

CHAPTER 9

AVERAGE EARNINGS

#64.00 INTRODUCTION

Whether payable to disabled workers or dependants of deceased workers, compensation is normally based on the worker's "average earnings". Occasionally it is based wholly or partly on fixed amounts set out in the Act which are subject to Consumer Price Index adjustments.

#65.00 AVERAGE EARNINGS

Section 33(1) of the Act provides in part as follows:

"The average earnings and earning capacity of a worker must be determined with reference to the average earnings and earning capacity at the time of the injury, and may be calculated on the daily, weekly or monthly wages or other regular remuneration which the worker was receiving at the time of the injury, or on the average yearly earnings of the worker for one or more years prior to the injury, or on the probable yearly earning capacity of the worker at the time of the injury, as may appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury, but not so as in any case to exceed the maximum wage rate, . . ."

This section provides for various alternative methods of calculating average earnings. It obliges the Board to select for each claim the method which most accurately represents the workers actual loss of earnings by reason of the injury. This does not mean that Claims Adjudicators have complete freedom of choice in respect of each individual claim. In addition to considering the circumstances of each individual claim, the Board must ensure that the application of Section 33 is consistent between different claims. This requires that the Board lay down a framework of principles which Claims Adjudicators are required to follow. However, within that framework, the Claims Adjudicator retains the basic discretion granted by Section 33(1) to calculate a particular worker's average earnings in accordance with the method that most accurately reflects the loss.

There will be situations where the framework laid down by the Board, when applied to an individual case, will not meet the principles of, or the intent of, Section 33(1). Therefore the discretion allowed under Section 33(1) of the Act may require that the Adjudicator exercise judgment in calculating average earnings that would ". . . appear to the board best to represent the actual loss of earnings suffered by the worker by reason of the injury, but not so as in any case

to exceed the maximum wage rate, . . .” The Adjudicator will not, however, interpret “best” to mean the highest rate possible, but rather to select the rate which most closely reflects the actual loss incurred.

The general provisions of Section 33(1) are modified in respect of particular situations by other provisions of the Act.

Set out below is the framework of principles adopted by the Board in its application of Section 33(1), together with other relevant statutory provisions.

#66.00 WAGE-LOSS RATES ON NEW CLAIMS

Except in the cases set out in #66.10-34, wage-loss payments made at the outset of a claim are based on the worker’s rate of pay at the date of injury up to the maximum wage rate permitted by the Act. (1) Compensation based on this rate will normally continue until the end of the worker’s temporary disability or the 8-week rate review, (2) whichever comes first.

Irrespective of how wages are paid by the employer, they are converted by the Board to a weekly equivalent. After conversion to a weekly equivalent, a daily wage rate is calculated by dividing the weekly earnings rate by the number of days worked in the week. The daily compensation rate is 75% of this figure.

#66.01 Variable Shift Workers

1. Short-Term Disabilities – Within One Shift Cycle

In general, in those cases where a worker’s disability does not extend beyond one short cycle of shifts (usually with a maximum disability period of two weeks or a first and final payment), the wage-loss payment is calculated by entering the worker’s actual loss into the Board’s computerized automated wage-loss system which calculates 75% of the loss incurred. The application of the statutory maximum entitlement is determined by the computer by reference to the amounts paid over each calendar week.

2. Disabilities Extending Beyond One Shift Cycle

(a) Variable But Repeating Shifts

In those cases where variable but repeating shifts are worked, for example, a nine-day fortnight shift pattern, and the Adjudicator or Claims Officer anticipates the period of disability will not be short-term, rather than pay on the basis of the actual loss as described in 1. above, the automated wage-loss system will calculate the

worker's payments. The calculations are based on the shift cycle starting date, the shift cycle pattern, and the worker's rate of pay at the time of injury (hourly rates are converted to daily or weekly amounts). An 8-week rate review, as described in #67.20, is carried out on these claims. Exceptions to this approach are made when the worker:

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

(b) Irregular Shifts

In those cases where the worker has irregular shifts, shifts with no repeating patterns, or situations involving the four exceptions listed above, the wage rate is set using the rate setting guidelines for long-term earnings as described in #66.10, and the worker is paid on the basis of a seven-day week for the full period of temporary disability. No 8-week rate review is carried out in those cases.

#66.02 Claimant with Two Jobs

If a worker holds two jobs and is disabled from both by an injury arising out of and in the course of one of them, wage-loss compensation will be based on the combined earnings of both jobs up to the statutory maximum. This applies whether or not the other job is covered by Part 1 of the Act or is self-employment. The total days worked in both jobs are merged to obtain the days worked per week. Both employers, if covered by Part 1 of the Act, may be reimbursed by the Board if they continue paying the disabled worker. (3)

When a worker is injured on a job for which personal optional protection has been purchased and we are combining actual income earned in a second job, with the actual income earned in the job for which personal optional protection coverage has been purchased, the compensation rate on the claim cannot be less than the personal optional protection rate purchased. (See #66.20 also.)

#66.10 Use of Long-Term Earnings

Because of the irregular or varying nature of a worker's earnings, it may not be reasonable or practical to determine the rate of pay at the date of injury without

having regard to earnings over a long period of time. For example, this may apply to shift or piece workers, or cases where a significant portion of a claimant's earnings consist of commission, tips, bonuses, or intermittent overtime.

Alternatively, information available at the outset of a claim may indicate that a worker's earnings over a longer period prior to the injury are significantly greater or less than the earnings at the time of the injury. The Claims Adjudicator should investigate the claimant's earnings over the longer period (usually the one-year period prior to the injury), and determine the reasons for the difference. If satisfied that the worker's earnings over the longer period better represent the loss of earnings by reason of the injury, the Claims Adjudicator may base wage-loss payments on these earnings from the outset of the claim. Suppose, for example, there are high earnings over the previous year, but for reasons beyond the worker's control there are low earnings at the time of injury. It may be reasonable in such a case to use the worker's earnings over the year prior to the injury rather than his earnings at the time of injury. On the other hand, if the worker's earnings are lower over the longer period because of a personal choice for more leisure time over that period, it might be reasonable to use the lower earnings over the longer period.

