

## CHAPTER 6

### PERMANENT DISABILITY AWARDS

#### **#36.00 INTRODUCTION**

Permanent disability awards are made when a worker fails to completely recover from an industrial injury or disease, but is left with a permanent residual disability. They commence at the point when the worker's temporary disability under the claim ceases and the condition stabilizes. They may be total (Section 22) or partial (Section 23).

Permanent disability awards are calculated on the basis of a worker's "average earnings". The computation of average earnings is dealt with in Chapter 9.

#### **#37.00 PERMANENT TOTAL DISABILITY**

Section 22(1) provides that "Where permanent total disability results from the injury, the compensation must be a periodic payment to the injured worker equal in amount to 75% of the worker's average earnings, and must be payable during the lifetime of the worker."

A pension is awarded to a worker which continues for life. Some examples of permanent total disability are paraplegia, quadriplegia, hemiplegia, total blindness, and severe loss of cerebral powers. Combinations of permanent partial physical impairments can also become permanent total disabilities, such as bilateral amputations of arms and legs.

#### **#37.10 Commencement of Pension/Wage-Loss Payments Prior to Award**

Permanently totally disabled workers are awarded pensions as soon as it is clear to the Board that they will survive their injuries.

From the date of the injury up to the date of the award, wage-loss payments are made at the same rate as the eventual pension. (Reference should be made to #66.20 regarding minimum policy in personal optional protection cases.) However, it may be necessary to make these payments at a provisional rate pending clarification of the worker's pre-injury earnings. (1)

### **#37.20 Minimum Amount of Compensation**

Section 22(2) provides that the compensation awarded for permanent total disability cannot be less per month than the minimum set out below. This minimum is subject to Consumer Price Index increases.

<b>Date</b>			<b>\$ Minimum</b>
July 1, 2000	—	December 31, 2000	1,269.36
January 1, 2001	—	June 30, 2001	1,294.21
July 1, 2001	—	December 31, 2001	1,314.54
January 1, 2002	—	June 30, 2002	1,319.06

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

Section 33(5) provides that the compensation payable to workers who, on July 1, 1974, were in receipt of compensation for permanent total disability cannot be less than the amount set out above. This amount is subject to Consumer Price Index adjustments.

Where workers partially commuted their pensions prior to July 1, 1974, and are eligible for the increased minimum provided by Section 33(5), they do not simply receive a percentage increase on the benefits currently being received. The full amount of the increased minimum is paid, less the actual dollar amount that has been commuted. (2)

### **#37.21 Dual System of Measuring Disability**

The statutory minimum only applies in cases where a worker is found to be 100% disabled on a physical impairment basis. It does not apply when the percentage of disability on a physical impairment basis is less than 100% but the worker is found to be totally unemployable under the dual system of measuring disability. (3)

### **#37.30 Manner of Payment**

A monthly pension is awarded which is paid by cheque or, if the worker elects, by electronic direct bank deposit, at the end of each month. The same procedures apply as in the case of permanent partial disability awards. These are set out in #41.00.

### **#37.40 Reopening Claims**

Where a claim involving a permanent total disability is reopened, no payments of wage loss can be made. Wage loss may, however, be payable where a claimant

receiving a permanent total disability pension of less than the current maximum suffers a new injury at work. The amount payable would be the difference between the pension being paid on the old claim and 75% of the wage rate on the new claim, limited by the current maximum.

### **#38.00 PERMANENT PARTIAL DISABILITY**

The Board has two basic methods of assessing permanent partial disabilities. These are:

1. Loss of function/physical impairment method.
2. The projected loss of earnings method.

The use of these two methods is termed the “Dual System”. These two methods are considered in every case where applicable, the amount of the pension being the higher of the two figures produced by the two methods.

#### **#38.10 Decision-Making Procedure**

The Disability Awards Officer or Adjudicator in Disability Awards is responsible for seeing that the necessary examinations and other investigations are carried out with respect to the physical impairment assessment and they make the decision on the degree of disability and whether a pension should be awarded.

Permanent functional impairment evaluations will be conducted by either a Disability Awards Medical Advisor or a Board authorized External Service Provider. The Rehabilitation & Compensation Services Division sets protocols and procedures for these evaluations. The Board determines whether the evaluation is referred to a Disability Awards Medical Advisor or an External Service Provider based on the nature of the injury and other relevant criteria as set out in the protocols.

The determination of whether there is a permanent psychological impairment, and the severity of the impairment, is made by either a Board Psychologist or a Board authorized External Service Provider. Once this evaluation is completed, the claim is referred to the Psychological Disability Committee to assess the percentage of disability resulting from the permanent psychological impairment. The Disability Awards Officer or Adjudicator assesses any percentage of disability for physical impairment and, in conjunction with the Committee’s percentage of psychological disability, decides the worker’s permanent disability award under the loss of function method.

The Disability Awards Committee is ultimately responsible for the conclusion on projected loss of earnings awards implemented under section 23(3) of the *Act*. The Disability Awards Officer or Adjudicator is required to conduct the necessary investigations and make a specific recommendation to the committee. It is the

function of the committee, following any further investigation it considers necessary, to agree or disagree with the Disability Awards Officer's or Adjudicator's recommendation. If the committee agrees, the Disability Awards Officer or Adjudicator will establish a pension according to the initial recommendation. If the committee disagrees with the Disability Awards Officer's or Adjudicator's recommendation, it will either establish an award which it deems appropriate to the circumstances or return the file for further investigation. The Disability Awards Committee consists of one senior representative from the Disability Awards, Medical, and Vocational Rehabilitation Services Departments.

Physical impairment and projected loss of earnings assessments are made at the same time. It is not proper to establish a physical impairment pension alone and delay a projected loss of earnings assessment on the grounds that it is difficult at the time to assess the claimant's potential loss of earnings. An assessment must be made, however great the difficulty. A decision may be reopened where a ground for reopening is met (see Chapter 14).

The rules of evidence followed by Disability Awards Officers, Adjudicators and the Disability Awards Committee are discussed in policy item #97.40.

**EFFECTIVE:** March 3, 2003 (as to reference to reopening and deletion of references to pension review and appeals)

**APPLICATION:** Not applicable.

### **#39.00 LOSS OF FUNCTION/PHYSICAL IMPAIRMENT ASSESSMENT**

Section 23(1) provides that "Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines."

The physical impairment method is the primary one used for measuring permanent disabilities. It is the method provided for in Section 23(1). In applying this method, the Board does not normally have regard to the individual worker's actual loss of earnings. It considers the physical and/or psychological condition of the worker. It results in a percentage of disability being allocated to the claimant's condition.

Once the percentage of disability is determined, it is applied to the worker's average earnings, and the pension is 75% of the amount so determined. For

instance, consider a worker with a 30% disability with average earnings of \$3,400.00 per month:

	30% of 3,400.00	1,020.00
Monthly pension	75% of 1,020.00	765.00

There are two basic methods for assessing the percentage of disability. These are the Scheduled method and the Non-Scheduled method.

Where a claim is reopened more than three years after the injury and a worker has a compensable permanent disability or an increased permanent disability, but is unemployed at the time of the reopening otherwise than through the effects of the injury, and it is determined that the worker has no potential loss of earnings, a pension will be assessed on a physical impairment basis under Section 23(1) of the *Workers Compensation Act*. It will be calculated on the basis of the wage rate originally set on the claim subject to any appropriate wage rate review being carried out or Consumer Price Index adjustments.

### #39.01 *Chronic Pain*

This policy sets out guidelines for the assessment of section 23(1) awards for workers who experience disproportionate disabling chronic pain as a compensable consequence of a physical or psychological work injury.

#### 1. Definitions:

Chronic pain is defined as pain that persists six months after an injury and beyond the usual recovery time of a comparable injury.

The Board distinguishes between two types of chronic pain symptoms:

Specific chronic pain - pain with clear medical causation or reason, such as pain that is associated with a permanent partial or total physical or psychological disability.

Non-specific chronic pain - pain that exists without clear medical causation or reason. Non-specific pain is pain that continues following the recovery of a work injury.

#### 2. Multidisciplinary Assessment:

Where a worker has been referred for a permanent partial disability assessment under section 23(1) for chronic pain, the Board officer in Disability Awards may refer the worker for a multidisciplinary assessment. (See policy item #22.35, "Pain and Chronic Pain")

A multidisciplinary assessment may involve consideration of the worker's medical history, health status, the impact of the pain on the worker's physical functioning, psychological state, behaviour, ability to perform the pre-injury occupation and ability to perform activities of daily living. [See policy item #22.35, "Pain and Chronic Pain", subsection 2(b)]

Based on the various assessments, the evaluation will provide the Board officer with information on whether the worker is experiencing persistent chronic pain as a result of a work injury or disease and the extent of the chronic pain. The evaluation will also provide information on the consistency of the worker's pain presentations.

### 3. Evidence Considered in a Chronic Pain Section 23(1) Assessment:

In making a determination under section 23(1), the Disability Awards Officer or Adjudicator in Disability Awards will enquire carefully into all of the circumstances of a worker's chronic pain resulting from a compensable injury or disease.

The evidence that a Board officer may consider in a section 23(1) assessment for chronic pain includes the following:

- i) The findings of any multidisciplinary assessments.
- ii) Information provided by the worker's attending physician as well as any other relevant medical information on the claim.
- iii) The worker's own statements regarding the nature and extent of the pain.
- iv) The worker's conduct and activities and whether they are consistent with the pain complaints.
- v) In cases of specific chronic pain, the Board officer will consider the extent of the associated physical or psychological permanent impairment and whether the specific chronic pain is in keeping with the particular permanent impairment.

The evidence that is relied upon to support the assessment of a section 23(1) award must be fully documented.

4. Entitlement to a Section 23(1) Assessment:

Entitlement to a section 23(1) award for chronic pain may only be considered after all appropriate medical treatment and rehabilitation interventions have been concluded.

(a) Specific Chronic Pain – Consistent with the Impairment

Where a worker has specific chronic pain that is consistent with the associated compensable physical or psychological permanent impairment, the section 23(1) award will be considered to appropriately compensate the worker for the impact of the chronic pain. Pain is considered to be consistent with the associated compensable impairment where the pain is limited to the area of the impairment, or medical evidence indicates that the pain is an anticipated consequence of the physical or psychological impairment. In these cases, an additional award for the specific chronic pain will not be provided, as it would result in the worker being compensated twice for the impact of the pain.

(b) Specific and Non-Specific Chronic Pain – Disproportionate to the Impairment

A worker's entitlement to a section 23(1) award for chronic pain will be considered in the following cases:

- i) Where a worker experiences specific chronic pain that is disproportionate to the associated objective physical or psychological impairment.

Pain is considered to be disproportionate where it is generalized rather than limited to the area of the impairment or the extent of the pain is greater than that expected from the impairment.

In these cases, a separate section 23(1) award for chronic pain may be considered in addition to the award for objective permanent impairment.

- ii) Where a worker experiences disproportionate non-specific chronic pain as a compensable consequence of a work injury or disease.

Disproportionate pain, for the purposes of this policy, is pain that is significantly greater than what would be reasonably expected given the type and nature of injury or disease.

Where a Board officer determines that a worker is entitled to a section 23(1) award for chronic pain in the above noted situations, an award equal to 2.5% of total disability will be granted to the worker.

**EFFECTIVE DATE:** January 1, 2003  
**APPLICATION:** Applies to new claims received and all active claims that are currently awaiting an initial adjudication.

### **#39.10 Scheduled Awards *Permanent Disability Evaluation Schedule***

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

Scheduled awards are awards made under the Permanent Disability Evaluation Schedule, which is set out in Appendix 4. This is a rating schedule of percentages of impairment for specific injuries or mutilations. (4)

The Permanent Disability Evaluation Schedule is a set of guide-rules, not a set of fixed rules. The Disability Awards Officer or Adjudicator in Disability Awards is still free to apply other variables in arriving at a final pension; but the “other variables” referred to means other variables relating to the degree of physical impairment, not other variables relating to social or economic factors, nor rules (including schedules and guide-rules) established in other jurisdictions. In particular, the actual or projected loss of earnings of a worker because of the disability is not a variable which can be considered. (5)

Any revision of the schedule must be undertaken by procedures that are appropriate to changes of a legislative nature. It will not be done through appeal decisions in individual cases. The schedules in use in other jurisdictions are part of the material that would be looked at in any revision of the schedule used here; but they are not part of the material relevant in the decision of any individual claim.

In cases where the specific impairment is not covered by the schedule, but the part of the body in question is covered, the Disability Awards Officer or Adjudicator must first determine the percentage loss of function in the damaged area. This determination is based on the findings of the permanent functional impairment evaluation and other medical and non-medical evidence available. The final award is arrived at by taking this percentage of the percentage allocated in the schedule to the disabled part of the body. Because the schedule is used in the calculation, this type of award is still considered as a scheduled one. For example, the amputation of an arm down to the proximal third of the humerus or its disarticulation at the shoulder is scheduled at 70% of total disability. Suppose a worker suffers a severe crush injury to the arm which culminates in a permanent loss of half its function. The final assessment would be 50% of 70%, i.e. 35% of total disability.

