

December 2002

Update 2002-8

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

This update of the *Rehabilitation Services & Claims Manual* contains changes to the *Manual* approved by the Panel of Administrators since update 2002-7.

These changes include:

- Clarification of policy with respect to section 23(1) awards for chronic pain

A summary of the changes is attached and the amended pages are included as part of the package.

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 2002-8**

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

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#### 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 #39.02, "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 #39.02 have been removed.

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### **#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 worker is psychologically disabled. It cannot be assumed that such a disability exists simply because the worker 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 worker's employment without the occurrence of any physical trauma, reference should be made to policy items #13.20, #13.30 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 policy item #39.01.

**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 worker'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 worker 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 policy item #77.30.

For the Board's policy toward applications for compensation for alcoholism as an occupational disease, reference should be made to policy item #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 #39.02, "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

detraining 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 C11-88.00, "Nature and Extent of 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")

(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 *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 policy item #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 worker’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 worker 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 worker 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 worker 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 worker 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 worker.

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 worker which renders more probable the truth of the worker'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 worker. Thus, there is not normally corroboration where the only evidence is the statement of the worker, 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 worker 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 worker.

A possible exception to this rule was recognized in cases where the worker 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 worker 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 worker 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 worker 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 policy item #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 worker 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 worker 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 worker 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 policy item #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; policy item #24.00
- (2) See policy item #13.12
- (3) *Law of Workmen's Compensation*, A. Larson, 1972, Vol. I, para. 23.61
- (4) See policy item #2.23
- (5) Larson, para. 25.00
- (6) See policy item #19.31
- (7) See policy item #19.31
- (8) See policy item #21.10
- (9) See policy item #78.11
- (10) See policy item #44.00
- (11) See policy item #88.54 and policy item #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

The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.

Once the percentage of disability is determined, it is applied to the worker's long term average net earnings, and the permanent partial disability award is 90% of the amount so determined. The permanent partial disability award is granted following the determination of a worker's entitlement under section 23(1) of the *Act*.

Under the section 23(1) method of permanent partial disability assessment, a worker's percentage of disability is expressed as a percentage of total disability, with one hundred percent (100%) being the maximum possible rating for a totally disabled worker. A worker's percentage of permanent partial disability is based on the whole person. A worker, therefore, cannot be more than 100% disabled as a result of a work injury or combination of injuries.

### *#39.01 Decision-Making Procedure under Section 23(1)*

Section 23(1) assessments are undertaken once a worker reaches medical plateau.

A Board officer in the Disability Awards Department is responsible for ensuring that the necessary examinations and other investigations are carried out with respect to the assessment and making a decision on a worker's entitlement to a permanent partial disability award.

Permanent functional impairment evaluations may be conducted by either a Disability Awards Medical Advisor or a Board authorized External Service Provider. The Rehabilitation & Compensation Services Division sets protocols and procedures for these evaluations. The Board determines whether the evaluation is referred to a Disability Awards Medical Advisor or an External Service Provider based on the nature of the injury and other relevant criteria as set out in the protocols. The Board officer in Disability Awards may determine the worker's functional impairment without examination by a Disability Awards Medical Advisor or a Board authorized External Service Provider, if there is sufficient medical information on file to complete the assessment.

The determination of whether there is a permanent psychological impairment, and the severity of the impairment, is made by either a Board Psychologist or a Board authorized External Service Provider. Once this evaluation is completed, the claim is referred to the Psychological Disability Committee to assess the percentage of disability resulting from the permanent psychological impairment.

The Board officer in Disability Awards assesses any percentage of disability for physical impairment and, in conjunction with the Committee's percentage of psychological disability, decides the worker's permanent disability award under the section 23(1) method.

## **#39.02      *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 Board officer 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 Permanent Disability Evaluation Schedule**

Section 23(1) awards may be made with reference to 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. (3)

The Permanent Disability Evaluation Schedule is a set of guide-rules, not a set of fixed rules. The Board officer in Disability Awards is free to apply other variables in arriving at a final award; but the "other variables" referred to means other variables relating to the degree of physical or psychological 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. (4)

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 Board officer in Disability Awards 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 schedule is modified by the application of an age variable. This age adaptability factor is used for workers 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 judgement.

### **#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 Board officer 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 policy items #39.22 to #39.32.

### **#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 policy item #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 disability in schedule	18%
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 worker 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 an award 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%

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>
Overall Award	11.6%

### **#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 Board officer 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 Board officer 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:

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

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

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

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

### **#39.32**      *Thumb Restrictions*

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

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

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

Where a finger and thumb are affected, an enhancement factor is added in the manner set out in policy item #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 policy item #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 an award can be granted, including the requirement that there be a disablement from earning full wages. (5)

### **#39.42**      *Visual Acuity*

For permanent disability award 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 *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.