The Adjudicator must use the figure which best represents the worker's actual loss of earnings by reason of the injury. This will not necessarily be the figure which gives the worker the highest compensation rate. Furthermore, the requirement that average earnings "at the time of the injury" be used means that payments cannot be based on earnings in a period of time in the past which terminated prior to the injury. Only earnings in a continuous period which ends with the injury can be used. For the majority of short-term disability claims, unless the difference between the rate at the time of the injury and the long-term earnings is excessive, the best representation of the short-term loss will be the rate being earned at the time of the injury.

Where it is clear that a worker is permanently totally disabled, wage-loss payments will from the outset of the claim be based on the same wage rate as the pension. (4)

#66.11 Computation of Long-Term Earnings

If not supplied by the employer, earnings information for the required period of time prior to the injury must be provided by the worker. Thus, information must generally be confirmed by the employer or the Income Tax Authorities. For this purpose the Board accepts wage stubs, T-4's, or letters from the Income Tax Authorities or employers or any other confirmatory evidence.

The Board policy in all cases where a person derives their income from self-employment and other employment, is not to take the net taxable income as the sole criteria for determining average earnings. The net taxable income should be looked at in light of all other relevant facts and particulars, and judgment must be given on what is reasonable in view of all the facts and circumstances. For example, regard must be had to the fact that the *Income Tax Act* may allow deductions to be made from earnings of amounts which are not relevant to a calculation of earnings for the purpose of the *Workers Compensation Act* and which distort the claimant's real earnings position.

Generally speaking, the Board does deduct from the total period over which earnings are being averaged any periods during which the claimant was receiving wage-loss compensation or for which there is medical evidence of disability. It would normally be unfair that a claimant's average earnings should be reduced because of a work injury or other illness. For example, suppose a worker had a 20-day absence due to sickness and an income of \$37,000 in the year before the injury. The calculation of average earnings over the year would be as follows:

Deduct period of absence from days in year	$365 - 20 = 345$
Average weekly earnings	$\frac{37,000}{345} \times 7 = 750.72$

However, this rule does not apply in a case where a claimant is frequently absent from work through illnesses or other non-compensable disabilities. There is a substantial difference between absences due to an occasional illness which reduces a claimant's average earnings below their normal level and a normal work pattern which includes regular absences from work. In the latter case, the claimant's average earnings are most fairly calculated by not making any adjustment for the periods of absence. The procedure would also not apply in situations where a disabled worker, covered under compensation had been maintained on full salary by the employer during the period of disability. This is because the period of disability would not be reflected by a drop in income.

The above principles also apply to absences from work resulting from the taking of educational or training programs. Although periods of unemployment due to a strike are not taken into account in assessing average earnings, employees who are locked out and are not themselves involved in the labour dispute, will be given a credit for the period involved when assessing average earnings.

#66.12 Provisional Rate

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

The amount of the provisional rate depends on the information available to the Board officer. While being careful not to set a rate which is higher than the

worker's actual earnings, the Board officer should, as far as is possible, take into consideration the actual circumstances of the worker, for instance, age, occupation, seniority and union status. The Board officer should also have regard to statements of earnings already on file or on other recent compensation claims.

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

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

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

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

EFFECTIVE DATE: March 3, 2003

APPLICATION: To provisional rates set on or after the effective date.

#66.13 Casual Workers

The rate of pay of a casual worker at the date of injury is not normally the best representation of the actual loss of earnings. Because of the sporadic employment history of such workers, the Board considers that there is a need to look at the worker's earnings over a longer period of time. It has been the Board's practice to use the casual worker's earnings for the one-year period prior to the injury, but a shorter or longer time could be used if this best represented loss of earnings.

Stevedores are treated as casual workers. Normally they are paid on a seven-day week basis. However, the actual days worked per week may be used if there is a steady work pattern.

Fishers are treated as workers engaged in casual employment. However, this rule cannot be rigidly applied without regard to the particular circumstances of the case. For instance, it is conceivable that a particular fisher could be employed 52 weeks a year, five days a week. The fisher would then have to be treated as a regular full-time worker rather than a casual worker. Similarly, it is possible that some types of fishers might be regarded as seasonal workers. Where a job is to last more than three months, the worker is generally regarded as a seasonal or full-time worker rather than a casual worker. Regulation 3 of the Fishing Industry Regulations addresses the calculation of earnings for compensation benefits.

In determining the average earnings of a fisher who owns a fishing vessel, the depreciation for income tax purposes, i.e. "capital cost allowance", is deducted from the gross income as it is not considered to be earnings. See #71.41 for the formula used in calculating the capital cost allowance or depreciation figure. Interest accrued (whether or not paid) as the result of an indebtedness, in respect of a fishing vessel used and owned by a commercial fisher, is considered an operating cost. The accrued interest is deducted from the gross income. The purchase of food as an operating cost is not deducted from the gross income as it is considered a direct benefit to the fisher and is a measurable return from the activities of fishing. The purchase of fuel, fishing nets, etc., plus costs incurred in the maintenance of the vessel and its equipment are deducted from the gross income as operating costs.

Workers in the fishing industry who are not classified as commercial fishers, such as packing house workers, will usually be considered in the same fashion as other workers in the province unless the nature of their employment is clearly seasonal. Geoduck divers are treated as commercial fishers.

Tradespersons dispatched to construction jobs from a union hiring hall, for example, carpenters, pipefitters, etc., are not for that reason alone considered as casual workers. The same applies to truck drivers or other unionized workers who, though they generally are employed full time, have prior to the injury, experienced short temporary lay-offs due to general economic conditions.

#66.14 Seasonal Workers

Workers injured while engaged in a seasonal occupation are normally paid wage loss on the basis of their rate of pay at the date of injury. However, if the seasonal occupation is of very short duration (normally less than three months), and the claimant has other jobs during the year prior to the injury, she or he may be treated as a casual worker.