### #39.11 *Age Adaptability Factor*

The percentage rate derived by use of the simple physical impairment method is modified by the application of an age variable. This age adaptability factor is used for claimants over the age of 45 where the disability is calculated in accordance with the schedule. The disability is increased by 1% of the assessed disability for each year over 45 up to a maximum of 20% of the assessed disability.

Example:

Award effective at age 55  
Scheduled disability 50% of total disability  
Age adaptability factor 10% of 50% = 5% of total disability  
Disability assessed at 55% of total disability

The worker's age at the effective date of the disability award is used, not his or her age at the time of the injury.

The age adaptability factor is not applied to non-scheduled awards. However, the worker's age is one of the overall considerations in making the judgment.

The age adaptability factor set out above has only been applied since October 2, 1958. Awards made prior to that date were subject to differing rules.

### #39.12 *Enhancement*

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

The combined effect of two separate disabilities may be greater than the separate effect of each. Therefore, where a worker has an additional disability which pre-existed the injury or the injury causes more than one disability, the Board may, in certain situations, increase the overall percentage of disability that would otherwise be awarded. This is known as the "enhancement factor".

One situation where this may be done is where the worker has impairment in both arms or both legs. An enhancement factor of 50% of the lesser disability may be added to the total of the percentages awarded for each separate disability. Suppose, for example, a worker suffers an injury causing total immobility in the right ankle. That would be assessed pursuant to the schedule at 12% of total disability. There may be an adjustment for age; but suppose it appeared that, at the time of the work injury, the worker was already suffering from a serious disability involving total immobility in the left knee. The Disability Awards Officer or Adjudicator in Disability Awards may well conclude that having regard to the impaired mobility that the worker was already suffering through the disability in the left leg, the compensable disability in the right ankle results in a greater degree of physical impairment than it would for a person with a normal left leg.

Enhancement factors applied where more than one finger of the same hand is affected are dealt with in #39.22-32.

Prior to October 27, 1977, the Board did not normally permit an enhancement factor in respect of spinal column disabilities. However, subsequent to that date, the Board has concluded that such a factor may be added for combinations of disabilities when one of those disabilities involves the spinal column and that disability is shown to have been enhanced by the others. A factor of 50% of the disability attributed to the spine is added. Therefore, if the disability in the back is 10%, and the sum of the other disabilities is 16%, the enhancement factor is 5% and the total disability awarded 31%. This has not been retroactively applied to awards made prior to October 27, 1977.

### *#39.13 Devaluation*

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

The percentages set out in the Permanent Disability Evaluation Schedule represent the loss occurring when a disability exists alone in an otherwise healthy limb or body. When a disability exists alongside another disability in the same or another part of the body, adjustments may have to be made. This adjustment may be in an upward direction. For instance, as indicated in #39.12, an enhancement factor may be added in certain cases when the combined effect of two disabilities in different areas of the body exceeds the sum of the schedule percentages allocated to each disability. On the other hand, where the sum of the schedule percentages allocated to several disabilities exceeds their actual combined effect, a downward adjustment is required. This is known as “devaluation”.

If the schedule provides that the total loss of a particular part of the body causes a certain percentage loss of future earning capacity, then a partial loss of the use of that particular part will leave only a portion of the function of that part of the body remaining. If the schedule allocates 70% to the amputation of an arm at the shoulder, the occurrence of a fused index finger and thumb, worth 18%, will leave only 52% of the value of the arm. Any subsequent disabilities will be measured by reference to the remaining percentage, not the whole percentage set out in the schedule, i.e. 52% rather than 70% in the above example. Therefore, if, following the fused index finger and thumb, the claimant suffers a fused elbow, and then a frozen shoulder, the relevant percentages of disability awarded will be as follows:

- |    |  |                |
|----|--|----------------|
| A. | Value of whole arm in schedule                       | 70% of total   |
| B. | Value of fused index finger and thumb<br>in schedule | 18% disability |

C.	Remaining value of arm (A-B)	52%
D.	Value of fused elbow in schedule	20%
E.	Percentage awarded for fused elbow ( $\frac{D}{A} \times C$ )	14.9%
F.	Remaining value of arm (C-E)	37.1%
G.	Value of frozen shoulder in schedule	35%
H.	Percentage awarded for frozen shoulder ( $\frac{G}{A} \times F$ )	18.6%
I.	Total percentage of disability awarded (B + E + H)	51.5%

A claimant will never receive more than 70% for disabilities existing in one arm.

### **#39.20 Amputations of Arms or Legs**

In assigning a rating level to any amputation, it must be assumed that the stump is structurally perfect, that it is well padded, that the scar is properly placed and that there is no undue tenderness on areas which are subject to pressure. Uncorrectable defects such as scarring, tenderness, grafts, muscle wasting, nerve damage may warrant a rating level higher than the schedule. In the case of major limb amputations, rating levels assigned should have regard to the type and probable usefulness of the prosthesis to which they are adaptable. Amputations always involve scheduled awards.

Where a worker suffers a permanent disability to the dominant hand, the fact the worker is unaccustomed to using the other hand to the same extent does not affect the percentage of measured disability. It is usually a temporary handicap rather than a permanent problem. Whether the worker was left- or right-handed is, therefore, not a relevant factor in establishing a pension for a permanent partial disability. It is, however, a factor that may sometimes be relevant in establishing temporary benefits, or in the provision of rehabilitation services. For example, it might be relevant in deciding exactly when the worker is fit to return to work, whether more exercise is needed, or whether retraining may be needed.

#### **#39.21 Amputation of One Finger**

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

It is usually considered that there must be shortening of the bone before an award is granted for finger amputations.

The percentages of disability awarded in respect of amputations of the fingers are set out in the Permanent Disability Evaluation Schedule (items 13 to 40).

In considering the index and middle fingers, if the amputation of the portion of the distal phalanx involves:

- (a) less than 1/4 of the phalanx, it is not normally considered significant enough to have any impact on future earning capacity.
- (b) 1/4 to 3/4 of the phalanx, it is considered as an amputation equivalent to 1/2 the value of the whole phalanx.
- (c) 3/4 of the phalanx or greater, it is considered as an amputation equivalent to the whole phalanx.

In considering the ring and little fingers, if the amputation of the portion of the distal phalanx involves:

- (a) less than 1/2 of the phalanx, it is not normally considered significant enough to have any impact on future earning capacity.
- (b) 1/2 to 3/4 of the phalanx, it is considered as an amputation equivalent to 1/2 of the value of the whole phalanx.
- (c) 3/4 of the phalanx or greater, it is considered as an amputation equivalent to the whole phalanx.

These are guidelines and discretion can be used in this area. For example, it is possible that with a loss of less than 1/2 of the distal phalanx of the ring finger there may be scarring and sensitivity remaining. Discretion could then be exercised because of the additional disabilities and an award considered.

### **#39.22      *Amputation of More than One Finger***

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

Enhancement factors for multiple finger disabilities are built into the hand charts, in the Permanent Disability Evaluation Schedule. To determine what chart or combinations of charts apply to particular multiple finger disabilities, the following procedure is used.

1. Determine the most distal component(s) of the finger(s) involved. Use the applicable chart and record the percentage of disability.
2. Follow this procedure for each next level involved.
3. Total the percentages from each common level to determine the overall percentage of disability.

**Examples Using the *Permanent Disability Evaluation Schedule***

1. Index finger amputated at M.P. joint, middle finger amputated at D.I.P. joint.

Take Chart #2

distal phalanx of index	1.4%
distal phalanx of middle	1.4%

Take Chart #1

middle phalanx of index	1.6%
proximal phalanx of index	<u>1.6%</u>

Overall Award 6.0%

2. Index finger amputated at M.P. joint, middle finger at P.I.P. joint, and ring finger at D.I.P. joint.

Take Chart #8

distal phalanx of index	1.7%
distal phalanx of middle	1.7%
distal phalanx of ring	1.0%

Take Chart #2

middle phalanx of index	2.8%
middle phalanx of middle	2.8%

Take Chart #1

proximal phalanx of index	<u>1.6%</u>
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Overall Award 11.6%

### **#39.23**      *Amputation of Thumb*

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

Partial amputation of the phalanx of a thumb is considered in the following fractions: 1/4, 1/3, 1/2, 2/3, 3/4. For example, if a worker suffered an amputation of the thumb involving 2/3 of the distal phalanx, an award of 2/3 of 4% or 2.67% would be considered.

### **#39.24**      *Amputation of Thumb and One or More Fingers*

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

The percentage of disability of the thumb is determined and the percentage of disability for the finger or fingers is determined. Normally, an enhancement factor of 100% of the lesser of these two disabilities is then added. The Disability Awards Officer or Adjudicator in Disability Awards does have discretion, based on the severity of the injuries, to adjust the enhancement factor, but normally a 100% multiple of the lesser is used.

More serious disabilities of this type are awards listed in the Permanent Disability Evaluation Schedule, items 9-12.

### **#39.30**      **Restrictions of Movement in Arms or Legs**

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

Restrictions of movement in the joints of the body are measured and documented during the permanent functional impairment evaluation. The Disability Awards Officer or Adjudicator in Disability Awards then applies the measurement to the appropriate item in the Permanent Disability Evaluation Schedule.

These awards are always scheduled.

### #39.31 *Finger Restrictions*

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

When considering restriction of finger movement, the full range of flexion restriction is taken into consideration, but only 50% of the range of restricted extension. This is because extension is not considered as vital as flexion. The formula used to compute a percentage value for restriction of finger movement is:

$$\frac{\text{Restriction Degrees}}{\text{Normal Degrees}} \times 3/4 \times \text{amputation value at the joint concerned}$$

This formula is used as it is normally considered that a fused finger joint is equal to 3/4 of the value of an amputation at the same level.

Items #51, #52 and #53 of the Permanent Disability Evaluation Schedule allow a higher value to be applied if necessary (up to value of amputation). These are normally used when the fused finger is essentially useless and there would be no difference in the disability if the finger had been amputated.

When more than one finger is involved, the appropriate multiple finger chart from the Permanent Disability Evaluation Schedule is used to determine the amputation value at the joint concerned, thus building in any enhancement factor.

### #39.32 *Thumb Restrictions*

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

The basic principles set out in #39.31 also apply here. The formula used to compute a percentage value for restriction of thumb movement is:

$$\frac{\text{Restriction Degrees}}{\text{Normal Degrees}} \times 1/2 \times \text{amputation value at the joint concerned}$$

This formula is used in that it is normally considered that a fused thumb joint is equal to 1/2 of the value of an amputation at the same level.

Where a finger and thumb are affected, an enhancement factor is added in the manner set out in #39.24.

## **#39.40      Sensory Losses**

For all section 23(1) assessments and reassessments undertaken with reference to the *Permanent Disability Evaluation Schedule* on or after August 1, 2003, please refer to the *Permanent Disability Evaluation Schedule* in Appendix 4 of Volume II and the appropriate policies in Chapter 6 of Volume II on the application of the *Schedule*.

Some sensory losses are specifically listed in the Permanent Disability Evaluation Schedule. Others, though not specifically referred to, may be assessed on a judgment basis as part of the overall disability incurred in a part of the body covered in the schedule.

The complete loss of the major nerves in the arms and legs is covered in items 73 to 76 of the Permanent Disability Evaluation Schedule.

When the fingers lose sensitivity as the result of an injury, an award of up to the full amputated value of the joint can be granted. This especially relates to the thumb, index and middle fingers, when the pinch grip is involved.

Awards for hearing loss are dealt with in #31.00.

### **#39.41      *Loss of Taste and/or Smell***

Although there is not a scheduled award for the loss of either or both of these senses, the Board's policy is to allow 3% for a loss of smell. This includes the partial loss of taste, which always in practice accompanies a complete loss of smell. A loss of taste alone is regarded as a non-scheduled award.

If the loss of sense of taste or smell results from an occupational disease, the requirements of Section 6 must be met before a pension can be awarded, including the requirement that there be a disablement from earning full wages. (6)

### **#39.42      *Visual Acuity***

For pension purposes, loss of visual acuity should be measured both before and, if correction is possible, after correction with conventional lenses. The intent of this evaluation is to determine the nature and degree of the injury.

Section 23(1) of the Workers Compensation Act provides compensation based on the existence of a permanent partial "disability". The degree of disability is the extent to which the injury is presumed to impair the earning capacity of the average worker. In determining the degree of disability for the purposes of calculating an award under Section 23(1), measurement of the loss of visual acuity is usually based on the best vision obtainable after correction with conventional lenses. Effective application of corrective lenses should eliminate any impairment of earning capacity.

