

PANEL OF ADMINISTRATORS
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Update 2002-7

**TO HOLDERS OF THE *REHABILITATION SERVICES & CLAIMS MANUAL* -
VOLUME I**

This update of the *Rehabilitation Services & Claims Manual* contains changes to the *Manual* approved by the Panel of Administrators since update 2002-6.

Changes have been made to clarify policy with respect to the provision of section 23(1) awards for chronic pain. A summary of the amendments is attached.

If you have any questions regarding this update, or the *Rehabilitation Services & Claims Manual*, please call the Publications and Videos Section of the Workers' Compensation Board at (604) 276-3068.

MAUREEN NICHOLLS
Chair, Panel Of Administrators

Attachment

SUMMARY OF AMENDMENTS - Update 2002-7

Amendments to the Board's policy on pain and chronic pain in Volume I of the *Rehabilitation Services and Claims Manual (RS&CM)*.

Table of Contents

Chapter 3, COMPENSATION FOR PERSONAL INJURY:

- **Policy item #22.33, "Psychological Problems"** – The policy no longer contains a section on acceptance of chronic pain problems.
- **Policy item #22.35, "Pain Problems"** – This new policy sets out the definitions for acute, subacute and chronic pain and introduces the concepts of early intervention through early return to work assistance and focussed treatment and rehabilitation to prevent the onset of chronic pain. The policy also provides for a multidisciplinary approach to treatment and rehabilitation.
- **Notes**

Chapter 6, PERMANENT DISABILITY AWARDS:

- **Policy item #39.01, "Chronic Pain"** – The policy sets out the definition of specific and non-specific chronic pain and clarifies those cases that will be considered for a section 23(1) award for chronic pain.

Chapter 12, CLAIMS PROCEDURES:

- **Policy item #97.40, "Disability Awards"** – Sections of this policy that repeat the prior wording of policy item #39.01 have been removed.

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- (b) the symptoms and signs of the disease occurred shortly after the injury; and
- (c) there has been no preceding history of neurologic deficit.

#22.32 Cancer

In claims where trauma is alleged to be the cause of cancer, the following five criteria (12) should be satisfied before a cancer can be even remotely considered to be traumatically induced.

1. Authenticity and adequacy of trauma.
2. Previous integrity of the wounded part.
3. Origin of tumour at exact point of injury.
4. Reasonable time limit between injury and time of appearance of tumour.
5. Positive diagnosis of the presence and nature of the tumour.

Recent reviews of the medical literature have been completed to ascertain whether or not there is new evidence to associate trauma as a causal agent in cancer.

Except in the case of skin cancer, there is little firm evidence to associate trauma with cancer as an etiologic agent. In particular, reviews of several studies (13) of bone cancer fail to establish a causal relationship between trauma and cancer, although there is general recognition of what has been called “traumatic determinism”, i.e. that an injury may call the person’s attention to a pre-existing tumour.

#22.33 Psychological Problems

Psychological problems arising from a physical or psychological injury are acceptable as compensable consequences of the injury. However, there must be evidence that the claimant is psychologically disabled. It cannot be assumed that such a disability exists simply because the claimant has unexplained subjective complaints or is having difficulty in psychologically or emotionally adjusting to any physical limitations resulting from the injury.

When a claim is submitted for psychological problems resulting directly from the claimant’s employment without the occurrence of any physical trauma, reference should be made to #13.20 and #32.10.

When a psychological impairment becomes permanent, it will be necessary to determine whether there is entitlement to a permanent disability pension. The decision-making procedure for assessing entitlement to a permanent disability award for psychological impairment is found in #38.10.

EFFECTIVE DATE: January 1, 2003
APPLICATION: To decisions made on or after January 1, 2003.

#22.34 Alcoholism and Drug Dependency Problems

Where it is claimed that an alcohol problem may have arisen out of and as a result of a compensable injury, the compensability of the problem is thoroughly investigated in the same manner as followed in investigating the relationship of other problems to an injury. Because of the psychological nature of the problem, this investigation would normally include a reference to a Board Psychologist. The decision on acceptability will however be made by the Claims Adjudicator.

Any pre-existing alcohol problem can be treated in the same way as any other pre-existing condition. The Claims Adjudicator will have to decide whether the claimant's problems are simply a continuation of the previous problems or have been worsened by the injury.

