

CHAPTER 5

WAGE - LOSS BENEFITS

#33.00 INTRODUCTION

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

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

#34.00 TEMPORARY TOTAL DISABILITY PAYMENTS

Where a temporary total disability results from an injury, Section 29(1) provides that the compensation consists of periodic payments to the injured worker equal in amount to 75% of her or his average earnings.

#34.10 Meaning of Temporary Total

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

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

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

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

Most compensable injuries and diseases involve an initial period of temporary disability during which wage-loss benefits are paid. This disability will usually improve in time until it disappears entirely or becomes permanent. However, in the case of some diseases there is no initial period of temporary disability; the condition is permanent right from the beginning and no wage loss is payable. Raynaud’s Phenomenon, is one of these diseases. There are also others, for example, hearing loss caused by exposure to industrial noise. The worker’s only entitlement in these cases is to be assessed for a permanent partial disability award.

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

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

#34.11 Selective/Light Employment

STATEMENT OF PRINCIPLE

Selective/light employment is a temporary work alternative, offered by an employer, that is intended to promote a worker’s gradual restoration to the pre-injury level of employment. The Board supports selective/light employment as an important component of a worker’s rehabilitation and recognizes the value of maintaining an injured worker’s positive connection to the workplace. It has been amply demonstrated that the earlier a worker is able to safely return to productive employment following an injury, the more likely he or she is of obtaining maximum recovery.

CRITERIA

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

- While the compensable injury may temporarily disable the worker from performing his or her normal work, the worker must be capable of undertaking some form of suitable employment.
- The work must be safe for the injured worker to perform. The worker's attending physician must be apprised of the nature of the work and conclude that it will neither harm the worker nor slow recovery. Should the attending physician be unable or unwilling to provide the required advice, a Board medical advisor must make the necessary determination.
- The work must be productive. Token or demeaning tasks are considered detrimental to the worker's rehabilitation.
- Within reasonable limits, the worker must agree to the arrangement.

INTERVENTION

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

- The worker and employer are in disagreement over the terms of the return-to-work.
- There is a request for intervention by either the worker or employer.
- The Board officer adjudicating the claim considers that further inquiry is required.

ADJUDICATION

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

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

Where a worker accepts suitable selective/light employment, benefit entitlement will be determined under Section 30 of the *Act*.

Should the Board determine that the worker's refusal is unreasonable, benefit entitlement may be determined under Section 30 of the *Act*.

#34.12 *Claimant in Receipt of Permanent Disability Pension*

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

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

#34.20 *Minimum Amount of Compensation*

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

		\$ Per Week (Net)	
July 1, 2000	—	December 31, 2000	292.90
January 1, 2001	—	June 30, 2001	298.63
July 1, 2001	—	December 31, 2001	303.32
January 1, 2002	—	June 30, 2002	304.36

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

Consider, for example, the case of an injury occurring on July 2, 1986, when the minimum amount of wage-loss compensation was \$201.40 (net) per week.

Worker's Actual Weekly Earnings	Weekly Compensation (Net)
\$268.53	\$201.40
220.00	201.40
199.00	199.00 (100%)

The minimum is subject to Consumer Price Index increases. However, these increases only apply to injuries or disablements occurring after they come into force. Existing payments are not automatically increased to a new minimum, although they may be the subject of Consumer Price Index increases in their own right.

#34.30 Commencement of Payment

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

While the plain wording of the section would seem clearly to indicate that "day of the injury" means calendar day, the Board finds that the intention of the legislation is not to provide payment for the "shift" on which the worker is injured but to provide payment for any subsequent "shift" on which the worker is disabled. Payment of compensation, therefore, will commence effective the shift next following the shift on which the worker is injured.

#34.31 *Worker Continues to Work After Injury*

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

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

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

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

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

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

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

In interpreting "potential loss" no rigid rules can be established since every case will have to be determined on the information received. In situations where there is a lay-off due to lack of work, a worker would normally be considered as having suffered a potential loss. The position would be similar where a partially disabled worker has continued work on light work and has been laid off due to a lack of work, but payments on such a claim would be considered under Section 30 of the *Act*. The general expectation in those situations is that the claimant would, if not injured, have immediately sought new employment and the Board should not speculate as to if and when it would have been found. If, however, there is evidence to rebut this general expectation, the Board may conclude in a particular situation that there was no actual or potential loss. For example, suppose a homemaker has been injured in the course of a single day's work at a polling station during an election and has no other attachment to the labour force whatsoever. The homemaker would not normally be available on the general labour market beyond the one day of work at the polling station.