The Permanent Disability Evaluation Schedule, items 84 to 90, sets out the percentages of disability payable for loss of visual acuity. These values have been developed based on corrected vision in order to establish an accurate measure of disability.

The Board recognizes that certain occupations require perfect uncorrected vision as a condition of employment. A worker who was employed in such an occupation prior to the injury may suffer an actual loss of earnings. In these circumstances, it may be more equitable to provide compensation under Section 23(3). A Section 23(3) pension is calculated by determining the difference between the average earnings of the worker before the injury and the average amount the worker is able to earn in some suitable occupation after the injury.

As total blindness in one eye is assessed at 16% of total and total blindness in two eyes is equal to 100% of total disability, the value attached to the total loss of the second eye is 84%. When assessing a bilateral visual loss which is less than total, each eye is first assessed separately in accordance with the schedule. 84/16 times the percentage applied to the better eye is then added to the percentage applied to the poorer eye.

Where the work injury leaves the worker with an aphakic eye, an award of 12% of total is made. This award is on the assumption that the worker has 20/20 vision. If the vision is worse, the worker receives an additional award equal to the percentage allocated in the schedule to the loss of visual acuity, but this additional award is devalued according to the rules set out in #39.13. If, for example, a worker with an aphakic eye has 20/60 vision the percentage is calculated as follows:

A. Percentage for blind eye	16%
B. Percentage for aphakic eye	12%
C. Percentage for loss of visual acuity equal to 20/60 (Item 87 in schedule)	4%
D. Additional percentage awarded where B combined with C <u>4% (C)</u> 16% (A) X [16%(A) – 12%(B)]	1%
E. Total percentage awarded [(B) + (D)]	13%

The above formula would also apply in other situations where a compensable eye disease is combined with a loss of visual acuity.

### **#39.43      *Sexual and Reproductive Function***

Sexual function is defined as the ability to engage in sexual activity. It must be distinguished from reproductive function, which is defined as the ability to procreate.

Cases involving sexual or reproductive function are classified as follows:

1. Impaired sexual or reproductive function resulting from paraplegia, quadriplegia, or similar disabilities.

In these cases, the worker is generally receiving an award for total disability, and where that is so, there is no scope for considering impaired sexual or reproductive function as a separate compensable item.

2. Where a physical injury other than to the genital organs or their related structures results in a psychological disturbance, and impaired sexual function is a symptom or consequence of the psychological disorder.

In this situation, the psychological problem, including the impaired sexual function, should be considered according to the principles applicable to psychological problems, and the impaired sexual function should not be considered as a separate matter. In cases of this kind, it is normal to explore the possibilities of treatment before regarding the case as one for a permanent disability award.

3. Where a compensable injury or occupational disease has caused permanent damage to the genital organs or related structures resulting in impaired sexual or reproductive function.

The reference here is to cases where the remedial treatment has been considered and found not to be possible. Where impaired sexual or reproductive function in this category occurs, a permanent disability award will be given. The *American Medical Association Guide to the Evaluation of Permanent Impairment* will be used to determine the appropriate percentage of disability.

A worker with impaired sexual or reproductive function derived from physical damage to the sexual or reproductive organs or related structures may suffer actual psychological symptoms over and above what might normally be assumed for impaired sexual or reproductive function. In such a case, it will not be appropriate to simply grant an award which is based on the ordinary assumed psychological effect. An assessment of the actual psychological disability suffered by the worker should be carried out in accordance with the general policy for assessing such disabilities under Section 23(1) of the Act. If, after that assessment, it is found that the worker is entitled to a general psychological award of an amount higher than what might normally be awarded for impaired sexual or reproductive function, the worker will be paid this award in lieu of the award for impaired sexual or reproductive function.

With regard to impairment of sexual function, this policy applies to impairments occurring on or after April 6, 1992. For impairments occurring prior to that date, the policy was to use a table of percentages of disability for an impairment resulting from physical damage to the genital organs. The percentage varied

according to the age of the worker. There was a maximum of 15% for a worker aged 45 at the time of injury reducing to 5% for a worker aged 65 or over. The table of percentages did not apply to an impairment of sexual function resulting from paraplegia, quadriplegia or similar disabilities, to impairment of sexual function resulting from psychological causes, to female workers or to impairment of reproductive function. Awards in these situations were considered separately. (7)

With regard to impairment of reproductive function, this policy applies to impairments occurring on or after April 6, 1992 as well as to existing impairments in respect of which a request for an award is subsequently submitted to the Board. However, no payments under this policy will be made in respect of the time period prior to April 6, 1992.

**#39.44      *Assessment of Pensions for Hand-Arm Vibration Syndrome***

To measure the extent of any permanent disability resulting from Hand-Arm Vibration Syndrome, the evaluation is carried out in the following manner:

1. The Disability Awards Medical Advisor assesses the vascular, sensorineural and musculoskeletal impairments of the worker in reference to the following table.

<b>ELEMENTS</b>	<b>Process (Assess each hand separately)</b>	<b>Points Applied</b>
<i>Vascular Element:</i>	Assess vascular elements: blanching of fingers in cold temperature, pain, swelling, ulcers, gangrene & amputations: <ul style="list-style-type: none"> <li>• Distal phalange on index, middle and ring finger = 1 point each</li> <li>• Middle phalange on index, middle and ring finger = 1 point each</li> <li>• Proximal phalange on index, middle and ring finger = 2 points each</li> <li>• All phalanges on little finger = 1 point</li> <li>• All phalanges on thumb finger = 1 point</li> <li>• Distal half of palm (top) = 1 to 2 points</li> <li>• Proximal half of palm (bottom) = 1 point</li> </ul>	17 points max per hand
	ADD: Double value of sum of above if there is evidence of trophic changes (i.e., ulcers)	17 points max per hand
	MAXIMUM points for Vascular element	34 points per hand

<i>Sensorineural Element:</i>	Assess sensorineural impairment (evidence of numbness, tingling and reduced sensory perception)	2 points max per hand
	Assess manual dexterity (i.e., difficulty with buttons and writing) <ul style="list-style-type: none"> <li>• Additional 1 to 2 points per hand if reduction occurs</li> </ul>	2 points max per hand
	MAXIMUM points for sensorineural element	4 points per hand
<i>Musculoskeletal Element:</i>	Assess musculoskeletal impairment (loss of grip strength)	2 points max per hand
	MAXIMUM points from vascular, sensorineural and musculoskeletal elements for each hand	40 points per hand
	Add total points for both hands.	

2. The Board Officer in Disability Awards assesses the worker's disability using the Disability Awards Medical Advisor's assessment of impairment and the following table.

Conversion of Points to Percentages of Disability

Points System	% Disability	Points System	% Disability	Points System	% Disability
1 - 4	1	21 - 30	6	Beyond 40	Maximum of 20
5 - 15	2	31 - 35	8		
16 - 20	4	36 - 40	10		

Where the Board Officer in Disability Awards considers it more equitable, section 23(3) of the *Workers Compensation Act* will apply in the assessment of pensions for Hand-Arm Vibration Syndrome.

**EFFECTIVE DATE:** November 19, 2002  
**APPLICATION:** To all section 23(1) decisions adjudicated after the effective date.

**#39.50 Non-Scheduled Awards**

Any award where the schedule is not directly or indirectly used in the assessment is a non-scheduled award. This covers impairments in all parts of the body not listed in the schedule. Disabilities resulting from multiple injuries or occupational diseases may also involve non-scheduled awards. The rules governing respiratory and skin diseases are set out in #29.00 and #30.50 respectively.

In the case of non-scheduled awards, the Disability Awards Officer or Adjudicator in Disability Awards use their own judgment to arrive at a percentage of disability appropriate to the particular claimant's impairment. Regard will be had to, inter alia, the permanent functional impairment evaluation, the circumstances of the claimant, medical opinions of Board or non-Board doctors, and to schedules of disability used in other jurisdictions.

Neither the age adaptability or enhancement factors nor devaluation are formally applied in respect of non-scheduled awards. (The exception is that an enhancement factor may be added with respect to spinal injuries as outlined in #39.12.) However, in making a judgment as to the correct percentage of disability, the Disability Awards Officer or Adjudicator will have regard to the age of the claimant, to existing disabilities in other parts of the claimant's body, or to the combined effect of more than one disability in the same part of the body.

### **#39.60      Minimum Pension**

The minimum compensation for permanent partial disabilities is calculated in the same manner as for temporary total disability but only to the extent of the partial disability. (8) Thus, for example, if a worker is injured on January 2, 1986, and suffers a residual disability assessed at 10% of total disability, the minimum compensation will be the lesser of 10% of \$197.25 or 10% of his average earnings prior to the injury. (The formula for converting this weekly figure to the monthly equivalent is contained in #68.00.)

The minimum for permanent total disability does not apply simply because a worker is found to be totally unemployable under Section 23(3). (9)

### **#39.61      *Injury Prior to March 18, 1943***

Notwithstanding any other provision of the Act, all periodic payments awarded as compensation for permanent partial disability to workers injured prior to March 18, 1943, who, on January 1, 1955, or after that are in receipt of those periodical payments are calculated or recalculated at a rate of sixty-six and two-thirds per cent of average earnings of not less than two thousand dollars nor more than two thousand five hundred dollars per annum. Compensation is not payable under this provision for any period prior to January 1, 1955. (10)

### **#39.62      *Injury Prior to January 1, 1965***

In regard to payments made on or after January 1, 1965, permanent partial disability pensions awarded in respect of injuries occurring before that date were recalculated in accordance with the then minimum for permanent total disability but to the extent only of the partial disability. This minimum was an amount equal to \$30.00 per week (\$130.00 per month), unless the worker's average earnings were less, in which case compensation would be paid in an amount equal to the average earnings.

Any increase resulting from the above provisions did not apply to a commuted pension or the commuted portion of a pension.

In considering whether the worker's earnings were less than the minimum, the artificial wage created by the application of #39.61 was not taken into account. Only the worker's actual earnings were relevant.

#### **#40.00 PROJECTED LOSS OF EARNINGS METHOD**

Section 23(3) provides that "Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury, and the compensation must be a periodic payment of 75% of the difference, and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business."

On October 2, 1973, the Board introduced a dual system for assessing permanent disability pensions involving the spinal column. Effective October 1, 1977, this system was extended to non-spinal injuries. This system implements Section 23(3) of the Act.

Under this system, awards are calculated as follows:

1. The degree of physical impairment is calculated using the method described in #39.00, and a possible pension is calculated in accordance with this.
2. A possible pension is calculated according to the projected loss of earnings method described in #40.10.
3. The higher of these two results is then used as the pension.

Where the claimant is aged 51 years or above, this system is modified in the manner set out in #40.20.

It is not the policy of the Board to grant an award under the dual system without regard to the nature of the condition or disability causing the unemployability or loss of earnings. The worker must not only have a disability accepted by the Board, but the disability accepted by the Board must be a significant factor in the reduced employability or loss of earnings potential. Therefore, the Board has declined to grant awards under the dual system when the unemployability of the worker is related directly to psychological problems which are not considered acceptable as part of the claim.

Where a Disability Awards Officer or Adjudicator in Disability Awards decides that no pension can be awarded on a physical impairment basis because the

impairment is unlikely to affect the worker's earning capacity, no pension can be awarded on a projected loss of earnings basis. While Section 23(3) is not expressed to be dependent on an award being made under Section 23(1), this must in practice be the case. The Board could not consistently decide at the same time both that a worker's impairment was too minimal to affect earning capacity and that it would cause a loss of earnings in the future.

The Board will not make a temporary award on a projected loss of earnings basis.

#### **#40.10 Assessment Formula**

The rules, set out in #40.10-#40.30 apply to assessments of new permanent disability awards carried out on or after April 18, 1985.

These rules do not apply to earlier projected loss of earnings awards unless those awards are reassessed on the basis of a change in the worker's physical impairment. Where, on such a reassessment, there is found to have been a deterioration in the worker's physical impairment and these rules produce a lower pension than the projected loss of earnings pension the worker is currently receiving, the current pension will remain unchanged. The pension will, however, continue to be adjusted in the normal way in accordance with changes in the Consumer Price Index.

Where a pension was calculated on the policies prior to April 18, 1985, and an appeal results in a reconsideration of the pension, the reconsideration will be carried out under the same rules that applied at the time the **original decision** was made.

The rules for assessing a projected loss of earnings pension under Section 23(3) adopted by the Board are:

1. Average earnings prior to the injury will be determined in accordance with established policies and procedures.
2. Having regard to the evidence, including the medical evidence, of the limitations imposed by the compensable disability and the fitness of the claimant for different types of work, and having regard to the evidence of the Rehabilitation Consultant about the suitability of the claimant for jobs that could reasonably become available, the Adjudicator in Disability Awards will arrive at a conclusion about suitable occupations that the claimant could be expected to undertake over the long-term future.
3. Earnings that maximize the claimant's long-term potential will be selected from the jobs that are suitable and reasonably available. Earnings in those occupations will be determined as at the time of the injury.