The above procedure would also apply if a claimant whose alcohol problems have previously been accepted by the Board seeks to re-open the claim because of further problems of this type. The request would have to be investigated and if appropriate, a reference made to a Board Psychologist, and a determination made as to whether the current problems are related to the injury and the previous problem, or to some pre-existing condition or other cause.

This policy also has general application in the adjudication of drug dependency problems. For the policy regarding the prescription of narcotics and other drugs of addiction, reference should be made to #77.30.

For the Board's policy toward applications for compensation for alcoholism as an occupational disease, reference should be made to #32.15.

#22.35 Pain and Chronic Pain

A worker's pain symptoms may be accepted as compensable where medical evidence indicates that the pain results as a consequence of a work injury or occupational disease. This policy discusses the scope of coverage in cases where pain is accepted as compensable. Pain is not assessed as a psychological impairment.

1. Definitions:

Pain is an unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage. It includes cognitive, affective, behavioural and physiological components.

The Board recognizes three main stages of pain:

- i. Acute pain is pain that coincides with a traumatic injury or disease and the early stages of recovery. In the vast majority of cases acute pain eventually resolves, either spontaneously or with some form of treatment.
- ii. Subacute pain is pain that an injured worker continues to experience four to six weeks after a traumatic injury or disease.
- iii. Chronic pain is pain that persists six months after an injury or occupational disease and beyond the usual recovery time for that injury or disease. Chronic pain is further distinguished as either specific or non-specific as set out in policy item #39.01, "Chronic Pain".

Usual recovery times for injuries or diseases are based on medical protocols and procedures adopted by the Rehabilitation and Compensation Services Division. These medical protocols set out the points in time, after an injury, when a worker should regain pre-accident functional ability, or reach maximum medical recovery.

In determining the appropriate recovery time for an injury, the Board officer may, in consultation with a Board Medical Advisor, consider the medical protocols as well as other factors such as the worker's pre-injury health status and any treatments received that would likely impact the recovery time of the work injury.

2. Early Intervention – Acute and Subacute Pain:

Early intervention involves the provision of early return to work assistance and/or focused multidisciplinary treatment and rehabilitation, to expedite the worker's medical recovery and return to work. Early intervention at the acute or subacute stages of pain is essential as both rehabilitation and prevention measures in deterring the development of chronic pain. Studies indicate that even with some residual or recurrent pain symptoms, workers do not have to wait until they are completely pain free to return to work.

Early intervention should be incorporated into the worker's rehabilitation plan. (See policy item #88.00, "Programs and Services")

(a) Early Return to Work Assistance

In the majority of cases following an injury, a worker is able to return to work shortly after an injury without Board assistance. The provision of early return to work assistance for a worker experiencing acute or subacute pain that is

affecting the worker's return to work efforts will be considered as soon as the worker is medically able to participate. A Board officer will coordinate the worker's early return to work plan in collaboration with the worker, the attending physician, a Board Medical Advisor, the employer and treating clinicians as needed.

In developing an early return to work plan, the Board officer may consider the worker's entitlement to vocational rehabilitation programs and services such as graduated return to work assistance, placement assistance and work site/job modifications where the Board officer concludes that they will assist in a worker's return to work. (See Chapter 11, "Vocational Rehabilitation Services")

(b) Multidisciplinary Treatment and Rehabilitation

In certain cases, the Board officer may consider it appropriate to refer the worker for focused multidisciplinary treatment and/or rehabilitation intervention. These interventions are preferred in cases where the Board officer concludes that they will assist in the worker's early return to work. The Board officer may also consider these interventions where they will assist in preventing the onset of chronic pain.

In making this determination, the Board officer may consult with a Board Medical Advisor and/or a Board Psychologist. The worker's attending physician may also be consulted to confirm his or her agreement with the proposed intervention.

A multidisciplinary approach may include one or more of the following: medical management, physical conditioning, work conditioning, pain and stress management, ergonomic consultation, and vocational counseling and placement.

In determining what specific treatment or rehabilitation intervention is appropriate for a worker, the Board officer may refer the worker for a multidisciplinary assessment. A multidisciplinary assessment is an evaluation of the worker by a physician, a psychologist, a physiotherapist, an occupational therapist, or other provider as the Board determines appropriate.

A multidisciplinary assessment may involve consideration of the worker's medical history, health status, physical limitations, psychological state, behaviour, and workplace issues. The evaluation will provide an opinion on the treatment or rehabilitation intervention, or combination of interventions that would be appropriate to aid in the worker's recovery and return to work.