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

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

#34.40 Pay Employer Claims

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

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

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

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

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

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

#34.41 Vacation Pay

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

#34.41A Vacation Pay School Teachers

School teachers are paid an annual salary by School Boards, but the salary is usually paid by dividing it into ten equal payments. Prior to February 28, 1975, the Board's policy was that no wage-loss benefits be paid for the vacation months, July and August, because there was no loss of earnings in those months. The only exception was where the school teacher could provide evidence that alternative employment was going to be undertaken during the vacation and because of the injury the school teacher was prevented from doing so. Since February 28, 1975, the Board's policy has been to continue wage loss in the vacation months, but to make these payments to the employer where, as is usually the case, the employer continues the teacher's salary during the disability. If the employer ceases to pay the teacher for a period because of a lay off or for budgetary reasons, payments by the Board are made direct to the teacher in that period. Payments could also be made directly to the teacher where there was evidence of an additional loss of earnings in the summer months because of the disability, but only then to the extent that the total earnings did not exceed the statutory maximum. The same principles apply to other School Board employees paid on the same basis as teachers.

#34.42 Termination Pay

The language of Section 34 is broad enough to cover termination pay.

In a Board decision, the claimant suffered a compensable injury on October 28. On October 30, the employer terminated the service of the claimant, and

pursuant to Section 19 of the *Mines Act*, the claimant received a termination payment roughly equivalent to wages for one month. The Board rejected an application that the compensation payments attributable to the month of November should be paid to the employer under Section 34.

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

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

#34.50 Termination of Wage-Loss Payments

Section 29(1) provides that payments for temporary total disability will continue only so long as the disability lasts. This means that the benefits payable under this section will be terminated when the worker's physical impairment resulting from the injury ceases to be "temporary total", i.e. becomes partial, disappears entirely or stabilizes. If the worker's impairment remains temporary, but is only partial, there may be entitlement to temporary partial disability payments under Section 30(1) of the Act. If the worker's impairment remains but ceases to be temporary, there may be entitlement to a permanent disability award under Section 22 or 23 of the Act, which will commence at the date when the temporary disability payments under Section 29 or 30 were terminated.

#34.51 Other Factors Prevent Return to Employment

The general rule is that, while a claimant's temporary total disability lasts, wage-loss payments continue to be paid even though some event occurs after their commencement which would in any event have meant that the claimant would not be working. Therefore such benefits are not terminated just because there is a strike, vacation, lay-off or the worker reaches official retirement age. On the other hand, as pointed out in #34.32, on a recurrence of a compensable condition occurring more than three years after the injury, wage loss will not be paid for any temporary total disability where there is at that time no actual or potential loss of earnings.

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

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

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

If a worker's physical impairment has disappeared or stabilized, wage loss must be terminated even though the worker, to prevent further occurrences of his or her condition, remains off work. Compensation is not payable for preventive measures. Alternatively, if the worker's continuing unemployment is due to factors such as fire hazard, seasonal closure, strike or lock-out, benefits are also not payable. Where, however, there is a delay in return to work due to the travelling required back to the place of employment, such as a previously injured worker returning to the home community from a treatment centre elsewhere or a few days until a company doctor clears the worker to return to work, the Adjudicator may extend full wage-loss benefits for a few days beyond the time when the disability ceased. This extension will not be granted if it is concluded that the worker is unnecessarily delaying the return to work.

#34.52 *Workers Undergoing Educational or Training Program*

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

There appear to be three different situations:

1. Retraining or Educational Program Covered by #88.50-#88.53

In certain cases, as outlined in #88.50-#88.53, the Board supports retraining or educational programs needed wholly or partly as

rehabilitation for a worker's compensable injury. This applies when a worker is no longer disabled from working and temporary disability payments have terminated, but before she or he can return to work some retraining or educational program is required. Item #34.52, however, is intended to deal with a worker who undertakes a course of training while receiving compensation for temporary disability under Section 29 or 30 of the Act and does not affect the operation of #88.50-#88.53.