4. The possible pension will then be 75% of the amount by which the earnings level thus established is less than the average earnings prior to the injury.
5. Any increase that may be due to the claimant because of an increase in the Consumer Price Index will then be added.
6. Since the assessment on a projected loss of earnings basis aims to predict the worker's actual loss of earnings over the future, no award can be made when the worker is unemployed for reasons unrelated to the injury and it is determined that there will not be a potential loss of earnings.

It may be helpful to illustrate how the dual system works. Consider the example of a skilled tradesperson in a trade that involves manual labour earning an average of \$3,500 per month. Assume, in 1985, the worker suffered a back injury as a result of being crushed under a load dropped from an overhead crane and had spinal surgery, following which the worker was unfit to return to the former occupation. Having regard to age and educational background, the worker is not considered suitable for retraining; but is able to take an unskilled clerical job and can now earn \$2,150 per month. Average earnings in 1985 for that occupation would be approximately \$1,900 per month. The pension is now being assessed in 1986. The way it might work out is as follows:

**Method 1**

Medical assessment estimates the degree of physical impairment, measured according to the physical impairment method, at 10% of total disability	10%
Average actual earnings prior to injury	\$3,500.00 per month
Statutory ceiling applicable in 1985	\$2,700.00 per month
Amount that would be payable for total disability (75% x \$2,700.00)	\$2,025.00 per month
Compensation payable as partial disability pension (10% of total disability)	\$202.50 per month

**Method 2**

Actual average earnings in 1985	\$3,500.00 per month
Statutory ceiling in 1985	\$2,700.00 per month
Average earnings obtainable in unskilled clerical work in 1985	\$1,900.00 per month

Compensable loss of projected earnings  
(\$2,700.00 less \$1,900.00) \$800.00 per month

75% thereof \$600.00 per month

Being entitled to the greater of the two amounts, the claimant will now receive a pension of \$600.00 per month plus applicable Consumer Price Index increases.

#### #40.11 *Average Earnings Prior to Injury*

Further comment is required on items 1 to 3 in #40.10.

Section 23(3) of the *Workers Compensation Act* requires the Board to have regard to the “average weekly earnings of the worker before the injury”. This is generally in line with the other sections of the Act which govern the payment of temporary or permanent disability benefits, namely Sections 22, 23(1), 29 and 30. All of these provisions base compensation on the worker’s earnings, but use the slightly different term “average earnings”.

It has been suggested that the use of the term “average weekly earnings” in Section 23(3), as opposed to the term “average earnings” is significant. This arises in relation to the provisions of Section 33(1) which give the Board a wide authority to determine the “average earnings and earning capacity of a worker”, but place a limit on the earnings that can be used in the form of the maximum wage rate. It is contended that since it specifically refers to “average earnings”, Section 33(1) is not relevant to determining “average weekly earnings” under Section 23(3) with the result that the maximum wage rate does not limit those earnings. Rather, the maximum limits only the ultimate pension that can be awarded under that section.

While noting the slight difference in terminology, Section 23(3) clearly requires the Board to determine a worker’s earnings prior to the injury and Section 33 is the only section in the Act which provides for how this is to be done. The Board has concluded that “average weekly earnings” prior to the injury must be determined under the projected loss of earnings method in the same manner as “average earnings” are determined for the purpose of pensions assessed under Section 23(1) and the maximum wage rate must apply to limit those earnings.

The average earnings prior to the injury are calculated according to the normal rules set out in #68.00.

In making this calculation, regard will not normally be had to promotions which might have been received if the worker had not been injured. This is so even though the worker returns to the pre-injury job following the injury, is promoted, but is unable to remain in the job because of the disability.

When calculating the pre-injury earnings of a person covered by personal optional protection, a departure is made from the normal rule of using the rate of earnings for which coverage has been purchased. (11) For the purpose of the projected loss of earnings assessment, actual pre-injury earnings are used, but the amount of the award can never exceed the amount of earnings for which the coverage was purchased.

#### *#40.12 Suitable and Available Occupations for the Claimant*

The purpose of direction 2 in the assessment formula set out in #40.10 is to arrive at a long-term projection of the earning capacity of the worker. The evidence of the Rehabilitation Consultant should relate to jobs that are suitable and reasonably available to the claimant in the long run and the conclusion of the Adjudicator in Disability Awards should be concerned with such of those jobs as will maximize the claimant's long-term earnings potential.

It is not satisfactory simply to take the wage rate in a job to which the claimant actually returns. For a variety of reasons, the long-term employment prospects of a claimant may be different from the most immediate job opportunities. On the other hand, the phrase "available jobs" does not mean any job position in which there are vacancies. An available job means one reasonably available to the claimant in the long run. For example, a city may have several theatres, and there may be occasional job vacancies for the position of theatre usher; but if there are always numerous better qualified applicants and the realities are that a worker with the particular disability is not likely to obtain such a job, that is not a reasonably available job.

In advising on the suitability of the claimant for reasonably available jobs, the Rehabilitation Consultant must have regard to the limitations imposed by the residual compensable disabilities of the claimant and assess the claimant's earnings potential in light of all possible rehabilitation measures that might be of assistance, including the possibility of retraining or other measures that may be appropriate to the particular worker.

The guidelines set out below are followed in determining suitable and reasonably available jobs for a claimant:

1. Where the worker is doing his or her best to maximize earnings, and is following the advice of the Rehabilitation Consultant, and is presenting himself or herself in good faith to obtain a job at the highest level of earnings among the jobs that the worker is fit to undertake, then the earnings level in the job that is actually obtained is generally the earnings level that should be taken, unless there is evidence that this position is transitory and that jobs at another level of earnings will be available to the worker in the near future.

2. Regard may be had to other jobs than the present one with the same employer to which the worker might in future progress and this is not limited to jobs which the claimant has a right to because of seniority. The fact that there is a formal or informal competition for a higher job is not a bar to its being considered. On the other hand, it would not be fair to assume that a claimant will receive all possible promotions that might theoretically be open. The Board is only concerned with jobs that are, in practice, reasonably available. Thus, the Board will, in general, only have regard to higher paying jobs which a person in the claimant's present job would ordinarily be expected to obtain.
3. A reasonably available job must be one that the worker is fit to undertake, and which would not involve adverse health consequences either immediately or in the long run compared with other jobs.
4. Where a suitable job is reasonably available over the long term, it is taken into consideration even though it is not reasonably available at the time of assessment because of general economic conditions.
5. In deciding whether it is reasonable for a worker to refuse a job, regard should be had to the long term as well as the immediate position. For example, job A may have an earnings rate of \$16.00 an hour, and job B may have an earnings rate of \$15.00 an hour; but if job A is subject to fluctuations in the economy and job B appears more stable in the long run, then job B may be the better-paying job in the long run. Therefore, the wage rate in job B should be used in the calculation of projected loss of earnings.
6. A reasonably available job must be one that is within a reasonable commuting distance of the worker's home. Where there is no available job within that commuting distance that the worker could reasonably be expected to undertake, the worker might be expected to relocate, depending on age, the availability of a suitable job elsewhere, and other factors; but relocation will not normally be expected unless the worker is offered the expenses of relocation, either by the Canada Employment and Immigration Commission or by the Board or by some other government agency.
7. If the worker declines the best-paying reasonably available job because of a personal preference for a lower-paying occupation or for an alternative life-style, the wage rate in the best-paying reasonably available job should be used in the formula.

For the distinction between the jobs which can be considered properly available for the purpose of the projected loss of earnings method and those which can be considered as available for the purpose of assessing temporary partial disability benefits, reference should be made to #35.21.

#### *#40.13 Measurement of Earnings Loss*

Section 23(3) requires the Board to compare the average weekly earnings of the worker before the injury with “the average amount which the worker is earning or is able to earn in some suitable occupation after the injury”. The latter figure is obtained by ascertaining the earnings in the occupations which have been found to be suitable and reasonably available according to the criteria set out in #40.12 and determining the earnings figure which will maximize the claimant’s long-term earnings potential.

The intention of the Act is to protect workers’ earnings only up to the maximum wage rate. This is shown by Section 33(1) which results in payments for total disability being limited to 75% of the maximum and by Section 31 which ensures that, where a worker is already receiving payments for a disability, additional payments can be made for any further disability only to the extent that they do not take the total payments above the maximum. No pension can be awarded on a projected loss of earnings basis where, following the injury, the claimant is earning or is able to earn at or above the maximum wage rate. Where a claimant was earning at or above the maximum prior to the injury and it is projected that because of the injury earnings will be less than the maximum, a projected loss of earnings pension can be awarded but only to the extent of the difference between the maximum and the projected earnings.

Although assessment of a pension will often be made some time after the original injury, it would not be fair to compare directly the actual pre-injury earnings with the earnings the worker might now earn in the jobs available. The effect of inflation upon earnings levels would mean that the real loss would not be properly determined in that way. The practice of the Board is to use the earnings in the jobs available after the injury as they stood at the date of the injury. It occasionally happens that earnings in jobs at the time of the injury are not available. If this occurs, it may be necessary to use the earnings in those jobs as they were at another date and bring the pre-injury earnings into line by applying Consumer Price Index adjustments.

#### *#40.14 Provision of Employability Assessments*

Workers are provided with a copy of a completed employability assessment before a pension decision is made. They have 30 days in which to provide a written submission. All such submissions received within this time frame will be considered before the final decision is made. Workers are also advised that, at their request, a copy will be made available to their treating physicians. If the details of the employability assessment and its impact on the pension are known and agreed to, the 30-day waiting period may be waived.

## **#40.20 Duration of Projected Loss of Earnings Pension**

Pensions assessed on a physical impairment basis are, under the terms of section 23(1), payable for life. It was suggested that projected loss of earnings pensions should also be payable for life in every case, but the Board does not accept this. Section 23(3) does not specifically require this, but rather gives the Board a discretion in the matter. Compensation is only payable under section 23(3) "Where the board considers it more equitable". Since the section authorizes the Board to calculate a worker's actual loss of earnings resulting from the injury, it is reasonable for the Board to have authority to terminate benefits payable under the section at a time when, even if not disabled because of the compensable injury, the worker would not have been working.

The situation where this issue arises is when the worker reaches retirement age. The Board considers age 65 years to be the standard retirement age. Any direct loss of earnings the worker suffers because of the compensable disability will normally cease at that time. However, the Board does not, in practice, feel this is an automatic reason for terminating a projected loss of earnings pension. Rather, it is recognized because of the compensable disability, the worker may be less able to accumulate retirement benefits. The Board, therefore, allows the projected loss of earnings pension to continue in whole or part past the standard age of retirement where the worker was under 65 years of age at the time of the injury. The portion of the pension so continued depends on how close the worker was to the age of 65 years, the assumption being that the older the worker, the less the ability to build up retirement benefits would be affected by the injury.

The following principles apply:

1. Where, at the date of injury, the worker is at or below the age of 50 years, the pension is established based on the higher of the physical impairment and projected loss of earnings assessment, and the pension so established is payable for life.
2. Where, at the date of injury, the worker is at or above the age of 65 years, the pension will usually be established by the physical impairment method, and that pension is payable for life. No projected loss of earnings pension is awarded unless clear and objective evidence is presented that the worker would have continued to work past age 65 if the injury had not occurred. Where a projected loss of earnings pension is awarded, it will cease when the worker reaches retirement age, as determined by a Board officer, and compensation will thereafter be established by the physical impairment method.

3. Where, at the date of injury, the worker is in the age range of 51 to 64 years, and where a pension calculated by the projected loss of earnings method is payable, the pension so calculated, unless modified on a review, will usually continue until the age of 65 years. From the age of 65, the pension is at a rate calculated by the physical impairment method, plus a proportion of the difference between the two methods according to the following table.

<b>Age at Date of Injury</b>	<b>Proportion of Difference Between Two Methods</b>
51	14/15ths
52	13/15ths
53	12/15ths
54	11/15ths
55	10/15ths
56	9/15ths
57	8/15ths
58	7/15ths
59	6/15ths
60	5/15ths
61	4/15ths
62	3/15ths
63	2/15ths
64	1/15th

The revised pension commences on the first day of the month following the worker's 65<sup>th</sup> birthday.

Where the projected loss of earnings pension is assessed following a recurrence of disability, the age at the date of the recurrence is used for the purpose of the above principles.

In cases where the worker presents clear and objective evidence that he or she would have worked past age 65 if the injury had not occurred, the projected loss of earnings pension may continue in whole past that age. In these situations, the formula provided in the table above does not apply. From the age of retirement, as determined by a Board officer, compensation will be established by the physical impairment method.

4. Where an injury occurs in the age range 51-64 years, and full wage-loss payments are made from the date of injury up to or beyond the worker's 65<sup>th</sup> birthday, a pension will usually be established by the physical impairment method, and that pension will be payable for life.