(c) Early Intervention - Chronic Pain

In all cases where a Board officer considers that a worker may be experiencing chronic pain symptoms, a multidisciplinary assessment must be undertaken. This evaluation will provide an opinion on whether a worker is experiencing chronic pain as a consequence of a compensable injury. The evaluation will also

provide an opinion on the appropriate course of treatment and rehabilitation for the worker.

3. Compensation:

Where a worker is participating in treatment and/or rehabilitation for temporarily disabling pain, a worker's entitlement to temporary wage loss benefits may be considered under section 29 or 30 of the *Act*.

Where chronic pain is considered by the Board officer to become permanent, entitlement to permanent partial disability benefits may be considered under section 23 of the *Act*.

EFFECTIVE DATE: January 1, 2003
APPLICATION: To decisions made on or after January 1, 2003.

#23.00 REPLACEMENT AND REPAIR OF ARTIFICIAL APPLIANCES, EYEGASSES, HEARING AIDS, AND DENTURES – SECTION 21(8)

The Board may assume the responsibility of replacement and repair of

- (a) artificial appliances, including artificial members damaged or broken as the result of an accident arising out of and in the course of the employment of the worker; and
- (b) eyeglasses, dentures and hearing aids broken as a result of an accident arising out of and in the course of employment if that breakage is accompanied by objective signs of personal injury, or, where there is no personal injury, if the accident is otherwise corroborated and the Board is satisfied the worker was not at fault. (15)

In no other circumstances can the Board accept responsibility for damage to a worker's personal possessions.

With the exception of eyeglasses, no compensation for broken appliances, etc. can be paid under the *Government Employees Compensation Act* to employees of the Federal Government unless the breakage resulted from an accident that also caused personal injury. In claims for broken eyeglasses, the adjudication principles used are the same as those which apply under the provincial *Workers Compensation Act*.

#23.10 Meaning of Authority in Section 21(8)

The payment of compensation under Section 21(8) is not a legal right. The section merely confers authority on the Board to pay the compensation provided for. Whether the Board exercises its authority or not is within its discretion. Compensation will be payable in respect of all claims which fall within the terms of the section.

#23.20 Appliances Covered by Section 21(8)

The reference to “eyeglasses” in Section 21(8)(b) includes contact lenses.

Where an injury involves damage to dental crowns and fixed bridgework, they are regarded as part of the natural anatomy for the purpose of adjudication.

Therefore such claims are adjudicated as claims for personal injury under Section 5(1) rather than under Section 21(8).

#23.30 Meaning of Damaged or Broken under Section 21(8)

Section 21(8) refers to items being “damaged” or “broken”. However, suppose an accident occurs which causes the loss of a worker’s glasses. For instance, they may “fly off” somewhere unknown or be dropped into a place which is inaccessible. Where this follows from an “accident” as defined in #23.40 below, and it is reasonable to assume that, though lost, the worker’s glasses are broken, Section 21(8) may be applied as if they are in fact “broken”.

#23.40 Meaning of Accident under Section 21(8)

Compensation is not payable under Section 21(8) unless the damage or breakage results from an accident arising out of and in the course of the claimant’s employment.

The meaning of “accident” in this section was considered in a Board decision where it was stated:

“It appears to us that the purpose of Section 21(8) is to provide a form of insurance protection against damage to eyeglasses through chance events. In this case, however, the damage was nothing unexpected. The replacement of eyeglasses in the plant where this occurred is a

predictable routine and part of the normal operating cost of the type of work done by the claimant in that plant. Usually the employer contributes to the replacement of eyeglasses by men working in this situation, and the claim came about only because the claimant required replacement more frequently than the employer regarded as reasonable.

In this situation, the cost of replacing eyeglasses should be regarded as part of the wear and tear of industrial activity rather than being classified as damage by accident.”

It should not be concluded from this that if a worker’s glasses are broken as a result of a chance event arising out of and in the course of employment, compensation will automatically be payable under Section 21(8). The section is limited to situations where there is a personal injury, the consequences of which include breakage or damage to this apparatus, or there is a direct injury to this apparatus which might also have caused a personal injury. To be an “accident” for the purposes of Section 21(8) a chance event must be such that if it does not actually cause the claimant personal injury, it must have had the potential for doing so. In other words, there must have been a reasonable probability that the accident could have caused the claimant personal injury. No compensation is payable under Section 21(8) if the accident involved the damaged article only and there was no reasonable probability of its harming the claimant.