2. Retraining or Educational Program Arranged Prior to Injury

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

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

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

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

3. Retraining or Education Program Arranged After the Injury

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

#34.53 *Termination at a Future Date*

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

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

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

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

#34.54 When is the Worker's Condition Stabilized

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

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

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

In the case of (a), the condition is considered permanent and the pension is immediately assessed. A condition will be deemed to have plateaued or become stable where there is little potential for improvement or where any potential changes are in keeping with the normal fluctuations in the condition which can be expected with that kind of disability. In the case of (b), the condition is still

temporary and the claimant will be maintained on temporary wage-loss benefits under section 29 or 30 of the *Act*.

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

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

1. If the potential change is likely to resolve relatively quickly (generally within 12 months), the condition will be considered temporary and the worker maintained on temporary wage-loss benefits under section 29 or section 30 of the *Act*, and a further examination will be scheduled.
2. If the potential change is likely to be protracted (generally over 12 months), the condition will be considered permanent and the pension assessed and paid immediately on the worker's present degree of disability and the claim scheduled for future review.

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

EFFECTIVE DATE: March 3, 2003 (as to deletion of reference to pension review)
APPLICATION: Not applicable.

#34.60 Payment Procedures

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

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

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

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

Where wage-loss benefits have been paid for a period of disability in excess of 13 weeks and it is not clear that the worker has actually returned to work, the Board officer does not final wage-loss compensation benefits until there has been a discussion with the worker regarding this decision. In some cases it will also be necessary to involve the services of the Rehabilitation Consultant where there are re-employment problems.

EFFECTIVE DATE: March 3, 2003 (as to reference to the Review Division)

APPLICATION: Not applicable.

#35.00 TEMPORARY PARTIAL DISABILITY PAYMENTS

Section 30(1) provides that “Where temporary partial disability results from the injury, the compensation shall be a periodic payment to the injured worker equal in amount to 75% of the difference between the average earnings of the worker before the injury and the average amount which he or she is earning or is able to earn in some suitable employment or business after the injury, and must be payable only so long as the disability lasts.”

#35.10 Meaning of Temporary Partial

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

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

#35.11 Procedure for Determining Whether Worker is Temporarily Partially Disabled

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

In other cases, it might well be necessary to have the worker examined by a Board Medical Advisor.

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

In any case where it is deemed necessary to have the claimant examined by a Board Medical Advisor, claims will be referred promptly for that purpose and the examination will be given priority. Where such an examination is conducted, the Board Medical Advisor will be required to indicate whether the worker is:

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

Where it is found that the claimant is temporarily partially disabled, the Board Medical Advisor will:

- (a) estimate the period required to full recovery or stability;
- (b) recommend a time for a future examination and record that on the claim;

- (c) specify any medical restrictions to re-employment, such as limitations on lifting activities, with the reason for such restrictions;
- (d) record any medical or other factors found in the examination which are considered significant in the determination of the claimant's recovery process.

Where the Adjudicator intends to rely for his or her decision upon a report from the claimant's attending physician or consulting specialist, these same general questions should be clarified through contact with that physician before any further action is taken. Again, such contact should be by the Board Medical Advisor or by the Adjudicator after consultation with the Board Medical Advisor.

Where a worker is medically judged to be only partially disabled and the condition remains temporary, any further wage-loss payments should then be processed under Section 30 of the Act, and the claim shall be referred immediately to a Rehabilitation Consultant indicating that benefits are now being paid under that section. This referral must be done in all cases, irrespective of whether the claim has previously been referred to a Rehabilitation Consultant.

The Adjudicator will then send a letter to the worker, with a copy to the employer and doctor, advising:

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

#35.20 Amount of Payment

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

- (a) the average earnings before the injury, less the amount which the worker is now earning; or,

- (b) the average earnings before the injury, less the amount which the worker is now able to earn.

The amount paid will be 75% of whichever of (a) and (b) is the less.

The amount of the payment will be the decision of the Adjudicator. During the period of temporary partial disability, the Rehabilitation Consultant will provide the Adjudicator with a report every month, or at shorter intervals where mutually considered advisable. To ensure income continuity where the worker is not employed, the first two-week payment may be processed in advance of the receipt of the Rehabilitation Consultant's report. The report will indicate what the worker actually earned in the intervening period, if anything, and will estimate what the worker could have earned in the opinion of the Rehabilitation Consultant. Payments by the Adjudicator will be based upon this information and on any other evidence considered significant.