A projected loss of earnings pension may be awarded if the worker presents clear and objective evidence that he or she would have worked past the standard retirement age had the injury not occurred. In these situations, the projected loss of earnings pension will cease when the worker reaches retirement age, as determined by a Board officer, and compensation will thereafter be established by the physical impairment method.

In calculating a worker's projected loss of earnings, no account is taken of any disability or retirement pensions received from the employer to which the worker has contributed or any other source than the Board. However, a Board officer may take into account the fact that the worker has retired or is about to retire in deciding whether there is a projected loss of earnings in the first place. The formula set out above only applies when it has been determined that there is such a loss and the pension is assessed on the basis of that loss.

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

*#40.31 Existing Pension Assessed Prior to Establishment of Dual System*

Differing rules apply to spinal and non-spinal disabilities.

Upon any application for reopening of entitlement to pension benefits in the case of an injury involving the spinal column, the dual method of assessment is applied if the worker is under the age of 64 years and a pension has not previously been calculated or considered under the dual method. This applies regardless of the date of injury, but the effective date for any readjustment is the date of the application for reopening. Where the claimant was in receipt of a term pension that has expired or the claimant has commuted a life pension, the pension so expired or commuted is recalculated as a notional life amount. If the projected loss of earnings method produces a pension in excess of that notional life amount, a new pension will be instituted, but only to the extent of the excess.

Any pension for a non-spinal disability which has been assessed since October 1, 1977, on the basis of functional impairment only, and where the application of the dual system was not considered, will be reconsidered on that basis should such a request be made. Should an application be made for reopening of a pension assessed before October 1, 1977, on the basis of changed medical circumstances, and it is concluded that the application has merit and the pension should be reassessed, that reassessment will include consideration of a loss of earnings award as of the date of the changed medical condition but not retroactive to the date the pension was first established. In the case of applications for reconsideration on the basis of significant new evidence or error in law in the original decision, even if the new evidence or submission results in a change in the

original decision, no consideration can be given to a loss of earnings award unless, of course, the original decision was made since October 1, 1977. In other words, a simple request to reopen the claim on the basis that a claimant wishes to have a pension reassessment under the new system must be rejected on the ground that the "new system" is effective only from October 1, 1977 for non-spinal disability.

## **#41.00 PAYMENT OF PENSIONS**

Pensions are normally payable monthly and last for life. However, some are paid as lump sums. The cheques are mailed to the claimant's home address or, if she or he elects, direct to their bank by electronic direct bank deposit.

When a payment to a worker has been lost or stolen or otherwise not received or cashed by the worker, the worker may request a reissue of payment, but the Board will require a written and signed declaration of this from the worker before a reissue will take place.

### **#41.10 Commencement of Pension**

The general rule is that the pension commences at the date when the claimant's temporary disability ceased and his condition stabilized or was first considered to be permanent.

Where a worker has been paid any temporary disability benefits under Section 29 or 30 of the Act, the pension will take effect from the date following the termination of these temporary benefits. For the majority of cases, this will adequately reflect the financial impact of the disability on the worker's earnings.

There may, however, be the unusual situation where a worker has or could have returned to a significant level of employment with a minimal loss of income. Wage-loss benefits under Section 30 would be 75% of this minimal figure.

Should the worker eventually be assessed at a pension rate which is higher than the rate paid for temporary benefits under Section 30, it would appear that the worker may have suffered a loss of compensation income. The Act, however, precludes the payment of both temporary and permanent benefits for the same condition at the same time.

A problem of pension retroactivity also occurs when, although the worker had a temporary partial disability, the worker had or could have returned to full employment and has not, therefore, actually been paid any benefits under Section 30. As previously stated, the Act requires that the Board recognize a disability as either temporary or permanent, but not both concurrently. When carrying out the final disability assessment, the Officer in Disability Awards will have the benefit of the earlier examination, or at least some other documentary evidence on file, on which the decision was made to delay the pension. If the findings on the latter

examination are the same as the initial findings, or only show a minimal degree of change, it is reasonable to consider the condition as having plateaued from the date of the first examination. In that event, the date of the first examination should be the starting date of the pension. If, on the other hand, the latest examination shows a measurable and significant change since the first examination, the worker will be considered as having been, in the interim, temporarily disabled. In that event, the date of the last examination will be the starting date of the pension.

When there was no examination by either a Board Medical Advisor or an External Service Provider when wage-loss benefits were terminated under Section 30, and there is no other measurable data on file with which to make a comparison with the final assessment of the Officer in Disability Awards, the pension will be backdated to the date benefits were terminated under Section 30.

#### *#41.11 Commencement Following Medical Review Panel Certificate*

Where a pension is being revised following an examination and certificate by a Medical Review Panel, it is not proper to automatically make the adjustment only from the date of the certificate. While this may be correct in some cases, it is not defensible as a general policy.

Where a certificate of a Medical Review Panel is received indicating results that differ from previous decisions of the Board or findings of the former Workers' Compensation Review Board, it must be considered what further decisions are required as a proper response to the certificate of the Panel.

Suppose, for example, there has been a dispute from the outset about whether a worker is suffering from disability "A" (which is compensable), or disability "B" (which is not compensable). The Board decided that it was "B", and that decision was maintained throughout the appeal system. Suppose the Medical Review Panel then decided that the worker is suffering from "A". It may be agreed by all concerned that the worker has not changed from "B" to "A", and that if suffering from "A" now, the worker must have been suffering from "A" at the outset. In that circumstance, there is obviously entitlement to compensation as from the date when first suffering from the disability.

There may be another case where it is agreed by all concerned that the degree of disability has not changed, and yet the Medical Review Panel has concluded that the worker is suffering from a disability more extensive than that which the Disability Awards Medical Advisor or External Service Provider found. In that case too, the pension adjustment must be retroactive.

In a third case, it may appear that a different condition diagnosed by the Medical Review Panel has resulted from a recent change and, in such a case, it would be proper to commence the disability award from the date of the certificate. In a fourth case, it might appear that there was some progressive deterioration and,

in that case, a sliding scale may be appropriate so that the revised disability award is partially retroactive, but not to the full amount.

In other words, there can be no standard rule that a revised disability award should or should not be retroactive. The previous decisions on the claim must be reconsidered in the light of the certificate of the Panel, and new conclusions must be reached to whatever extent is necessary to give full effect to the certificate of the Panel.

**EFFECTIVE DATE:** March 3, 2003 (as to reference to the former Review Board)  
**APPLICATION:** Not applicable.

#### *#41.12 Retroactive Awards*

Where a pension is awarded retroactively, the payments due prior to the date of the award will be paid in the form of a lump sum.

In calculating that sum, entitlement in respect of a portion of a month is determined by reference to the actual calendar days in a particular month. For example, if a worker is entitled to an award of \$1,000 per month, for the period March 17 to 31 (15 calendar days), the calculation is as follows:

$$\frac{\$1,000}{31 \text{ days}} \times 15 \text{ days} = \$483.87$$

A reduction in the lump sum is made in respect of periods of time during the period following the commencement of the pension when the claimant received wage-loss or rehabilitation benefits. However, no such reduction is made when the pension is awarded in the form of a lump sum and the monthly equivalent is less than \$20.00 per month at the time of the commutation.

The payment of interest on the lump sum is dealt with in #50.00.

#### **#41.20 Termination of Pension**

Pensions are normally payable throughout the claimant's lifetime, but for various reasons may be terminated prior to that time. For example, the claimant's disability may disappear, (12) the rule set out in #40.20 may result in a loss of earnings pension being wholly or partially terminated at age 65, or the Board may exercise certain powers discussed in #48.00 and #49.00.

In situations where a claimant in receipt of a pension dies from causes unrelated to the disability, the pension will be paid for the full month in which the death occurred. The past Board policy which came into effect on November 12, 1982 and required an apportionment of the pension in situations where there was no surviving dependants is rescinded. The effect of this policy will be that no overpayments will be considered to have arisen for the period from the date of the claimant's death up to the end of the month covered by the last pension payment.

If the worker dies prior to the implementation of the pension, the award is calculated and paid to the date of death. The situation where such a worker would have received a lump sum award is dealt with in #45.00.

### **#41.30 Pension Adjustments**

If a pension to a worker or a dependant is paid or increased on the basis of a Review Division decision, and the finding is later reversed by the Workers' Compensation Appeal Tribunal, the pension payments are terminated or adjusted as of the date of the Workers' Compensation Appeal Tribunal decision. In such cases, the capitalization is adjusted by the reversal of an amount equivalent to the unused portion of the capitalization or, in the case of a modification, the adjustment applies to the amount of the capitalization affected by the modification. The policy regarding relief of costs to employers in such circumstances is detailed in policy item #113.10.

**EFFECTIVE DATE:** March 3, 2003 (as to references to Review Division and Workers' Compensation Appeal Tribunal)  
**APPLICATION:** Not applicable.

### **#42.10 P.P.D. with Review**

Sections 22 and 23 of the *Act* are designed to provide income support for a worker who has suffered a permanent disability. These sections are intended to be used only where the recovery or change process has, to all intents and purposes, become medically constant and stable. Realistically, such a circumstance is not totally practical since ongoing change is a feature of human physiology; but, within reason, it is designed to come into play where healing is complete or where the deterioration in the condition of the claimant has ceased and no improvement can be reasonably foreseen. P.P.D.'s with review, i.e. permanent partial disability awards with a provision for review in the future have been used in the past where the change process was still underway and where, therefore, the medical condition of the claimant was still "temporary". That practice was not in accord with the *Act* and was discontinued.

A permanent partial disability award decision may, however, be reopened where a ground for reopening is met (see Chapter 14).

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

## **#42.20 Worsening or Improvement of Disability**

If the disability on which an award is based worsens, the extent of the disability is reassessed and a new award is made based on the reassessment. Conversely, if a worker should unexpectedly recover from a disability classified as permanent, the pension would be subject to termination or downward adjustment.

## **#42.30 Review of Old Pensions under Section 24**

Section 24(2) provides that “With respect to a claim for compensation to which this section applies, the board must, on application by the worker, reconsider the compensation benefits; and, if it decides that, in its opinion, the worker is not receiving adequate compensation having regard to the projected loss of income resulting from the disability, periodic payments must be established or raised accordingly.”

### *#42.31 Claims to Which Section 24 Applies*

Section 24(1) provides that “This section applies to the claims for compensation that the board may by regulation determine, provided that

- (a) the worker is still suffering from a compensable disability sustained more than 10 years before the application under subsection (2); and
- (b) a permanent disability award was made by the board based on a percentage of total disability of 12% or greater, or the case is of a kind in which the board uses a projected loss of earnings method in calculating compensation.”

Regulations have been issued by the Board which are set out below:

- “1. The regulations come into effect on the 1st day of December, 1982.
- 2. The regulations with respect to the review of old disability pensions, promulgated by the Board on the 21st day of July, 1975, the 13th day of November, 1975, and the 19th day of August, 1976 (B.C. Regulations 524/75, 746/75 and 492/76) are hereby repealed.
- 3. Unless the Board otherwise determines, Section 24 of the *Workers Compensation Act* applies to claims in which all of the following conditions are present:
  - (1) The worker is still suffering from a compensable disability sustained more than ten years previous to the application under Section 24(2).

- (2) A permanent disability award was made by the Board based on a percentage of total disability of 12% or greater, a disability award was made for an injury involving the spinal column, or a disability award was made for an injury to a part of the body other than the spinal column on or after October 1, 1977. Where the worker is still suffering from two or more compensable disabilities, this condition is satisfied if permanent disability awards were made by the Board which in aggregate were based on a percentage of total disability of 12% or greater, provided that a minimum of 5% of total disability was attributed to an injury or injuries sustained more than ten years previous to the application under Section 24(2).”

Clause 3(1) of these regulations does not mean that it is a requirement that each claim considered under Section 24 must be more than 10 years old. Where a worker has suffered several injuries with permanent disability resulting in several claims, the whole of the compensable disabilities resulting from these claims may be considered, provided that at least one of the compensable disabilities was sustained more than 10 years previous to the application under S. 24(2), and that a minimum of 5% of total disability was attributed to an injury or injuries sustained more than 10 years previous to the application.

The requirement in Clause 3(2) that the percentage of disability exceed 12% is a separate and independent requirement from Clause 3(1). Thus, it is not necessary that the disability award should have been made more than 10 years previous to the application, or that it should have been calculated at 12% or greater at any particular time.

The requirement in Clause 3(2) that a non-spinal disability of less than 12% be one that was assessed on or after October 1, 1977, in conjunction with Clause 3(2), means that no application for such a disability can be made under Section 24 until October 1, 1987.