Consider the following examples:

- A. The worker is wearing glasses, or is not wearing them but has them about his or her person, for instance, in a pocket, and they are broken when an object flies into or falls upon them, some harmful liquid splashes onto them, the worker slips and falls to the ground, or bumps his or her head against a wall or some machinery. Even if such an accident does not injure the worker, there is usually an “accident” for the purposes of Section 21(8) as there is usually a reasonable probability that it could have injured the worker.
- B. The worker drops his or her glasses, they fall out of a pocket, or off his or her face, or the worker knocks them off when removing clothing or headwear, and they break on impact with the ground or when something falls on them, or the worker takes off the glasses and places them in a position where they are broken. If such an accident does not injure the worker, there is usually not an “accident” for the purposes of Section 21(8) as there is not usually a reasonable probability that it could have injured the worker.

- C. Where breakage of eyeglasses falling within Example B. follows immediately after an accident within the meaning of Section 21(8), i.e. one arising out of and in the course of employment which injured or could with reasonable probability have injured the worker, the breakage may be considered to have resulted from this accident. For instance, a worker slips and falls, and the glasses fly off and are run over by a truck, or some harmful liquid splashes into the worker's face and while washing his or her face, the worker places the glasses in a position where they are broken or the glasses are dropped while removed for cleaning. The breakage in these cases might be considered to have resulted from the fall and the splashing of the liquid. The question of whether the worker was at fault would have to be considered.

#23.50 Meaning of Corroboration in Section 21(8)

In the case of eyeglasses, dentures, and hearing aids, where the breakage is not accompanied by objective signs of personal injury, the accident must be corroborated.

Corroboration is evidence other than that of the claimant which renders more probable the truth of the claimant's testimony on a material point. As the Act requires that the accident be corroborated, it is not sufficient for the corroborating evidence simply to confirm the existence of the broken glasses.

Corroboration means that there must be some evidence that is independent of the report or testimony of the claimant. Thus, there is not normally corroboration where the only evidence is the statement of the claimant, coupled with the evidence of another person who had no knowledge of the facts, but is simply able to report a similar statement of the claimant made to the person at an earlier time.

For example, suppose a worker who had just had his or her glasses broken as a result of an accident arising out of and in the course of employment goes immediately to the employer, reports the accident and shows the employer the broken glasses. No matter how shortly after the accident this occurs, a few minutes for instance, the employer's evidence as to this report is corroboration as to the breakage of the glasses, not the accident from which it may have resulted. The employer's evidence as to the occurrence of the accident is not evidence independent of the report or testimony of the claimant.

A possible exception to this rule was recognized in cases where the claimant makes a spontaneous exclamation, or reports an event momentarily after its occurrence so that the immediacy of the report adds to its credibility. This

exception was explained in a Board decision as a reference to what is known in the law of evidence as “res gestae”, where the facts speak through the party. More particularly, this means declarations uttered by the claimant simultaneously or almost simultaneously with the occurrence of the accident, so that the declaration forms part of the circumstances of the accident. For example, suppose a worker is hit in the face and the worker’s glasses are damaged by a splinter. The worker utters an exclamation of surprise or shock at the moment of impact which indicates that the glasses have been damaged as a result of the accident. This is overheard by someone standing near who did not witness the accident. The repetition of that exclamation by the person who overheard it might amount to corroboration.

Normally corroboration consists of the evidence of witnesses to the accident. Where there are no such witnesses it will, in practice, be very difficult to provide corroboration of an accident’s occurrence. It will therefore be very difficult for a person working alone to establish corroboration. However, it may be possible that a lack of witnesses could, in an appropriate case, be remedied by other evidence. This evidence would have to be independent of the report or testimony of the claimant and corroborate the occurrence of the accident as well as the breakage.

In one claim, for instance, the eyeglasses of a nurse in a mental hospital were broken while the nurse was trying to restrain a patient. There were no witnesses to the breakage, but some persons entered the room shortly after to see the glasses broken on the floor and the struggle between nurse and patient continuing. It was considered that the accident was sufficiently corroborated by the witnessing of the struggle. However, if those witnesses had entered after the struggle had ceased the question may be more doubtful. It would probably depend on whether the appearance of the nurse, the patient, and the room, without regard to the nurse’s statement as to what happened, made it clear that the struggle had occurred and had resulted in the broken glasses. Obviously, corroboration would be more difficult, the longer after the event the witnesses entered the room.