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

The Adjudicator shall, in all cases, make the claimant aware of the reasons for the payments being made under Section 30 and more particularly, when only partial payments are made and the claimant is not working.

#35.21 *Availability of Jobs*

In estimating what a worker could have earned, the Rehabilitation Consultant will consider such factors as:

- (a) the medical condition of the claimant and the limitations this condition places upon re-employment;
- (b) the availability of work in the claimant's community or, where appropriate, in the Province at large;
- (c) any personal limitations upon re-employment, such as age, lack of required skills or language;
- (d) any external limitations upon re-employment, such as the possibility of loss of pension entitlement or plant seniority;
- (e) the worker's own efforts and cooperation in becoming re-employed;
- (f) general or local depressed economic conditions which might have restricted the claimant's re-employment irrespective of the occurrence of the injury.

The legislation quite clearly envisages a distinction between Section 30 and 23(3) in determining what jobs are available to a claimant. (5) Section 30 uses

the words, “in some suitable employment” whereas Section 23(3) states, “in some suitable occupation”. The word, “employment” has a connotation of immediacy while “occupation” tends to suggest a more long-term concept. In light of this, the jobs that are looked at in assessing a loss of earnings pension must be available in the long run and must be within the worker’s capability. The jobs that are recommended as being suitable for the worker in calculating a loss of earnings pension need not be available at the time the recommendation is prepared, but should be available to the worker on a fairly regular basis over a reasonable period of time. The measure of what constitutes a reasonable period would depend on the particular circumstances of each claim with a major factor being the worker’s age.

In determining Section 30 benefits, the employment opportunity or opportunities should be available immediately or within the period under review (two weeks, one month) and there should be some certainty that the employment opportunity or opportunities would be open to the worker should he or she choose to apply. It is not appropriate to suggest for example that a “self service gas station attendant’s position is available from time to time in the community and therefore the worker could obtain this job”. This may be an appropriate recommendation in the development of a loss of earnings pension, but it is not suitable for determining Section 30 benefits which are more immediate and for a limited time duration.

With regard to item (f) above, the Board has to determine whether the worker’s employment problem is primarily due to a residual temporary disability or is more likely to be due to the lack of suitable employment occasioned by economic circumstances. It is appreciated that this will frequently be a difficult matter to fully resolve and while specific evidence to support a given decision is desirable, there will inevitably be circumstances which will have to be resolved on the basis of the best combined judgment of the Rehabilitation Consultant and Adjudicator. The general approach followed is to compare the situation of the worker with the worker’s fellow employees.

If the worker’s fellow employees are on a lay-off and also unemployed due to a lack of alternative work resulting from an economic down-turn and had the worker not been injured, he or she also would have been similarly laid off and similarly unemployed, it would be reasonable to assume that the economy is a major factor in the loss of income situation and not totally the injury. As such, the worker should not be entitled to full wage-loss benefits on a “could earn” basis simply on the grounds that the jobs that normally would have been available are not then available due to an economic down-turn. While it could be argued that the worker should not be paid any benefits in order to equate his

or her status with that of fellow workers, it is felt that a payment computed on the basis of the difference between the pre-injury wage rate and the wage rate of the jobs that would otherwise have been available were it not for the down-turn would be more in keeping with the intent of the Act and Board policy. It should be stressed at this point that this approach should not be confused with the situation where the worker's remaining disability makes him or her less viable as a potential candidate for employment in the labour force in competition with other non-disabled workers. In situations such as this, the interpretation of "reasonably available" would require that the worker be paid full benefits on the basis that the work is not reasonably available.

If there has been no lay-off and the worker's fellow employees are still working, and had the worker not been injured he or she also would have continued to be employed, then it is fair to say that even though alternative jobs are not available due to economic factors, the primary cause of the worker's loss stems from the injury. As such, the worker should be entitled to Section 30 benefits up to and including full wage-loss benefits if there are no jobs reasonably available in the period being considered. Jobs that are not available due to economic factors should therefore not be used as a measure of "could earn" to potentially reduce the level of temporary partial disability benefits.