Notwithstanding that a worker suffering a permanent disability has received an award that has been wholly or partly commuted, or an award for a fixed term, the worker may apply under this section, but he shall be deemed to be still receiving the periodic payments that have been commuted, or the life equivalent of the periodic payments made for a fixed term. (13)

#### *#42.32 Calculation of Benefits under Section 24*

Where a worker is under the age of 65 years, compensation is considered adequate for the purposes of this section if it equals 75% of the projected loss of earnings resulting from the disability. (14)

Section 24(4) provides that “Where a worker is 65 years of age or over, compensation is considered adequate for the purposes of this section if it equals 75% of the projected loss of retirement income resulting from the disability.”

Where a worker is under the age of 65 years, periodical payments established or raised under this section are subject to readjustment by reference to Subsection (4) upon the worker attaining the age of 65 years. (15)

The calculation of benefits is made in the manner the Board determines. (16)

Where a worker is under the age of 65 years, the Board must determine the projected loss of earnings resulting from the disability. This involves three steps:

1. A forward projection of the earning capability of the worker as it existed prior to the disability.
2. A projection of the present earning capability of the worker.
3. A determination of the extent to which any difference between (1) and (2) is a result of the disability.

These calculations are made primarily by reference to evidence in the particular case, with two exceptions. A table of monthly average wage rates in B.C. (see Supplement No. 1, Appendix 5) is used to establish two of the variables; and an age factor is applied to those cases where the disability was suffered when the worker was under the age of 23. With regard to the former, a projection of the pre-disability earning capacity is made by comparing the claimant's actual pre-injury earnings, limited by the maximum in effect at the time of injury, with the monthly average wage rate in the table for that year and applying the same ratio to the average wage in the table for the year when the calculation is being made. In making this projection, no account is taken of promotions which the claimant might have obtained if he had not been injured.

Where a worker is 65 years of age or over, the Board must determine the projected loss of retirement income resulting from the disability. This involves a determination of:

1. The retirement income that the worker would have been likely to be receiving if he or she had not sustained the disability.
2. The retirement income the worker is receiving.
3. A determination of the extent to which any difference between (1) and (2) results from the disability.

Here again, the determinations are made to some extent by reference to evidence in the particular case; but two standard formulae are used with regard to two important items.

The first relates to retirement income from savings. Many workers save part of the earnings accrued during their working lives, and these savings, or income from the savings, become part of retirement income. The Board must consider,

therefore, the loss of this element of retirement income resulting from the disability. To determine loss of retirement income from savings, a standard formula is used, based on such evidence as the Board has been able to obtain from aggregated data relating to the savings habits of Canadian families.

The second item being considered by a standard formula is the loss of retirement income from earnings by people at and above the age of 65 years. The formula selected is to use a flat rate cash amount per month for each percentage of disability.

Where a worker's pension has been adjusted under Section 24 when under the age of 65 years and the worker has now reached that age, the readjustment is done in the following manner:

1. When an adjustment is made to a pension for a worker who is under the age of 65, that adjustment will be diarized for review three months prior to the worker attaining the age of 65.
2. When the matter comes up for review, the file will be considered in accordance with the procedures developed for calculating awards for workers aged 65 or over. For the purpose of this calculation, the original functional award in effect prior to any previous adjustment under Section 24, plus applicable Consumer Price Index increases, will be regarded as the pension in effect at age 65.
3. The term adjustment payable to age 65 will automatically terminate when the worker reaches age 65. The adjustment calculated as per item (2) above will then come into effect. This new pension will be the higher of the original pension award plus Consumer Price Index increases or the adjusted pension determined in reference to the calculation for workers aged 65 or over.

The detailed calculation formulae are set out in Appendix 5 to this manual.

#### *#42.33 Maximum and Minimum Periodic Payments under Section 24*

Section 31 applies to the calculation of compensation under Section 24, but the calculation is not limited by reference to average earnings at the time of injury. (17)

The periodic payments awarded to a worker following a review under this section shall not exceed the maximum that the Board would award to a worker in an occupational category similar to the occupation of the applicant worker before the injury if she or he had, at the effective date of the review under this section, suffered a compensable disability similar to the compensable disability being suffered by the applicant worker. (18)

No decision under this section shall result in periodical payments to any worker being lower than they would if no application had ever been made under this section. (19)

**#42.34**      *Date when New Periodic Payments Commence under Section 24*

Where a worker whose disability occurred before January 1, 1965 applies under this section within one year of the earliest date on which becoming eligible to do so, an increase or establishment of benefits under Section 24 is effective from September 1, 1975 and, in all other cases, the effective date for the commencement of an increase or establishment of benefits under the section is the date on which the application is received at the Board. (20)

The following table sets out when claimants whose disabilities occurred prior to January 1, 1965 became eligible to apply under Section 24.

<b>Injury Occurred On or Before</b>	<b>Date of Commencement of Eligibility</b>
December 31, 1925	August 1, 1975
December 31, 1928	September 1, 1975
December 31, 1932	October 1, 1975
December 31, 1936	December 1, 1975
December 31, 1940	January 1, 1976
December 31, 1944	February 1, 1976
December 31, 1948	April 1, 1976
December 31, 1952	May 1, 1976
December 31, 1956	June 1, 1976
December 31, 1960	July 1, 1976
December 31, 1964	August 1, 1976

**#42.35**      *Reapplication under Section 24*

A worker may reapply under this section for reconsideration of his compensation benefits after a further 10 years have elapsed since the last previous application under this section. (21)

**#42.40**      **Reinstatement of Commuted Pensions under Section 26**

Section 26(1) of the Act provides that “Where periodical payments for permanent disability were awarded by the board prior to January 1, 1966, and where

- (a) the award was for a percentage of total disability of 12% or greater, and the whole of the periodical payments was commuted prior to that date;

- (b) a portion of the periodical payments equivalent to 12% of total disability or greater was commuted prior to that date; or
- (c) the award was for a percentage of total disability of 12% or greater and was of periodical payments for a fixed term,

and where the worker to whom the award had been made is still suffering from the disability, the board may, on the application of the worker, establish new periodic payments, which are to commence for the month in which the application is received at the board.”

#### #42.41 *Computation of Twelve Per Cent Disability*

In determining the percentage of total disability represented by a commutation of periodical payments, the monthly dollar amount of the commutation should be compared with the monthly dollar amount of the periodical payments before the commutation, and multiplied by the percentage of total disability represented by the periodical payments before the commutation.

If the worker has had more than one commutation in respect of the same or different disabilities, the total value of the commutations and the disabilities is taken into account. In this case, all the commutations required to make the 12% must have occurred prior to January 1, 1966.

Consider the following example of a worker injured in 1936 who had two partial commutations, one in 1952 and one in 1955, who applied for reinstatement in September, 1974.

A. True percentage of total disability awarded (as varied by age and wage factors)	61.20
B. Monthly wage rate prior to injury	100.00
C. Life value of pension per month	38.25
D. Monthly amount of 1952 commutation	6.75
E. 1952 commutation as percentage of whole disability $\frac{D \times A}{C} = \frac{6.75 \times 61.20}{38.25}$	10.80
F. Remaining percentage of total disability (A-E)	50.40
G. Balance of monthly pension (C-D)	31.50
H. Recalculation of monthly pension following #39.61 $31.50 \times \frac{66-2/3}{62-1/2} \times \frac{2,000.00}{12 \times 100.00}$	56.00

I.	Monthly amount of 1955 commutation	2.00
J.	1955 commutation as percentage of whole disability $\frac{(I \times F)}{H} = \frac{2.00}{56.00} \times 50.40$	1.80
K.	Total percentage of disability commuted (E + J)	12.60

In past years, the Board varied the assessed percentage of disability according to the earnings and age of the worker. In calculating the percentage of disability commuted for the purposes of Section 26, the disability as varied by these factors is used.

#### *#42.42 Purpose of Section 26 Already Achieved*

Section 26(5) provides that “This section does not apply where the purpose of the section has been achieved as a result of an application under Section 24 or in some other way.”

Therefore, Section 26 has no application to a situation where, in the events that have occurred, a worker has not lost the future benefit of any cost of living increases by reason of the commutation. As under Section 26, however, such a worker receives future cost of living increases based on what the periodical payments would have been had they not been commuted.

To take an example, suppose a worker was receiving a pension for permanent total disability, and in 1964 arranged with the Board a partial commutation of that pension equivalent to \$10.00 a month. If the remaining pension was increased pursuant to subsequent increases in the statutory minimum, it would, in November 1974, be \$341.01 less \$10.00 per month, i.e. \$331.01. The increases in the minimum have exceeded the cost of living increases, and in the result, the worker has not lost any cost of living increases by reason of the commutation. As cost of living adjustments are now made, the worker will continue to receive the cost of living percentage applied to \$341.01 so that the pension will continue to be the same as it would have been without the commutation, less the commuted \$10.00 per month.

#### *#42.43 Term Pensions*

Where the award was for a fixed term that has not expired or been commuted, Section 26 applies upon the expiry of the term. (22) The worker must also wait the expiry of the term if he or she has to combine an expired or commuted pension with the term pension to satisfy the 12% requirement.

Occasionally, a term pension may be converted into a life pension if the worker is found to have an increased entitlement because of a deterioration in the pensionable condition. Section 26 is applicable as soon as the conversion takes place.

#### #42.44 Rate of New Periodic Payments

Section 26(3) provides that "In order to calculate the rate of new periodic payments to be established under this section, the board must determine

- (a) the monthly payments that would have been payable on January 1, 1966 if the award had been of periodic payments for life and there had been no commutation, or, where the commutation was partial, the additional rate of monthly payments that would have been payable on that date if there had been no commutation; and
- (b) the additional amount of monthly payments that would have been payable for the month during which the application is received by way of increases on the amounts calculated under paragraph (a) if those amounts had continued to be due; namely, the total of all increases that would have been made from January 1, 1966 to and including the last day of the month preceding the date the application is received."

The rate of the new periodical payments is the amount calculated under clause (b). (23)

Consider the following examples:

1. Worker injured in 1938. Term award which expired in 1952. Application under Section 26 in February, 1976.
  - A. True percentage of total disability awarded (as varied by age and wage factors) 18.58%
  - B. Monthly wage rate prior to injury \$80.00
  - C. Life value of pension per month (24)  

$$\frac{18.58}{100} (A) \times \frac{62-1/2}{100} \times 80.00 (B)$$
 \$9.29
  - D. Monthly pension that would have been payable if there had been no term award under provision in #39.61 (Section 33(4))  

$$9.29 (C) \times \frac{66-2/3}{62-1/2} \times \frac{2,000.00}{12 \times 80.00 (B)}$$
 \$20.64
  - E. Provision in #39.62 inapplicable as would result in pension less than under #39.61
  - F. C.P.I. from January 1, 1966 to January 1, 1976, on \$20.64 (D)  
 76.3452% of \$20.64 \$15.75

G.	New monthly periodical payments under Section 26 commencing February 1, 1966	\$15.75
2.	Claimant injured in December, 1944. Commuted part of permanent partial disability pension in 1950. Application under Section 26 in November, 1974.	
A.	True percentage of total disability awarded (as varied by age and wage factors)	40.97%
B.	Monthly wage rate prior to injury	\$150.00
C.	Life value of pension per month $\frac{40.97}{100} (A) \times \frac{66-2/3}{100} \times 150.00 (B)$	\$40.97
D.	Monthly amount commuted	\$14.95
E.	Percentage of total disability commuted $\frac{14.95}{40.97} (D) \times 40.97 (A)$	14.95%
F.	Provision in #39.61 inapplicable as injury occurred after March 18, 1943	
G.	Additional monthly pension that would have been payable had there been no commutation under provision in #39.62 $\frac{14.95}{100} (E) \times 130.00$	\$19.44
H.	C.P.I. on additional monthly pension (G) from January 1, 1966 to July 1, 1974 49.85% of \$19.44	\$9.69
I.	Additional monthly periodical payments under Section 26 commencing November 1, 1974 (to be added to existing pension)	\$9.69

**#42.45 Consumer Price Index Adjustment After Reinstatement**

Consumer Price Index adjustments after the establishment of the new periodical payments are based on the sum of the amounts calculated under clauses (a) and (b) in #42.44. (25) A formula for calculating these adjustments, which applies both in cases of total and partial commutation is set out below.

Where the commutation was partial, so that part of the original pension is still subsisting, the residue of the original pension may be blended with the reinstated pension under Section 26. Where the commutation was total, the formula applies to the reinstated pension, and where the commutation was partial, it applies to the blend of the residue of the original pension with the reinstated pension.

The formula is:

1. The amount of pension benefits being paid for the month preceding the C.P.I. increase	\$
PLUS	
2. The monthly amount of pension that had been commuted	\$
	Subtotal \$
3. The application of the C.P.I. adjustment ratio to that subtotal	\$
	Second Subtotal \$
LESS	
4. The monthly amount of pension that had been commuted	\$
	Total \$

The resulting total is the monthly pension that will be applicable after the C.P.I. increase.

#### *#42.46 Commutation of New Periodic Payments*

Generally, no commutation will be allowed in respect of the new periodical payments awarded under Section 26. However, the Board does have discretion to permit this in unusual cases.