Wage-loss payments based on the rate of pay in the seasonal job continue until the claimant's temporary disability ceases, the 8-week rate review is undertaken

or the date when the seasonal job would have terminated, whichever comes first. If the claimant remains disabled at the time when the job would have terminated, and an 8-week rate review has not yet been carried out, it will be undertaken at this time.

The occupation of tree planting is a seasonal one.

#66.15 *Part-Time and Temporary Workers*

The terms “part-time” and “temporary” workers mean different things to different people. Irrespective of the terminology used to describe a job, the Board must decide whether the claimant is really a full-time worker covered by A66.00-66.10, a casual worker covered by #66.13 or a seasonal worker covered by #66.14.

Consider the following examples:

1. A person working regularly five days a week but not yet on the permanent staff is considered a full-time worker.
2. A person who works only on Saturdays is a full-time worker, but would have to lose time on the Saturday following the day of injury to be eligible for wage-loss payments.
3. A person works “on call” for one or more employers is treated as a casual worker.

Where a work week is temporarily reduced and Employment Insurance benefits are being paid to offset this partial reduction, the rate set for such a worker would be the long-term earnings figure for the year prior to the injury. When the actual earnings during the reduced week are however greater than the annual earnings, the weekly figure will be used initially and the 8-week rate change will, if it occurs, be considered in the normal fashion.

A student injured during summer employment is initially compensated on the basis of earnings at the time of the injury. Payments at this rate continue until the claimant’s temporary disability ceases, the 8-week rate review is undertaken, or the claimant returns to school. If the claimant remains disabled at the time of return to school, and an 8-week rate review has not been carried out, it will be undertaken at that time and payments continued at the new rate until the disability ceases.

#66.20 *Personal Optional Protection*

The “average earnings” of a person entitled to personal optional protection under Section 2(2) of the Act (6) are the earnings for which coverage has been purchased. There is no 8-week rate review.

The maximum and minimum amount of earnings for which coverage can be purchased are set out below.

	Monthly Amount		
	Maximum	Minimum	With Proof of Earnings (Effective January 1/87)
January 1, 1999 - December 31, 1999	\$2,500.00	\$1,000.00	\$4,792.00
January 1, 2000 - December 31, 2000	2,500.00	1,000.00	4,833.00
January 1, 2001 - December 31, 2001	2,500.00	1,000.00	4,875.00
January 1, 2002 - December 31, 2002	2,500.00	1,000.00	4,967.00

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

Effective January 1, 1987, where an applicant is applying for an amount which exceeds the maximum per month, proof of earnings must be provided. If verification of earnings is not provided, the Board automatically reduces coverage to the maximum per month. Proof of earnings must be in the form of a certified copy of the applicant's previous year's tax return or a declaration must be completed by a professional accountant (C.A., C.G.A., or C.M.A.), lawyer or notary public. This declaration must certify that the self-employed earnings of the applicant for the previous year were equal to or exceeded the coverage requested.

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

Where a claim is made in respect of an injury, a disablement from an occupational disease, or a death from either cause occurring on or after January 1, 1978, the minimum amounts of compensation provided for in Sections 22(2), 23(4), 29(2) and 30(2) have no application to persons who have purchased personal optional protection. (7) Compensation payments to such persons shall be based on a rate of 75% of the amount of earnings for which coverage has been purchased. However, the minimum average earnings provided for in Section 17(3)(g) does apply. (8)

Where personal optional protection has been obtained for members of an employer's family under 19 years of age, the wage rate set is based upon the actual earnings of the family member in the same manner as for other workers without regard to the rate of personal optional protection purchased by the employer for the employer or his or her spouse.

If a worker is injured on the job for which personal optional protection has been purchased, and also claims a loss from some other employment, the actual loss of earnings from both jobs (up to the statutory maximum) is used for computing average earnings. The same rule applies if a worker injured in the course of an employment covered by the Act also loses earnings from an occupation for which personal optional protection has been purchased. When a worker is injured on a job for which she or he has purchased personal optional protection and we are combining actual income earned in a second job, with the actual income earned in the job for which personal optional protection coverage has been purchased, the compensation rate on the claim cannot be less than the personal optional protection rate purchased.

When assessing a permanent partial disability on a projected loss of earnings basis, the actual pre-injury earnings of persons who have purchased personal optional protection are compared with the actual earnings they might obtain after the injury in jobs which they are able to do. However, the maximum loss of earnings for which an award will be made will be the earnings figure for which coverage has been purchased. (9) In determining temporary partial disability entitlement under Section 30 of the *Workers Compensation Act*, no earnings losses incurred are considered where such losses are in excess of the amount of personal optional protection purchased.

In the case of a reopening of a claim over three years from the date of injury and the claimant had personal optional protection when initially injured:

1. Where the worker has maintained personal optional protection coverage at the time of reopening, the Board will pay the claim on the basis of the current rate of optional coverage.
2. Where the worker is still employed in a capacity requiring optional protection and has no active personal optional protection coverage at the time of reopening, the Adjudicator will use the initial personal optional protection rate plus the appropriate Consumer Price Index increases.
3. Where the claimant is now employed in circumstances where there is compulsory coverage for workers, the rate on reopening will normally be the claimant's current earnings rate subject to an evaluation of the question of any impact of the original injury on these current earnings should they be lower than that ACTUALLY EARNED (not the personal optional protection rate) at the time of the injury. (10)

Compensation payable to persons entitled to personal optional protection is subject to the same Consumer Price Index adjustments as compensation payable to other persons.

#66.30 Workers with No Earnings

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

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

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

July 1, 2000	—	December 31, 2000	\$97.65
January 1, 2001	—	June 30, 2001	99.56
July 1, 2001	—	December 31, 2001	101.12
January 1, 2002	—	June 30, 2002	101.47

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

The minimum wage set out above is subject to Consumer Price Index adjustments.