Where a claimant and the Vocational Rehabilitation Consultant are working toward an employment objective and as the result the worker is unable to accept a lower paying alternative job in the interim, to deny full benefits to such a worker would be an inappropriate application of the Board's policies with respect to temporary partial disability benefits. In such a case, the worker and the Rehabilitation Consultant are working toward an objective and this could be frustrated by suggesting that the worker could take a temporary, lesser paying job. Where the Rehabilitation Consultant and the worker are striving to carry out a rehabilitation plan, and all parties are cooperating in good faith, the Rehabilitation Consultant is not required to suggest in his or her recommendation that the temporary partial disability benefits be based on a short-term, temporary, lesser paying job that the worker could do if this is incompatible with the demands and commitment required from a worker to meet the vocational objective.

#35.22 *Calculation of Earnings*

The average earnings of the claimant before the injury are for the purpose of Section 30 generally calculated in accordance with the Board's practice set out in Chapter 9. Therefore, where the period of temporary disability has gone beyond eight weeks, the rate set at the time of the 8-week rate review will be used. (6) An exception to this is made in computing temporary partial disability

entitlements where a worker returns to the same employer on a suitable employment basis at a reduced wage, and where the rate has been reduced at the 8-week point following the injury. In calculating the worker's loss, the Adjudicator uses the wage rate at the time of the injury and not the 8-week rate set on the basis of average earnings. If the worker returns to a different employer, the 8-week rate is used.

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

Earnings are, where possible, calculated on a weekly basis. Where, for example, a worker has worked for only one day in a week, the earnings in that day are considered the week's earnings. The worker will not be paid for the other days of that week on the assumption that there were no earnings.

#35.23 Minimum Amount of Compensation

The minimum amount of compensation is calculated in the manner set out in #34.20 for temporary total disability but to the extent only of the partial disability. (7)

Where a worker's earnings are less than the minimum and he is receiving compensation in an amount equal to his earnings, he will receive compensation equal in amount to his loss of earnings in any case where Section 30 applies. The loss will not be reduced by the 75% factor.

#35.24 Workers Engaged in Own Business

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

The general position of the Board is that, in determining earnings on a claim, dividends from investments in corporations are not considered. The Board accepts at face value the wages paid by a company to its principal if they are

reasonably related to what is done. However, where the principal receives nominal or no wages for the work done the Board will estimate what it considers to be a reasonable wage for that work.

In determining wage rates of principals for compensation purposes, regard is primarily had to the earnings rate reported by the employer.

If reported earnings are being received by a principal's or shareholder'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 or shareholder. 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 or shareholder'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 or shareholder. 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.

Similar principles operate when, although the claimant was not engaged in his or her own business prior to the injury, the claimant commences a business after the injury. Being in control of the business, the claimant determines what personal salary is paid. The claimant can, and will commonly, take no earnings at all, or very low earnings, out of the business when it is starting up in the expectation that he or she will reap the benefit later. Yet, the claimant may be doing a substantial amount of work which, under normal circumstances, would command a significant wage. In such a situation, the only way the Board can determine the claimant's real earnings is to estimate the value of the work the claimant does.

#35.30 Termination of Payments

Section 30(1) provides that payments for temporary partial disability continue so long as the disability lasts. This means that the benefits payable under this

section will be terminated when the worker's physical impairment resulting from the injury ceases to be temporary partial, i.e. it disappears entirely, becomes total or stabilizes. If the worker's impairment remains temporary, but is total, there will be entitlement to temporary total disability payments under Section 29(1) of the Act. If the impairment has stabilized, the worker will be entitled to be assessed for a permanent partial disability award. The principles to be followed in determining whether a condition has stabilized are set out in #34.54.

Benefits will be terminated under Section 30(1) where, notwithstanding the existence of a temporary partial physical impairment, the worker is suffering no loss of earnings as a result of the injury.

#35.40 Manner of Payment

Temporary partial disability payments are made in the same manner as temporary total disability payments. (8)

NOTES

- (1) See #34.54
- (2) S.29(2)
- (3) See #34.40
- (4) See #73.50; #78.00
- (5) See #40.00
- (6) See #67.20
- (7) S.30(2)
- (8) See#34.60