## **#43.00 DISFIGUREMENT**

Section 23(5) of the Act provides:

“Where the worker has suffered a serious and permanent disfigurement which the board considers is capable of impairing the worker's earning capacity, a lump sum in compensation may be paid, although the amount the worker was earning before the injury has not been diminished.”

### **#43.10 Requirements for Award**

Section 23(5) establishes the following requirements:

1. The disfigurement must be “permanent”. A temporary disfigurement is not sufficient.
2. The disfigurement must be “serious”. No award will be made if the disfigurement is minimal.
3. The disfigurement must be one that the Board considers capable of impairing the worker’s earning capacity. This is normally assumed in cases of the head, neck and hands. In other cases, a decision must be made which has regard to the age and occupation of the worker, the visibility and extent of the disfigurement and any other relevant circumstances. Since Section 23(5) states that the amount the worker is currently earning does not have to be diminished, this requirement is concerned with the worker’s long-term earning capacity.

Where there is disfigurement as well as a permanent disability, the worker may receive awards for both. Subject to the Board applying Section 35(2) of the Act (see #45.00), the award for the permanent disability is a pension, and the award for disfigurement a lump sum. These awards must be assessed separately.

Disfigurement is concerned with the appearance of the body, not loss of bodily function. Therefore, a loss of skin function, for example, soreness or itchiness or unusual sensitivity to light, heat or humidity, will be considered for a permanent disability rather than a disfigurement award. The granting of an award will depend on the normal criteria for permanent disability awards.

The ultimate aim of disfigurement and permanent disability awards is to compensate for loss of earning capacity. The worker should not receive double compensation for the same loss. No disfigurement award is granted for something which is directly covered by a permanent disability award, for

example, the deformity caused by the normal appearance of an amputated limb. A disfigurement award may be considered where the appearance of an impairment for which a permanent partial disability award has been granted is disfiguring to an exceptional degree.

If the worker receives an award of 100% on a physical impairment basis under Section 23(1), or an award for total unemployability under Section 23(3), there is no additional loss of earning capacity which can form the basis for a disfigurement award.

Where psychological disability results from disfigurement, consideration will be given to a permanent disability award under Section 23(1) or 23(3) following the normal practices for such awards (see #22.33).

### #43.20 Amount of Award

In calculating the amount of an award, the guidelines set out below apply:

1. Points are assigned to each of five factors assessed individually according to the table set out below. The assessment will normally be based on photographs of the worker but there may also be a visual examination of the worker in exceptional cases. The Board officer will give reasons for the points assigned to each factor.

<b>POINTS / FACTORS</b>	<b>0-24 POINTS</b>	<b>25-49 POINTS</b>	<b>50-74 POINTS</b>	<b>75-99 POINTS</b>
<b>Surface area of part of body (see guideline 3)</b>	Less than 25%.	25%-49%.	50%-74%.	75% or more.
<b>Texture and thickening. keloid scarring hardening.</b>	Mild alteration of texture.  Slight wrinkling, furrows or marks.	Moderate thickening.  Moderate hardening.  Mild dryness or scaling. Prone to pimples.	Major thickening.  Major hardening.  Moderate dryness or scaling. Frequent pimples.  Prone to ulceration.	Severe  Severe  Major dryness or scaling. Frequent ulceration. Significant irregularity of scar.
<b>Colour</b>	Mild alteration of colour.	Moderate alteration of colour.	Major alteration of colour.	Severe alteration of colour.
<b>Visibility</b>	Less than 25% visible with work clothing.	25 to 49% visible with work clothing.	50 to 74% visible with work clothing.	75% visible or greater with work clothing.
<b>Loss of bodily form.</b>	Mild depression or elevation.	Moderate depression or elevation	Major depression or elevation. Moderate to major atrophy. Moderate to major irregularity of body.	Severer depression or elevation. Severe muscle or tissue loss.

2. An average is taken of the points assigned by dividing the total points by five and the disfigurement is placed in one of four classes as follows:

Class 1	0 to 24 points
Class 2	25 to 49 points
Class 3	50 to 74 points
Class 4	75 to 99 points

3. The area of the body affected is determined. Five areas are recognized. A minimum and maximum award exists for each of the four classes for each area of the body as shown in the following table:

**January 1, 2002 – December 31, 2002**

	<b>Minimum</b>	<b>Maximum</b>
Head and Neck		
1.	\$ 0.	\$ 4,656.80
2.	4,656.80	9,313.59
3.	9,313.59	28,289.97
4.	28,289.97	47,149.97
Each Hand		
1.	\$ 0.	\$ 1,513.46
2.	1,513.46	3,143.33
3.	3,143.33	9,313.59
4.	9,313.59	15,716.64
Each Arm		
1.	\$ 0.	\$ 1,164.18
2.	1,164.18	2,328.39
3.	2,328.39	7,101.59
4.	7,101.59	11,758.40
Each Leg (including the foot)		
1.	\$ 0.	\$ 814.93
2.	814.93	1,513.46
3.	1,513.46	4,656.80
4.	4,656.80	7,800.12

Torso

1.	\$ 0.	\$ 814.93
2.	814.93	1,513.46
3.	1,513.46	4,656.80
4.	4,656.80	7,800.12

The above figures are adjusted on January 1 of each year. The Consumer Price Index ratio determined under Section 25 of the *Workers Compensation Act* for January 1 and the previous July 1 will be used (see #51.00).

- The amount of the award is (subject to the minimum) the percentage of the maximum dollar amount for the class that the average points for the disfigurement bears to the maximum points assigned to the class. For example, if the average points for a hand disfigurement is 6, it is assigned to Class 1 of the hands area of the body and the amount of the award is \$325  $((6/24) \times \$1,300)$ . If a burn to the chest is assigned an average of 34 points, it is in Class 2 of the torso area of the body and the amount of the award is \$897  $((34/49) \times \$1,300)$ .

Detailed examples of the application of the above guidelines are set out below:

**Example 1**

The worker has a loss of the fingernail and nailbed, slight shortening of the right mid finger, a small curved raised nail growing through the graft at the injury site. Assuming that the disfigurement were found capable of impairing earning capacity, the award would be calculated as follows:

Factors	Description	Points
Surface area	Less than 25%	2
Texture / keloid	Minimal alteration; no keloid	2
Colour	No contrast	0
Visibility	Less than 25%	20
Structure	Mild evidence of depression	5

- A. Total points are 29.
- B. Average points are 6 (29/5). Disfigurement is in Class 1.
- C. Determine % which average points in line B bears to maximum points for Class 1 = 25% (6/24).
- D. Apply % from line C to maximum dollar amount for Class 1 for the hands area = \$325 (25% of \$1,300).

Amount awarded is \$325.

### Example 2

The worker has healed burns that extend up the right side and front of the abdomen and chest. There is evidence of occasional ulceration and moderate irregularity of the scars. Scar colour is significantly different when compared to unaffected skin. Assuming that the disfigurement were found capable of impairing earning capacity, the award would be calculated as follows:

Factors	Description	Points
Surface area	Less than 25%	20
Texture / keloid	Some puckering and contraction; moderate keloid, scars raised to 3 mm	70
Colour	Significant contrast	80
Visibility	Nil	0
Structure	No evidence of depression or elevation other than keloid	0

- A. Total points are 170.
- B. Average points are 34 (170/5). Disfigurement is in Class 2.
- C. Determine % which average points in line B bears to maximum points for Class 2 = 69% (34/49).

- D. Apply % from line C to maximum dollar amount for Class 2 for the torso area = \$897 (69% of \$1,300).

Amount awarded is \$897.

## **#44.00 PROPORTIONATE ENTITLEMENT**

Section 5(5) provides that “Where the personal injury or disease is superimposed on an already existing disability, compensation must be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease must, unless it is otherwise shown, be the amount of the difference between the worker’s disability before and disability after the occurrence of the personal injury or disease.”

This subsection deals with cases where the compensability of the immediate injury and disability has been accepted by the Board. It does not concern itself with the initial adjudication as to the causation of the particular disability.

### **#44.10 Meaning of Already Existing Disability**

The mere fact that the worker suffered from some weakness, condition, disease, or vulnerability which partially caused the personal injury or disease is not sufficient to bring Proportionate Entitlement into operation. The pre-existing condition must have amounted to a disability prior to the occurrence of the injury or disease.

Three situations are distinguished:

1. In cases where it has been decided that the precipitating event or activity, and its immediate consequences, were so severe that the full disability presently suffered by the claimant would have resulted in any event, regardless of any pre-existing disability, Section 5(5) should not be applied.
2. In cases where the precipitating event or activity, and its immediate consequences, were of a moderate or minor significance, and where there is only x-ray evidence and nothing else showing a moderate or advanced pre-existing condition or disease, Proportionate Entitlement should not be applied. These cases should not be classified as a disability where there are no indications of a previously reduced capacity to work and/or where there are no indications that prior ongoing medical treatment had been requested and rendered for that

apparent disability. In determining whether there has been ongoing treatment, regard will be had to the frequency of past treatments and how long before the injury they occurred.

3. Where the precipitating event or activity, and its immediate consequences, were of moderate or minor significance, but x-ray or other medical evidence shows a moderate to advanced pre-existing condition or disease, and there is also evidence of a previously reduced capacity to work and/or evidence of a request for and rendering of medical attention for that disability, Section 5(5) should be applied.

These rules apply to all permanent partial disability awards assessed on or after March 15, 1978.

Section 5(5) only applies where an injury is “superimposed” on an already existing disability. The injury and the existing disability must be in the same part of the body.

The fact that the claimant has an award from another agency for a pre-existing disability does not affect this Board’s practise. The Board makes its own assessment of the pre-existing disability and is not bound by the percentage awarded by the other agency.

#### **#44.20 Temporary Disability and Health Care Benefits**

It is not the policy of the Board to apply the provisions of Section 5(5) to health care benefits or temporary disability benefits. Ordinary wage loss will be paid on the simple presumption that the claimant was fit and able to carry on regular duties prior to the injury and is, at the time of receiving wage-loss benefits, totally or partially unable. The only conclusion to be derived from these facts is that the injury itself is the sole cause of that immediate total or partial disability. Proportionate Entitlement is thus a concept applicable only to permanent disability awards.

#### **#44.30 Permanent Disability**

Where a worker already has a pre-existing disability, and suffers a work injury resulting in an aggravation of the disability, wage-loss compensation is paid for the period of any temporary total disability. If the aggravation was temporary only and the worker recovers from the aggravation so that she or he is restored to the position of the pre-existing disability, there is then no residual disability resulting from the work injury, and therefore no further compensation. However,

where a pre-existing disability is permanently aggravated by the work injury, and the worker's condition has stabilized, the Board must then consider how much is the compensable aggravation.

Assuming that a pre-existing impairment has been established, Section 5(5) requires that compensation shall be allowed only for such proportion of the claimant's "disability" as may reasonably be attributable to the personal injury or disease. "Disability" again means loss of body function or physical impairment.

The measure of the disability attributable to the personal injury or disease shall, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease. (27)

The Board's practice in relation to Section 5(5) has no relevance to conditions which arise after the injury. It is only concerned with pre-existing problems. The Board's practice is that it will apportion its responsibility in respect of a disability attributable to causes other than the work injury arising after the injury.

Consider the example of a worker whose average earnings are \$1,000 per month and who, following a work injury, has a 10% disability. If the whole of that disability is attributable to the injury, the monthly pension awarded on a physical impairment basis is 75% of 10% of \$1,000, i.e. \$75.00 a month. If, however, 3% out of the total impairment existed prior to the injury, Section 5(5) requires that compensation only be awarded in respect of the 7% caused by the injury. The worker would therefore receive 75% of 7% of \$1,000 per month, i.e. \$52.50.

#### *#44.31 Application of Proportionate Entitlement to the Dual System*

In every case where there was a pre-existing disability, the Board has to decide whether the loss of earnings experienced by the worker after the injury is wholly the result of the compensable disability or partly the result of the pre-existing disability. If it decides that the whole loss is the result of the compensable disability, no reduction in the pension is made under Section 5(5). If it decides that a portion of the loss is attributable to the pre-existing disability, a pension is only awarded for the portion attributable to the compensable disability.

The Board feels that this is fair to claimants in that it allows for the fact that their pre-injury earnings may already have been reduced by the pre-existing disability. On the other hand, it ensures that the Board does not become responsible for loss of earnings which are really attributable to the delayed or progressive effect of non-compensable pre-existing disabilities. The Board recognizes that it is often difficult in practice to properly allocate the causes of a loss of earnings where there is pre-existing disability, but do not feel that it is any more difficult than other decisions that have to be made under the Act, or that this difficulty justifies a different interpretation of Section 5(5).

Consider, for example, a worker with a pre-existing disability determined to be 40% of total disability, who, following a back injury, has a disability of 60% of total disability. Assume the average earnings of the worker prior to the injury were \$1,000.00 per month and he or she has suffered a total loss of earnings following the injury which is partly attributable to a pre-existing disability.