#66.32 *Volunteer Firefighters and Ambulance Drivers and Attendants*

The average earnings of volunteer ambulance drivers and attendants and members of fire brigades working without remuneration is deemed to be the same in amount as the average earnings in their regular employment or employments, not, however, to be less than the amount on which the employer has been assessed. (11)

In order to provide a minimum level of coverage to volunteers who have no attachment to the labour force, the employer is assessed \$75.00 per month (\$17.30 per week) for each person, unless the municipality concerned has arranged with the Board for, or pays the claimant, a higher amount. Compensation is based on this rate unless or until wages are confirmed as being lost at another job. In the latter case, the rate can be increased to the rate on the job, but the \$17.30 cannot be combined with it. If the volunteer is unemployed, but has an attachment to the labour force in the sense that the volunteer is seeking employment, wage-loss benefits are determined on the average earnings from the last regular employment. The fact that the volunteer is collecting Employment Insurance benefits confirms for our purposes an

attachment to the labour force. In most cases, one year's earnings prior to the date the worker was last employed should be used to determine the level of benefits. If a firefighter is paid wages by the fire brigade these can be combined with earnings from another job, but not to exceed the maximum wage rate.

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

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

Firefighters, other than those referred to in 20:10:30 of the *Assessment Policy Manual* or firefighters whose employers are not covered by Part 1 of the *Act*, but to whom personal optional protection has been given, are to be assessed and paid on the same basis as above.

#66.33 *Sisters in Catholic Institutions*

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

#66.34 *Emergency Services Workers*

Average earnings used in claims by Emergency Services Workers are the earnings in the worker's ordinary employment but where the worker has no regular employment are fixed by the Board at a figure not less than \$25.00 per week nor more than the maximum under the *Act*. (12)

#67.00 **WAGE-LOSS RATE CHANGES**

The change from a provisional wage-loss rate to a rate based on the claimant's actual earnings was dealt with in #66.12. In addition, the rate changes referred to below may be applicable.

#67.10 Adjustments to Earnings of Learners

Section 33(3) provides that

“Where the board is satisfied that the average earnings of the worker at the time of injury by reason of the worker's age or the worker being in the course of learning a trade, occupation, profession or calling do not truly represent the worker's average yearly earnings or earning capacity, it may, in the case of temporary disability, adjust from time to time the payments of compensation to take into account the probable increase in average earnings and may, in the case of permanent disability, calculate the award by taking into account the probable increase in average earnings.”

A distinction must be drawn between learning a trade, occupation, profession or calling and working through an initial probationary period required by an employer for the purpose of determining that job performance is satisfactory. Only the former is covered by Section 33(3).

Section 33(3) does not automatically apply just because a worker is young and has low earnings. There must be evidence that the low earnings were because of the worker's youth and that, but for the injury, the earnings would have increased.

This section does not alter the general rules which determine the claimant's average earnings for the purpose of calculating initial wage-loss payments. It only provides a mechanism whereby this rate may be reviewed and increased from time to time in the future.

The question arises as to whether an 8-week rate change should be made on a claim where rates are subject to adjustment under Section 33(3) of the Act. The practise is as follows:

- (a) If the apprentice was fully employed with one employer during the year prior to the injury with little or no lay-offs, it is considered that the ongoing adjustments under Section 33(3) are a better representation of the ongoing loss. As such, no 8-week rate change will be implemented in these situations. An exception to this could be made however where, due to circumstances such as a high frequency of overtime, the annual earnings produced a higher average than the incremental figures under Section 33(3).
- (b) If, in the year prior to injury, the apprentice has been subject to lay-offs, or has served the apprenticeship with a number of different employers, it would be more appropriate to use the annual earnings

figure as the reflection of a future loss rather than the incremental steps under Section 33(3).

Where it is decided to use annual earnings under either (a) or (b) above, the ratio of increase that would have been applied under Section 33(3) is also applied to increase the long-term earnings figure used for an 8-week rate change.

An adjustment under Section 33(3) cannot have the effect of increasing the claimant's rate above the maximum at the time of the injury.

When a rate is periodically adjusted under the terms of Section 33(3) it will still be adjusted for Consumer Price Index increases where appropriate in addition to the Section 33(3) adjustment, but not so as to produce a figure in excess of the current maximum.

#67.20 8-Week Rate Review

An 8-week rate review is made where wage-loss payments based on the worker's rate of pay at the date of injury have continued for eight weeks. This review consists of an enquiry and determination of what earnings rate best represents the long-term earnings loss suffered by the worker by reason of the injury.

After a claim has lasted five weeks, the Claims Adjudicator considers whether it is likely to last for eight weeks and, if the Adjudicator has not done so already, sets in motion any enquiries necessary for a possible 8-week rate review.

Where a permanent disability is anticipated, the Claims Adjudicator will consult with the Disability Awards Officer or Adjudicator in Disability Awards at the time of the 8-week rate review in order to provide consistency between the rate selection for wage-loss benefits and that set for Disability Awards purposes. The appropriate form recording the conclusion will be placed on the claim file.

Circumstances in an individual claim may require the selection of two different rates and where this occurs, the reasons are clearly recorded on the claim file. In cases of permanent total disability the wage rate must always be the same as the pension.

In situations where a worker is being maintained on full salary by the employer, the Claims Adjudicator will still be required to carry out a rate review of this kind and, if a reduction is warranted, to make the necessary adjustment. If the worker's long-term earnings average out in excess of the rate set at the time of the injury and the figure being paid by the employer, it is conceivable that the worker could be in a less advantageous position than other workers with a similar earnings pattern. As such, a rate increase can be initiated and the

difference between the new rate and what is being refunded to the employer made payable to the worker. This would not apply if the employer is paying the worker at the maximum applicable to the claim. If an employer ceases to make payments to a worker, the Board will begin to pay the worker directly.