The above policies and procedures regarding situations where no personal injury occurs also apply to claims administered under the *Government Employees Compensation Act*.

#23.60 Meaning of Fault in Section 21(8)

Where breakage of eyeglasses, dentures, or hearing aids is not accompanied by objective signs of personal injury, not only must the accident causing the breakage be corroborated, but the Board must be satisfied that the worker was not “at fault”.

The question of whether the worker was “at fault” arises whenever some negligent or careless act or omission of the worker has contributed to the breakage. However, not all such acts or omissions will result in the worker’s being “at fault”. In the normal situation, a worker’s negligence or carelessness will combine with something in the employment to cause the breakage. Then the question becomes one of weighing the worker’s careless act or omission against the employment causes of the damage. If, after weighing these factors, it is considered that the worker’s negligence was the predominant cause of the breakage, the worker must be held to be at fault. If, although the worker’s negligence contributed to the breakage, it is felt that the predominant cause was something in the employment, the worker is not to be considered at fault.

In weighing the worker’s carelessness against any employment causes of the breakage of eyeglasses, it was considered that minor lapses of attention, which it is reasonable to expect from the average worker in the normal course of work, would not generally outweigh the employment aspects of the situation. Therefore, if, for example, a worker trips over or bumps into something in the course of employment, the worker will not usually be held to be at fault because of carelessness in not looking where he or she was going. On the other hand, if, for example, the claimant tripped or bumped into something as a result of horseplay or some other misconduct or unauthorized activity, or had previously been warned about this sort of conduct, such activity might be said to be the predominant cause of any breakage of eyeglasses.

Consider also the example given in #23.40, Example C, of a worker whose glasses are damaged when dropped or taken off following an accident within the meaning of Section 21(8). While the worker might be thought careless in dropping the glasses or placing them in an unsafe place, it was the accident which placed the worker in the situation where it was necessary to take them off, and this put them at risk of being broken as a result of carelessness. Assuming that the worker was not “at fault” in regard to the original accident, it would usually be unfair to regard the worker’s carelessness as the predominant cause of the breakage. This would be particularly so if the employment involved the worker in having wet or greasy hands or some other circumstance which would make the worker more prone to drop the glasses or give no opportunity to find a safe place to put them. There may, on the other hand, be cases where the worker’s carelessness clearly outweighs the effect of any employment accident.

#23.70 Compensation Payable under Section 21(8)

When a claim satisfies the requirements of Section 21(8), the claimant is reimbursed the amount charged by the supplier or repairer of the appliance in question. The amount payable is not limited to what the Board would pay for a

similar appliance required for a worker as the result of an injury covered by Section 5(1) of the Act.

A claimant is not entitled to wage-loss benefits under Section 21(8) when there is a delay in replacing the broken or damaged appliance and the claimant is unable to work without it. Nor is wage loss payable where the worker has to take off time from work in order to be fitted for new eyeglasses and to pick them up when ready.

#24.00 FEDERAL GOVERNMENT EMPLOYEES

Section 4(1) of the *Government Employees Compensation Act* provides that “compensation shall be paid to . . . an employee who is caused personal injury by an accident arising out of and in the course of his employment . . . and . . . the dependants of an employee whose death results from such an accident.” Section 4(4) applies a similar provision to railway employees of the Federal Government. The employees covered by these sections were discussed in #8.10.

The employee or the dependants are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed. (16)

Compensation entitlement is determined by “the same board, officers or authority as is or are established by the law of the province for determining compensation for workmen and dependants of deceased workmen” other than Federal employees. (17)

The phrase “by an accident” in Subsection 4(1) does not require that there be a clearly ascertainable incident or series of incidents which caused the injury. Injuries that arise gradually over time or “by process” are not excluded by this subsection. The injury itself can be the “accident” for the purpose of Section 4. Thus, the test for Federal employees in B.C. under Subsection 4(1) is, in effect, the same as the test for other workers in B.C. under Subsection 5(1) of the B.C. Act. (18)

The *Government Employees Compensation Act* applies to an accident occurring or a disease contracted within or outside Canada. (19)

For the purposes of the *Government Employees Compensation Act*, the place where an employee is usually employed is the place where the employee is appointed or engaged to work.