A. Physical Impairment Method

Amount that would be payable for a total disability – (75% x \$1,000.00)	\$750.00
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Partial disability pension after application of Proportionate Entitlement (60% – 40% = 20% x \$750.00)	\$150.00
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B. Projected Loss of Earnings Method

Projected loss of earnings	\$1,000.00
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75% of projected loss of earnings	\$750.00
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Partial disability pension after application of Proportionate Entitlement ( $\frac{20\%}{60\%} \times 100 = 33\text{-}1/3\% \times \$750.00$ )	\$250.00
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**#44.40 Disabilities Arising Prior to April 6, 1968**

Prior to 1968, the relevant provision of the Act, Section 7(5), read as follows:

“Where the personal injury consists of injury or disease in part due to the employment and in part due to causes other than the employment or where the personal injury aggravates, accelerates, or activates a disease or condition existing prior to the injury, compensation shall be allowed for such proportion of the disability as may reasonably be attributed to the personal injury sustained.”

This subsection, of course, continues to apply to all disabilities arising prior to April 6, 1968, when the new subsection was proclaimed.

## **#45.00 LUMP SUMS AND COMMUTATIONS**

Section 35(2) of the *Act* provides:

The board may in its discretion

- (a) commute all or part of the periodic payments due or payable to the worker to one or more lump sum payments, to be applied as directed by the board; and
- (b) divide into periodic payments compensation payable in a lump sum.

In case of death or permanent total disability or in case of permanent partial disability where the impairment of earning capacity exceeds 10% of the worker's earning capacity at the time of the injury, no commutation of periodic payments can be made under subsection (2) except upon the application of and at an amount agreed to by the dependant or worker entitled to such payments. (28)

### **#45.10 Pension Categories/Lump Sum Awards**

#### **Category A:**

Where

1. a compensable disability has been assessed at not more than 10% of total disability, and
2. the pension is not more than \$200.00 per month,

a lump sum will be awarded in lieu of a monthly pension.

#### **Category B:**

In any case not within Category A, where the pension is more than \$200.00 per month, the award will consist of a monthly pension and commutation will only be considered under the circumstances outlined below.

Where a worker or dependant has more than one disability pension or dependant benefit on one or more claims, the above figures apply to the combined total. Where the worker or dependant has had previous commutations or lump sum awards, these previous awards are not applied to the combined total.

Where a commutation request is made after the award of a pension or dependant benefit, the monetary level at the date of the request is used rather than the level at the date of the award.

A review of the monetary level in Categories A and B will be undertaken annually. Any changes to the amount will normally take place on the first day of the month following the month of the review.

The amount set out above is effective October 1, 2002. If required, earlier figures may be obtained by contacting the Board.

#### **#45.20 Criteria for Allowing or Disallowing a Commutation**

The same criteria apply, whether or not the Board has recovered all or part of the capital reserve in a third party action.

Workers granted awards that fall within Category A will automatically be given a lump sum award.

The general rule is that no commutation will be granted for cases in Category B.

There are, however, certain situations where a commutation may be desirable. The purpose of the guidelines set out below is to define those situations where it is in the worker's long term interests to receive a commutation and to state the terms and conditions on which such commutations are granted.

In considering a commutation, the following will apply:

1. A commutation must be for a specific purpose.
2. A commutation will, in general, only be allowed for purposes that are calculated to enhance the income position of the worker.
3. The applicant must have a stable source of income other than the disability pension.
4. A commutation will not be allowed where the applicant is a person whom the Board considers incapable of managing his or her own affairs or who has a demonstrated incapacity for money management.
5. Where there is an application by a widow or widower to commute a pension which is paid in whole or part for the children regard may have to be had to the separate interests of the children.

6. If the other requirements are met, a commutation may be in the worker's long term interests notwithstanding the worker's medical condition may not have settled or involves a significant risk of deterioration. However, while a potential deterioration in the worker's condition will not automatically bar a request, it is a relevant factor to be considered. It might, for instance, lead to a conclusion that the worker's existing income from other sources would not be stable from a long-term point of view.

Similarly, the fact that a disability may improve in the future will not automatically bar a request for a commutation, even though the commutation will prevent the Board from reducing the pension when the improvement occurs. The possibility of such an improvement may, however, be taken into account if it is significant. It may influence the amount of commutation granted.

7. A short expectation of life or a worker's wish to benefit the dependants following his or her death is not a ground on which the Board can permit a commutation.

**EFFECTIVE DATE:** March 1, 2007

**APPLICATION:** The amendments to this policy, that term commutations are no longer available, brought into effect by BOD Resolution No. 2007/01/23-02, apply to all applications for commutations made on or after March 1, 2007.

**HISTORY:** This policy was amended effective October 1, 2002. Changes were made to the threshold amounts for automatic commutations and the criteria for considering commutations were broadened. Please refer to BOD Resolution No. 2002/08/27-04 for details of the amendments. The policy as amended October 1, 2002 applies to all new claims received, all active claims that were awaiting an initial permanent disability award adjudication, and all active claims that were awaiting initial adjudication of periodic payments of compensation to a dependant of a deceased worker, on or after October 1, 2002. The policy as amended October 1, 2002 does not apply to workers in receipt of a permanent disability award or pension based on a projected loss of earnings that was initially adjudicated before October 1, 2002.

**#45.21**      *Death of Worker Prior to Award under Category A in Policy Item #45.10*

Under the terms of the *Act*, disability awards are payable to a worker. There is no provision for a disability award to be payable in respect of a deceased worker.

The *Act* distinguishes between two different categories of benefits:

1. Benefits payable to a disabled worker.
2. Benefits payable to dependants and others in respect of the death of a worker.

No compensation under the first heading can validly be awarded in respect of future disability after the death of a worker. Where future benefits have been issued after the death of a worker, the benefit will be cancelled and recalculated up to the date of the worker's death.

### **#45.30 Types of Commutations Permitted**

There are two types of commutations that the Board may permit:

1. A partial commutation resulting in a reduced level of pension for life.
2. A full commutation of the whole pension for life.

To ensure that a commutation is used for the purpose for which it is sought, the Board may make a commutation cheque payable to a worker and to another.

**EFFECTIVE DATE:** March 1, 2007

**APPLICATION:** This policy applies to all applications for commutations made on or after March 1, 2007.

### **#45.40 Purpose of Commutations**

Certain purposes for which commutations are commonly requested are discussed below. The list is not intended to cover every purpose for which a commutation may be requested but rather is designed to provide guidelines to ensure the consistent handling of certain common types of application.

#### *#45.41 Paying Off Debts*

The Board is concerned that lenders might be encouraged to grant excessive extensions of credit to pensioners if they became aware that commutations could easily be obtained to pay off debts. Section 15 of the *Act* seeks to protect workers from creditors by making pension payments non-assignable. The Board will not undermine this intention by freely allowing commutations for the purpose of debt reduction. Therefore, a commutation is more likely to be allowed for paying off debts that were incurred prior to the injury.

A person incurring heavy debt may have serious long-term problems which will not be resolved simply by a commutation to pay debts. These problems may lead to incurring further debt even if the existing debt is paid. The person will then be in an even more serious position than before because there will now be no pension. It may, in such cases, be more appropriate to refer the pensioner for financial counselling rather than to attempt to resolve the situation by a commutation of pension payments. Nevertheless, a commutation to pay off debts may be advisable and in the best interests of the worker if it will avoid high interest obligations. Commutation applications for this purpose will be carefully scrutinized for other alternatives before being allowed.

#### *#45.42 Investments*

A commutation will not be allowed for investment purposes.

#### *#45.43 Starting a Business*

From a purely financial standpoint, it may be difficult to distinguish between investing in one's own business and other forms of investment. It is, moreover, often difficult for officers of the Board to determine with any degree of certainty whether what the worker wishes to undertake is a sound business venture. Investing in one's own business, however, may be in the worker's best interests where there is a strong element of rehabilitation involved and the worker will be an active participant in operating the business. Any application for a commutation for the purpose of starting a business will be thoroughly investigated with these considerations in mind.

In each case where a business start-up is contemplated for which a commutation has been requested, or as a vocational rehabilitation measure, the Board officers undertaking the assessment of the matter will obtain, with the worker's written consent, an appraisal of the viability of the proposed business from the Business Development Bank of Canada or some similar organization before a final decision on the commutation request, or rehabilitation measure, is made.

#### *#45.44 Education*

Unless the proposed educational program will promote the worker's career, a commutation for this purpose would not normally enhance the worker's income position and consequently would not satisfy the above general guidelines. There may, however, be some therapeutic benefit in allowing pensioners to improve their education when the improvement cannot be provided through normal rehabilitation programs. The requirement for the applicant to have a stable source of income may be waived where the Board is satisfied that the training or educational program will increase the prospects of employment and therefore enhance the income position over the long term. Where the program will not

increase the employment prospects, but will have a significant therapeutic benefit, the Board may waive the requirement that the commutation be for a purpose that enhances the worker's income position. In such a case, it will not waive the requirement that the applicant have a stable source of income.

#### **#45.45**      *Buying a Home*

Commutations for purchasing a home will be allowed under the following conditions:

1. The home is purchased as a personal residence.
2. The worker will obtain clear title to the property subject only to any mortgage.
3. Any mortgage payments are well within the worker's ability to pay from other income.
4. The size, value and upkeep costs of the home are in line with other income.

The discharge or reduction of an existing mortgage will be dealt with under the criteria for paying off debts in policy item #45.41, rather than under the criteria for buying a home. In administering this feature, however, a request for a commutation to discharge or reduce an existing mortgage should primarily be considered in the same general vein as a commutation to purchase a home, with the added insurance that consideration should be given to the safeguards built into the debt payment provisions. The expectation of this approach is that, in general, given similar circumstances, there should be little difference in the result following a decision made under either category.

A commutation for the purpose of extending an existing home may be allowed if the above requirements are satisfied.

A commutation will not normally be allowed for the purpose of purchasing a second home to be used for vacations, or retirement, or to be rented out. The home must be for the purpose of providing the claimant with current accommodation.

#### **#45.50**      **Decision-Making Procedures**

The Board officer in Disability Awards is responsible for investigating an application for a commutation and making a decision on the application. The Board officer may obtain a report from the Board officer in Vocational Rehabilitation Services involved in the claim before making a decision.

Where a commutation application is under consideration, the value of the proposed commutation can be made available so that the claimant may properly evaluate the options open.

If the value of a commutation under Category B in policy item #45.10 exceeds the limit set in Category A, the Board officer must obtain approval of the Vice-President, Compensation Services Division before granting the request. Where an application is received that does not fall within the guidelines and it is thought that there should be some departure, the application must also be referred to the Vice-President for consideration.

An employer is not normally advised of the granting of a commutation. An exception is made where the employer is the Federal Government. It is advised of the amount and type of the commutation.

#### **#45.60 Amount Paid on Commutations**

When a pension reserve is established or a liability is calculated for a pension, the monthly pension amount is converted to a lump sum by applying an actuarial net discount rate. This actuarial net discount rate is set by the Board and represents the anticipated difference between long term future investment returns and long term future inflation.

Similarly, when a pension commutation is granted, the monthly pension amount is converted to a lump sum by applying a commutation net discount rate. For pensions that are automatically commuted by the Board without a request from the worker, the commutation net discount rate used will be equal to the actuarial net discount rate. For pensions that are commuted by the Board at the worker's or dependant's request, the commutation net discount rate used will be equal to the actuarial net discount rate increased by .5 percentage points.

#### **#45.61 *Calculation of Lump-sum Payment or Commutation***

Where, as a result of the application of the policies outlined in policy items #45.10 to #45.60, the Board officer in Disability Awards decides on a lump sum or commutation, it is paid forthwith.

Whenever a lump-sum payment or commutation is calculated following the review or appeal process, the calculation will be based on the date on which it is processed.

**EFFECTIVE DATE:** April 8, 2003  
**APPLICATION:** To all decisions made on or after April 8, 2003.

## NOTES

- (1) See #66.12
- (2) See #51.13
- (3) See #40.00
- (4) S.23(2)
- (5) Permanent Disability Evaluation Schedule Appendix 4
- (6) See #25.10
- (7) Decision No. 157
- (8) S.23(4); See #34.20
- (9) See #37.21
- (10) S.33(4)
- (11) See #66.20
- (12) See #42.20
- (13) S.24(7)
- (14) S.24(3)
- (15) S.24(5)
- (16) S.24(6)
- (17) S.24(8)
- (18) S.24(9)
- (19) S.24(12)
- (20) S.24(11)
- (21) S.24(10)
- (22) S.26(2)
- (23) S.26(4)
- (24) The 62-1/2% shown in the equation is the percentage of average earnings used in 1938 for calculating compensation, the equivalent of the present 75%
- (25) S.26(4)
- (27) S.5(5)
- (28) S.35(3)