As part of the Claims Adjudicator's enquiries, information will be obtained as to the worker's long-term earnings prior to the injury. Normally, earnings in the one-year period prior to the injury are obtained and used to reflect the worker's long-term wage loss and the pension rate. In some instances, however, the three-month figure prior to the injury may be used. Its use, however, is generally limited to those situations where there is a relatively fixed change in the worker's earning pattern which is deemed likely to continue into the future. In some instances, the Claims Adjudicator may decide to select the three-year earnings figure prior to the injury. These situations are normally limited to cases where there are extenuating circumstances in the one-year period prior to the injury and therefore the use of that one-year period would be incompatible with the worker's normal historical earnings pattern. This is sometimes occasioned by economic downturns which produce anomalies or irregularities in the earnings pattern of the worker in the year prior to the injury to the extent that they differ from the normal work history. In some exceptional circumstances, the Claims Adjudicator may decide to use the earnings in the five-year period prior to the injury. This, however, is of very limited application and would only apply to those exceptional circumstances where even the use of the three-year period would produce an inappropriate reflection of the worker's normal employment history. An example of this type of situation would be the case of a worker who for many years had been steadily employed with one company, which because of a downturn in the economy has either gone out of business or laid off some staff. Recognizing that many such long-term employees may have difficulty re-establishing themselves on a permanent basis in the labour force, but in recognition of the expectation that such workers will attempt to reinstate their earnings status on a similar basis to that in the past, the use of the average of earnings over the five years prior to the injury is felt to be appropriate at least for pension purposes. Its use for wage-loss purposes following the 8-week rate change will, however, depend on the circumstances of the case which would examine the worker's employability potential during the period of recovery from the injury.

The rules set out in #66.11 are used to calculate these earnings.

The Claims Adjudicator will also consider the probability of the worker continuing in the injury occupation. For this purpose, the Adjudicator will contact the employer to enquire whether the worker could reasonably have been expected to continue in the job. The Adjudicator will also question the worker as to future intentions with regard to this job and examine the previous employment history. Any difference of opinion between the worker and employer must be investigated

and the Adjudicator must then decide whether the continued employment of the claimant was probable.

Having completed the necessary enquiries, the Claims Adjudicator will determine the earnings rate of the worker which best represents the long-term loss of earnings. Where this decision involves a change in the amount of compensation payable, the change will take effect at the beginning of the week following the first eight weeks payment of wage-loss benefits.

Where an 8-week rate review would result in a reduction in compensation of less than \$1.00 per day, no change will be made. However, all increases will be paid.

If at the beginning of the ninth week there is insufficient information on which to complete the 8-week rate review, a provisional rate will be set until sufficient information is received. (13)

Since no refunds are made to the employer when workers covered under the *Government Employees Compensation Act* are maintained on full salary, no 8-week rate review is carried out and no payments are made to the worker. If payments made by the employer are discontinued at any time beyond eight weeks of disability and a worker is still disabled, an 8-week rate review is carried out at that time. Long-term earnings data is normally obtained where there is an indication that a permanent partial disability pension may be payable.

#67.21 Class Averages/New Entrants to Labour Force

Section 33(1) provides in part as follows:

“ . . . where, owing to the shortness of time during which the worker was in the employment of his or her employer, or in any employment, or the casual nature of his or her employment, or the terms of it, it is inequitable to compute average earnings in the manner described in this subsection, regard may be had to the average daily, weekly or monthly amount which, as shown by the records of the board, was being earned during the one or more years or other period previous to the injury by a person in the same or similar grade or class of employment.”

The persons covered by this provision are those whose actual earnings record is not sufficient to allow a determination of what best represents their long-term loss of earnings. For example, it may cover recent entrants into the labour force or new immigrants. In these cases, a class average is obtained when an 8-week rate review is being considered. If the class average is equal to or greater than the worker's rate of pay at the date of injury no change is usually made in the compensation rate. If the class average is lower, the compensation may be reduced accordingly.

A class average may occasionally be used at the outset of a claim where the particular circumstances show it to be the best representation of the claimant's loss.

When considering using a class average, the Claims Adjudicator should also have regard to other information that might warrant a variation from that average. For example, the Adjudicator should consider the last grade completed in school, any special training, any plans for future education, on what date the individual arrived in the province and what prior education, skills, occupation, etc. the worker had in another province or country.

The method of computing class averages is to determine the latest census figure and adjust this according to the change in the index of B.C. Salaries since that time. An adjustment is also made with respect to the census occupation code, which has fairly broad categories. Final adjustment is then made based on earnings information collected by the Board from data submitted by employers on individual claim files using a system of coded occupations. The average earnings figure is a ratio of these two figures. A number of averages are available, one involving all workers in the class and others involving restricted categories of workers in the class. The one generally used is the average for all workers in the class.

#68.00 PERMANENT DISABILITY PENSIONS

Permanent disability pensions are normally based on the earnings rate established at the point when long-term earnings are reviewed for wage-loss purposes. This, in most cases, means the rate resulting from the 8-week rate review; however, a different rate can be used if there are valid reasons for this. (14) The formula for converting the weekly wage-loss rate to the monthly pension rate is

$$\text{Weekly Wage-Loss Rate} \times \frac{365}{84} = \text{Monthly Pension Rate}$$

If there has been no review of long-term earnings for wage-loss purposes, a review will be carried out by the Disability Awards Officer or Adjudicator in Disability Awards in the same manner as a Claims Adjudicator would carry out an 8-week rate review. A provisional rate or class average may be applied in suitable cases. (15) If no earnings data is received, the pension may be based on the statutory minimum or lower. (16)

The rule in #67.10 respecting minors and learners is applicable where a disability pension is being assessed.

#69.00 MAXIMUM AMOUNT OF AVERAGE EARNINGS

Section 33(1) provides that a worker's average earnings cannot exceed the "maximum wage rate". This means that where a worker's earnings exceed the maximum wage rate compensation for temporary or permanent total disability will equal 75% of the maximum.

The Act contains a special procedure for determining the maximum wage rate in force in any year. Section 33(7) provides that "Prior to the end of each calendar year, the board must determine the maximum wage rate to be applicable for the following calendar year." The maximum wage rate to be determined under Subsection (7) is an amount that the Board thinks represents the same relationship to the sum of \$40,000 as the annual average of wages and salaries in the province for the year preceding that in which the determination is made bears to the annual average of wages and salaries for the year 1984; and the resulting figure is rounded to the nearest \$100. (17) For the purpose of determining annual average of wages and salaries under Subsection (8), the Board may use data published or supplied by Statistics Canada. (18) Prior to 1986, the Act referred to \$11,200 and 1972 as the factors in the formula for calculating the maximum.