Where an employee is usually employed in the Yukon Territory or the Northwest Territories, the employee is deemed to be usually employed in the Province of Alberta. (20)

Where an employee, other than a person locally engaged outside Canada, is usually employed outside Canada, the employee is deemed to be usually employed in the Province of Ontario. (21)

NOTES

- (1) Appeal Division Decision No. 92-0743; #24.00
- (2) See #13.12
- (3) *Law of Workmen's Compensation*, A. Larson, 1972, Vol. I, para. 23.61
- (4) See #2.23
- (5) Larson, para. 25.00
- (6) See #19.31
- (7) See #19.31
- (8) See #21.10
- (9) See #78.11
- (10) See #44.00
- (11) See #88.54 and #115.30
- (12) Ewing, J. Modern attitude toward traumatic cancer. *Arch. Path.* 19:690-728, 1935
- (13) Pritchard et al. The Etiology of Osteosarcoma. *Clin. Orthoped. and Rel. Res.* 111:14-22, September 1975;
Coley, W.B. *Neoplasms of Bone*. Paul Haber Inc., 2nd ed., 1960;
Dahlin, David C. *Bone Tumours*. Charles C. Thomas, 3rd ed., 1978;
Monkman et al. Trauma and Oncogenesis. *Mayo Cl. Proc.* 49:157-163, March 1974
- (14) ~~See Chapter 5-DELETED~~
- (15) S.21(8)
- (16) *Government Employees Compensation Act*, S.4(2)
- (17) *Government Employees Compensation Act*, S.4(3)
- (18) Appeal Division Decision No. 92-0743
- (19) *Government Employees Compensation Act*, S.3(2)
- (20) *Government Employees Compensation Act*, S.5
- (21) *Government Employees Compensation Act*, S.6

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: To decisions made on or after January 1, 2003.

#39.10 Scheduled Awards Permanent Disability Evaluation 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

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

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 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

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

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%
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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%
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#39.23 Amputation of Thumb

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

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

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

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:

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

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

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:

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

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

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.

ELEMENTS	Process (Assess each hand separately)	Points Applied
<i>Vascular Element:</i>	Assess vascular elements: blanching of fingers in cold temperature, pain, swelling, ulcers, gangrene & amputations: <ul style="list-style-type: none"> • Distal phalange on index, middle and ring finger = 1 point each • Middle phalange on index, middle and ring finger = 1 point each • Proximal phalange on index, middle and ring finger = 2 points each • All phalanges on little finger = 1 point • All phalanges on thumb finger = 1 point • Distal half of palm (top) = 1 to 2 points • Proximal half of palm (bottom) = 1 point 	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"> • Additional 1 to 2 points per hand if reduction occurs 	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 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

substantial foundation, such as clinical findings, other medical or non-medical evidence, or serious weakness demonstrated by questioning the claimant, or if the statement of the claimant relates to a matter that could not possibly be within his or her knowledge.

#97.33 *Statement by Lay Witness on Medical Question*

A statement by a lay witness on a medical question may be considered as evidence if it relates to matters recognizable by a layperson; but not if it relates to matters that can only be determined by expertise in medical science. For example, a statement by a fellow worker that he or she saw the claimant suffering from silicosis would be worthless; but a statement by a fellow worker reporting to have seen the claimant bleeding from the forehead would be evidence of a head wound. Statements made by a first aid attendant or other categories of paramedical personnel can be considered insofar as they relate to matters within the normal experience or training of that category of paramedical personnel. But they must obviously be treated very cautiously if they go beyond that into areas requiring greater medical expertise, or if they conflict with the opinion of a doctor.

#97.34 *Conflict of Medical Opinion*

Where there are differences of opinion among doctors, or other conflicts of medical evidence, the Adjudicator must select among them as best she or he can. The Adjudicator must not do it by automatically preferring the opinions of one category of doctors to another category, nor should it be done by counting heads, so many opinions one way and so many another. The Adjudicator must analyze the opinions and conflicts as best as possible on each issue and arrive at her or his own conclusions about where the preponderance of the evidence lies. If it is concluded that there is doubt on any issue, and that the possibilities are evenly balanced, the Adjudicator must follow the mandate of Section 99 and resolve that issue in accordance with the possibility that is most favourable to the worker. (32)

It should never be assumed that there is a conflict of medical opinion simply because the opinions of different doctors indicate different conclusions. A difference in conclusion between doctors may or may not result from a difference in medical opinion. For example, the difference could result from different assumptions of non-medical fact. Where there are two or more medical reports or memos on file from physicians, indicating different conclusions, the Adjudicator will not simply select among them as a first step. The Adjudicator should first think about why they are different and consider whether the relevant non-medical facts have been clearly established. The Adjudicator will seek advice from a Board Medical Advisor to determine whether the best medical evidence has been obtained and, for example, find out if any appropriate

medical procedures can be instituted that would assist in arriving at a more definite conclusion.

