longer period of time if the information required to determine the worker's average earnings is not available in the 12-month period immediately preceding the date of injury.

Exceptional circumstances that are not identified in this policy may only be considered for the application of section 33.4 with the approval of the President, or delegate.

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 inequity is that the level of compensation calculated 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 following criteria shall be applied to determine if a worker's circumstances are exceptional:

- a) Where the Board determines that the worker had a history of regular full time 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 illness, educational or maternity/paternity reasons.

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

- b) 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.

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

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- **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., revenue generating equipment and/or employee wages).**

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.