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

Date of Injury	Percentage Amount	Yearly Applicable
January 1, 1999 – December 31, 1999	75%	\$57,500.00
January 1, 2000 – December 31, 2000	75%	58,000.00
January 1, 2001 – December 31, 2001	75%	58,500.00
January 1, 2002 – December 31, 2002	75%	59,600.00

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

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

Increases in the maximum wage rate do not have the effect of increasing the existing compensation being paid to workers whose payments have been limited

by the lower maximum existing in a previous year. An exception to this rule may occur when, on a reopening occurring more than three years after the injury, the Board exercises its authority under Section 32 to base compensation payments on the worker's earnings at the time of the reopening. (19)

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

#69.10 Deduction of Pensions from Wage Loss

Section 31(1) provides as follows:

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

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

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

The deduction made under Section 31 must be reviewed on each July 1 and January 1 following the injury. This is to allow for possible Consumer Price Index adjustments to the amount of the pension and the wage loss and, with regard to January 1, changes in the maximum wage rate. For the purpose of Section 31, the relevant maximum is the one applying in the year in which the wage-loss payment is being made.

For the deduction from wage loss of pensions awarded under the same claim, reference should be made to #70.00-70.20.

#69.11 Pension Cash Awards and Term Pensions

Section 31(2) provides that “Where a worker has received a lump sum in lieu of the periodic payments that otherwise would have been payable for a permanent disability, the worker is, for the purposes of subsection (1), deemed to be still in receipt of the periodic payments.”

Where a worker is entitled to receive wage-loss benefits on a new claim and has received a lump-sum payment on any prior claim (in lieu of a monthly pension) with a monthly equivalent of \$20.00 per month or greater at the time of commutation, the pension will be deducted only to the extent that it is necessary to ensure that the worker does not receive in the aggregate more than the current maximum.

In the case of a reopening of the same claim within three years, any previous lump-sum payment (in lieu of a pension) with a monthly equivalent of \$20.00 per month or greater at the time of the commutation will be deducted from the current daily wage-loss payments. The same position exists in respect of reopenings of the same claim after three years where the claimant's pre-injury earnings are used to calculate benefits. Where, however, in the case of a reopening after three years, current earnings are used under the terms of Section 32(1), any previous lump-sum payment (in lieu of a pension) with a monthly equivalent of \$20.00 per month or greater at the time of the commutation will be deducted in accordance with Section 32(2).

Lump-sum awards having a monthly equivalent of less than \$20.00 per month at the time of the commutation will in all cases be ignored when paying wage loss on the future reopening of the same claim or when paying wage loss on a later new claim.

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

While the question whether a lump-sum payment is deducted is determined by its monthly equivalent at the time of the commutation, the amount actually deducted is the monthly equivalent at the time the deduction is made. The amount available for deduction includes Consumer Price Index adjustments which have occurred since the commutation was granted. An exception is made in respect of commutations granted prior to November 30, 1973. In those cases only the monthly equivalent at the time of the commutation can be deducted. Where in such a case, an award under Section 26 has been made, the amount available for deduction is computed by adding the current benefits under Section 26 to the monthly equivalent at the time of the commutation.

#70.00 AVERAGE EARNINGS ON REOPENED CLAIMS

#70.10 Disability Occurring Within Three Years of Injury

Where a claim is reopened for temporary total or temporary partial disability within three years of the date of injury (or the equivalent date in the case of occupational diseases), the wage rate set on the claim at the time of the injury is

the rate to be used. This could be either the original rate or the 8-week rate change figure if such an adjustment has occurred. Any pension awarded under the same claim is deducted from the amount of the payments. A pension that has been awarded on another claim is deducted only to the extent that the combined total of wage-loss and pension benefits exceeds the current maximum. Consumer Price Index adjustments are made if applicable. Section 32 has no application in these cases.

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

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

5-day week	= 261 days
5-1/2-day week	= 287 days
6-day week	= 313 days
7-day week	= 365 days

3. The daily pension is deducted from the daily wage-loss payment. (20)

If an 8-week rate review has not already been carried out on the claim, it will be done by the Claims Adjudicator following the reopening when the total wage loss paid on the claim adds up to eight weeks.

The provision discussed in #67.10 may be applied, so that compensation is based on the claimant's earnings at the date of the reopening. Suppose, for example, a student with a part-time job is injured and the rate is set at the low rate of pay being earned at the time of injury. If this student should later graduate from school or university and enter the labour force on a permanent basis and be required to stop work for further treatment of the injury, wage-loss payments would not necessarily be based on the rate of pay at the time of injury.

#70.20 Reopenings Over Three Years

Section 32 of the *Act* provides as follows:

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

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

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

The guidelines set out below apply effective October 27, 1986. They apply in situations where there is a recurrence of temporary disability or an occurrence of or increase in a permanent disability over three years after an injury or disablement from occupational disease.

1. **Temporary Disability Occurring After Three Years Where the Claimant Is Employed**
 - (a) **Worker’s Current Earnings Exceed the Rate Originally Set On the Claim**

Where the worker’s earnings at the time of the occurrence of disability **exceed** the earnings rate originally set on the claim (or the 8-week review rate, if applicable) plus Consumer Price Index adjustments, section 32(1) is normally applied so as to treat the recurrence of disability as the happening of the injury. Wage-loss compensation is based on the worker’s earnings immediately prior to the recurrence and, where there is an existing permanent partial disability pension granted in respect of the original injury, section 32(2) applies. Therefore, the pension is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. (21) An 8-week rate review will be carried out if the disability following the reopening of the claim continues for that period. Any Consumer Price Index increases occurring in the six months following the recurrence will, by virtue of section

25(2), not be applicable to the wage-loss payments being made. (22)

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

Where the worker is employed at the **same rate** as originally set on the claim (or 8-week review rate, if applicable), the previous rate will be used plus applicable Consumer Price Index adjustments. The discretion contained in section 32(1) will not be exercised.