Where two or more medical reports or memos indicate a probable difference of medical opinion and the issue is serious, the matter will normally be discussed with the physicians involved.

The Board has no rule which states that the evidence of a physician is always to be preferred to that of a chiropractor or other qualified practitioner. Reports from both types of practitioner are acceptable evidence and are weighed on their merits. This principle applies even if the referral to the practitioner is contrary to Board policy. Should there, for example, be concurrent treatment by a physician and a chiropractor, the Board might not pay for the chiropractor, but any chiropractor reports received must be weighed as evidence. They are not ignored just because the referral was unauthorized. (33)

#97.35 *Termination of Benefits*

Where a treating physician expresses an opinion that a claimant is disabled from work by reason of a compensable disability, the Claims Adjudicator or Claims Officer may rely upon overall existing medical evidence from a doctor who has examined the worker or other substantive evidence on the file to reach a conclusion contrary to that opinion or may decide to carry out further investigation which may involve an examination by a Board physician.

#97.40 **Disability Awards**

In cases of very minor disabilities, Board officers in Disability Awards may proceed to calculate a disability award without a permanent functional impairment evaluation, if they consider that this is unnecessary having regard to the medical evidence already available. Except for those cases, the normal practice is for a permanent functional impairment evaluation to be conducted for disability awards purposes by a Disability Awards Medical Advisor or an External Service Provider.

It is the responsibility of the Board officer in Disability Awards to classify the disability as a percentage of total disability. In doing this, it is proper for the Board officer to consider other factual and medical evidence as well as the report of the Disability Awards Medical Advisor or the External Service Provider. However, although the report of the Disability Awards Medical Advisor or the External Service Provider is not the only medical input that a Board officer may use, it will usually be the primary input, and caution will be used in referring to any other medical opinion.

The report of a Disability Awards Medical Advisor or External Service Provider takes the form of expert evidence which, in the absence of other expert evidence to the contrary, should not be disregarded. This does not mean that a Board officer must adopt the percentage indicated by the Disability Awards Medical Advisor or External Service Provider. It is always open to the Board officer to conclude that, although the functional impairment of the worker is a certain percentage, the disability (i.e. the extent to which that impairment affects the worker's ability to earn a living) is greater or less than the percentage of impairment.

The decision-making procedure for assessing entitlement to a permanent disability award for psychological impairment under section 23(1) of the *Act* is discussed in policy item #38.10.

In making a determination under section 23(1), the Board officer in Disability Awards will enquire carefully into all of the circumstances of a worker's condition resulting from a compensable injury.

EFFECTIVE DATE: January 1, 2003
APPLICATION: To decisions made on or after January 1, 2003.

#97.50 Rumours and Hearsay

Hearsay must only be used very cautiously as evidence, and rumour must not be used as evidence at all. But even rumour is often valuable as a lead to investigation.

#97.60 Lies

A lie may be ground for drawing an adverse inference with regard to the facts to which it relates. But it is not in itself ground for denying compensation, particularly when it relates to something not relevant to the claim at all.

#98.00 INVESTIGATION OF CLAIMS

In the majority of claims the issues are decided by reference to the information received in the worker's application and the employer's and medical reports. Any insufficiency in the information is usually made good by telephone, correspondence, or by informal interview. In a minority of claims, a more formal inquiry, or medical examination, may be necessary.

#98.10 Powers of the Board

Section 87 of the *Act* provides as follows:

- “(1) The board, including the appeal division, has the like powers as the Supreme Court to compel the attendance of witnesses and examine them under oath, and to compel the production and inspection of books, papers, documents and things.
- (2) The board, including the appeal division, may cause depositions of witnesses residing in or out of the Province to be taken before a person appointed by the board, including the appeal division, in a similar manner to that prescribed by the Rules of the Supreme Court for the taking of like depositions in that court before a commissioner.”

Usually, the Board receives the willing cooperation of all concerned, and the power of subpoena is not used as a normal routine.