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

Where the worker is employed at a **lower rate** than the rate originally set on the claim (or 8-week review rate, if applicable) plus applicable Consumer Price Index increases, a determination will be made as to the reason for the lower figure.

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

If it is determined that the reduced earnings level is due to the effects of the injury or disease accepted on the claim, the rate originally set on the claim (or 8-week review rate, if applicable) plus applicable Consumer Price Index adjustments will be used on the reopening. Care must be exercised in making this determination to ensure that consistency is maintained with prior decisions reached on the claim. If, for example, a prior decision has been reached that a pension or higher pension which the claimant asked for should not be awarded because the claimant was capable of undertaking certain occupations, it will not now be possible to conclude that the claimant's not being employed in those occupations is due to the effects of the injury.

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

If it is determined that the lower earnings level is due to a matter of personal choice on the part of the claimant, such as, for example, a voluntary change in lifestyle, the reduced earnings figure will be used on

reopening. Section 32 will be applied and the rules set out in (a) above will apply in relation to the reduced figure. If it is concluded that this voluntary or elective change in earnings status is indicative of the future, no 8-week rate change on the basis of prior earnings will be carried out should the disability following reopening extend to that point.

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

If it is determined that the reduced earnings at the time of the reopening are due to employment difficulties occasioned by economic circumstances, section 32 applies and the recurrence of disability is treated as the happening of the injury. Where there is an existing permanent partial disability pension granted in respect of the original injury, section 32(2) applies and the pension is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. The current rate of earnings will be used for the first eight weeks at which point a review is carried out. Since the 8-week review permits a consideration of the one year's, three or five years' earnings prior to the injury, it will have the effect of adjusting for the long term any temporary aberrations in earnings capacity caused by economic fluctuations.

Any Consumer Price Index increases occurring in the six months following the recurrence will, by virtue of section 25(2), not be applicable to the wage-loss payments being made.

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

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

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

If it is determined that the unemployed status prior to the recurrence is due to the effects of the injury or disease accepted on the claim, the rate originally set on the claim (or the 8-week review rate, if applicable) plus applicable

Consumer Price Index adjustments will be used. The discretion in section 32 will not be exercised. As in 1(c)(i) above, care must be exercised to ensure that the determination is consistent with prior decisions on the claim.

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

If it is determined that the worker's unemployed status prior to the recurrence is not due to the effects of the injury or disease accepted on the claim, no wage-loss benefits are payable unless the disability following reopening will produce a potential for loss of income by removing the worker as a viable entity in the labour force. In the latter case, benefits will be paid on the basis of the wage rate originally set on the claim (or the 8-week review rate, if applicable) plus applicable Consumer Price Index adjustments. In determining whether there is a "potential loss", the following are among the questions that might be considered.

- (i) Was the claimant's unemployment a matter of personal choice?
- (ii) Does the claimant's lifestyle render it unlikely that he or she will, in practice, obtain employment? For example, if the claimant has moved to a remote area where there are virtually no employment opportunities, this would indicate that there was no potential loss.
- (iii) Are there any other health conditions or personal problems that limit the possibility of employment?
- (iv) Was the worker being paid Employment Insurance benefits? Since the payment of such benefits requires a confirmation that the worker is fit for work, this would be an indicator that there was a potential loss.
- (v) Has the worker been making an active, ongoing, job search? Has the worker registered with the Canada Employment and Immigration Commission?
- (vi) Has the worker maintained union status, remained available for dispatch to jobs, been dispatched to jobs or declined offers of dispatch?
- (vii) Was the worker listed as seeking employment by the Ministry of Social Services?

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

The rules set out above in relation to wage-loss benefits are, in general, equally applicable to permanent disability pensions. These rules have the effect that in one situation no wage-loss benefits are paid, notably when the worker is unemployed otherwise than through the effects of the injury and it is determined that there is no potential loss of earnings. A pension assessed on a physical impairment basis under section 23(1) of the *Act* should, however, be paid in that situation and (subject to any appropriate wage rate review being carried out) calculated on the basis of the wage rate originally set on the claim plus applicable Consumer Price Index adjustments. Pensions are distinguishable from wage-loss benefits since they are concerned with the long term as opposed to the current situation. A permanent disability award is payable under section 23(1) for significant impairments even though the worker has returned to work with no loss of earnings and may not have a loss of earnings in the future. The section directs that the pension is payable for life and appears to rest on an assumption that over the many years ahead some loss will on average be experienced. It follows that, just because a person is unemployed and does not now foreseeably have an actual loss of earnings, it does not mean that the person should not receive an award under section 23(1). However, the situation is different for projected loss of earnings awards under section 23(3). Since that assessment aims to predict the worker's actual loss of earnings over the future, no award can be made when the worker is unemployed for reasons unrelated to the injury and it is determined that there will not be a potential loss of earnings.

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

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

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

EFFECTIVE DATE: March 3, 2003 (as to deletion of references to recurrence and new injury)
APPLICATION: Not applicable.

#70.30 Pension Cash Awards and Term Pensions

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

#71.00 COMPOSITION OF AVERAGE EARNINGS

A worker's average earnings is normally composed of wages or salary. Set out below are some other items which may have to be included or excluded.

#71.10 Extraordinary or Irregular Wage Payments

Such items as commission, piecework, bonus, tips and gratuities must be included in a worker's average earnings. This may involve basing wage-loss payments from the outset of the claim on the worker's earnings over a longer period, usually one year, rather than on the rate of pay at the date of injury.

#71.11 Overtime

Only regular overtime is covered when compensation is based on the rate of pay at the date of injury. If there has been significant amounts of occasional or irregular overtime, wage loss at the outset of the claim will normally have to be based on the worker's earnings over a longer period rather than on the rate of pay at the date of injury.

#71.12 Severance or Termination Pay

The Board does not assess firms for payments made as a result of severance, whether by collective agreement or other obligations.

In situations where a severance payment is involved, in setting a long-term wage rate on a claim at the 8-week point of disability, an Adjudicator will only include assessed payments in computing annual earnings.

#71.13 Salary Increases

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

#71.20 Fringe Benefits

The Board does not include fringe benefits as a component of average earnings. Fringe benefits include, but are not limited to, employment payment for or contributions to CPP, Employment Insurance, retirement, pension, health and welfare, life insurance, training, or other employee or dependent benefit plans.

Where wages paid to a worker are supplemented by an additional amount representing statutory holiday payments or vacation allowances, these additional amounts are included in setting the wage rate on a claim. This practice normally applies to construction workers. Recognition is also given to fixed allowances such as payments to carpenters who are paid a 40¢ per hour travel allowance. This is a taxable allowance and is not an actual cost reimbursement and as such is included in the wage rate.

#71.21 Room and Board

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

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

These principles apply to resident caretakers of apartment buildings. The value of any free or subsidized apartment provided with the job must be considered when determining average earnings. Where specific evidence is not available, the Minimum Wage Order in respect of resident caretakers, made under the *Minimum Wage Act*, may be referred to when valuing an apartment.

Where a worker continues to be provided with room and board during the disability without extra charge and the worker's salary is continued by the employer, any reimbursement to the employer carried out by the Board will, subject to the maximum wage rate under the Act, include the value of room and board as well as the worker's salary. Where, however, during a period of disability, the worker is provided with free room and board but is not being paid full salary, there will be no reimbursement made to the employer for the value of the room and board. (23)

#71.30 Strike Pay and Unemployment Insurance Payments

Strike pay and Employment Insurance payments are not included when calculating a worker's earnings over a period of time.

The same rule applies to supplementary unemployment benefits paid by an employer pursuant to a collective agreement and to any contributions made by the employer to the fund set up to make those payments.

#71.40 Property Value Losses

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

#71.41 Payments in Respect of Equipment

Any portion of the wages paid to a worker which represents rental of equipment supplied by her or him is excluded from average earnings. This does not apply to a worker who is simply providing one power saw or other hand tools.

For short-term disability claims and the first eight weeks on long-term disability claims, the gross earnings will be determined in the normal way. The gross figure will be converted to net wages by applying one of two percentages. These are:

- (a) **Medium Equipment** – Equipment – 40%
– Wages – 60%

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

- (b) **Heavy Equipment** – Equipment – 75%
– Wages – 25%

Examples: Logging trucks, skidders, bulldozers, line haul trucks.

In setting the rate after eight weeks of disability on a claim (including a fisher's claim) or in relation to a permanent disability pension, the gross earnings will also be determined in the normal way. When asked to provide earnings information, the claimant will also be asked to list the purchase price of the vehicle, vessel or piece of equipment. In deducting operating costs or expenses from the gross figure to obtain net earnings, the capital cost allowance or depreciation figure listed on the claimant's data will not be used. In place of this figure, a percentage will be selected from the straight-line depreciation tables set

out below which most closely represents the vehicle, vessel or piece of equipment involved. This percentage will then be applied to the purchase price of the item and the resulting figure will, along with the other operating costs or expenses, be deducted from the gross to compute the net earnings figure.

Equipment Type	Annual Rate
Road Construction	
Track-type – Lesser than 200 HP	11%
Tractor – Greater than 200 HP	6%
Motor Grader	7.5%
Excavator	11%
Track Loader	11%
Backhoe (R/T Tractor)	18.5%
Logging	
Track-type – Lesser than 200 HP	11%
Tractor – Greater than 200 HP	6%
Skidder	11%
Loader – Boom Type	7.5%
Loader – Front-end Type	11%
Log Truck and Trailer	8%
Transportation	
Line Haul Tractor	10%
5-ton Truck	10%
1-ton Truck/Van	8%
Automobile	12.5%
Gravel Truck	17%
Fishing	
All Vessels	7.5%

#71.50 Payments to Substitutes

If a disabled worker pays another person to do the job and the worker performs no functions, a refund can be made to the worker of 75% of the amount paid. This refund cannot exceed the wage-loss compensation that would otherwise have been paid to the worker or the maximum amount of compensation. The substitute must normally provide written confirmation of the amounts paid to him.

A claimant may be partially able to perform the normal work or work full-time at other types of work, but pay a substitute to carry out jobs which the claimant is

unable to do. Compensation will still be paid in respect of the payment to the substitute but only to the extent of the difference between the value of the work being performed by the claimant and the lesser of his pre-injury earnings and the statutory maximum. Where the value of that work exceeds pre-injury earnings or the statutory maximum, no compensation is paid.

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

Where a claimant has personal optional protection, benefits are calculated without regard to the fact that the claimant is employing a substitute to do all the pre-injury work. If, however, the claimant is still doing part of the work, or otherwise participating in the operation of the business, the payment to the substitute may be a factor in determining the value of the claimant's post-injury work for the purpose of computing temporary partial disability benefits under Section 30.

#71.60 Government Sponsored Work Programs

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

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

In cases of this type, the rate for compensation purposes for the initial eight weeks of disability is calculated on the basis of the total dollar amount being paid to the claimant either by the employer or the sponsoring government agency or a combination of either. The procedures for computing the long-term earnings at the 8-week rate change or for pension purposes will follow the standard procedures established for all other claims.

This procedure applies to injuries incurred on or after September 24, 1986.

NOTES

- (1) See #69.00
- (2) See #67.20
- (3) See #34.40
- (4) See #68.00
- (5) See #34.20
- (6) See 20:50:00 Assessment Policy Manual
- (7) See #34.20; #35.23; #37.20; #39.60
- (8) See #55.26
- (9) See #40.00
- (10) See #70.20
- (11) S.33(2); See 20:10:30 Assessment Policy Manual
- (12) See 20:10:40 Assessment Policy Manual
- (13) See #66.12
- (14) See #66.10; #67.20
- (15) See #66.12; #67.21
- (16) See #37.20; #39.60
- (17) S.33(10)
- (18) S.33(9)
- (19) See #70.20
- (20) See #69.00
- (21) See #69.10
- (22) See #51.11
- (23) See #34.40