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 policy item #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 $\frac{4\%(C)}{16\% (A) \times [16\% (A) - 12\% (B)]}$	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 assist in determining 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.

#### **#39.44**      *Assessment of Awards 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"> <li>• Distal phalange on index, middle and ring finger = 1 point each</li> <li>• Middle phalange on index, middle and ring finger = 1 point each</li> <li>• Proximal phalange on index, middle and ring finger = 2 points each</li> <li>• All phalanges on little finger = 1 point</li> <li>• All phalanges on thumb finger = 1 point</li> <li>• Distal half of palm (top) = 1 to 2 points</li> <li>• Proximal half of palm (bottom) = 1 point</li> </ul>	17 points max per hand
	ADD: Double value of sum of above if there is evidence of trophic changes (i.e., ulcers)	17 points max per hand
	MAXIMUM points for Vascular element	34 points per hand
<i>Sensorineural Element:</i>	Assess sensorineural impairment (evidence of numbness, tingling and reduced sensory perception)	2 points max per hand
	Assess manual dexterity (i.e., difficulty with buttons and writing) <ul style="list-style-type: none"> <li>• Additional 1 to 2 points per hand if reduction occurs</li> </ul>	2 points max per hand
	MAXIMUM points for sensorineural element	4 points per hand
<i>Musculoskeletal Element:</i>	Assess musculoskeletal impairment (loss of grip strength)	2 points max per hand
	MAXIMUM points from vascular, sensorineural and musculoskeletal elements for each hand	40 points per hand
	Add total points for both hands.	

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

Conversion of Points to Percentages of Disability

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

**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 policy item #29.00 and policy item #30.50 respectively.

In the case of non-scheduled awards, the Board officers 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 policy item #39.12.) However, in making a judgment as to the correct percentage of disability, the Board officer in Disability Awards will have regard to the age of the worker, to existing disabilities in other parts of the worker's body, or to the combined effect of more than one disability in the same part of the body.

## **#39.60 Minimum Award**

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. (6) 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 minimum for permanent total disability does not apply simply because a worker is found to be totally unemployable under section 23(3). (7)

## **#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. (8)

## **#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 policy item #39.61 was not taken into account. Only the worker's actual earnings were relevant.

## **#40.00 SECTION 23(3) ASSESSMENT**

Section 23(3) of the *Act* provides:

Subject to sections 34 and 35, if

- (a) a permanent partial disability results from a worker's injury; and
- (b) the Board makes a determination under subsection (3.1) with respect to the worker;

the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between

- (c) the average net earnings of the worker before the injury, and
  - (d) whichever of the following amounts the Board considers better represents the worker's loss of earnings:
    - (i) the average net earnings that the worker is earning after the injury;
    - (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.
- (3.1) A payment may be made under subsection (3) only if the Board determines that the combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury is so exceptional that an amount determined under subsection (1) does not appropriately compensate the worker for the injury.
- (3.2) In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of injury or to adapt to another suitable occupation.

Section 23(3) is a discretionary provision that establishes rules for compensating a worker for a permanent partial disability in exceptional circumstances. Section 23(3) is only applied where the test set out under section 23(3) and (3.1) is met.

This test requires that the Board determine whether the combined effect of a worker's occupation at the time of injury and a worker's disability resulting from the injury is so exceptional that an amount determined under section 23(1) does not appropriately compensate the worker for the injury. Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills.

For the purposes of determining whether the worker meets the test set out under section 23(3) and (3.1), the Board must consider the combined effect of a worker's occupation at the time of injury and the resulting disability. While a worker may experience a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under section 23(3) and (3.1).

The following is a list of criteria that must be considered under section 23(3) and (3.1). Each of these criteria must be satisfied in order for a worker to be assessed under section 23(3).

- The occupation at the time of injury requires specific skills which are essential to that occupation or to an occupation of a similar type or nature;
- As a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury or in an occupation of a similar type or nature;
- The effect of the compensable disability is that the worker is unable to work in his or her occupation or in an occupation of a similar type or nature, or to adapt to another suitable occupation, without incurring a significant loss of earnings.

Skills are defined in this context as the learned application of knowledge and abilities.

In all cases, the Board must determine if, following recovery from a work injury, a worker is either able to return to the occupation at the time of injury or to adapt to another suitable occupation. This determination includes consideration of both the worker's transferable skills and the worker's post-injury functional abilities. In the vast majority of cases a worker's entitlement to a permanent partial disability award is determined under the section 23(1) method and this estimate of impairment of earning capacity is considered to be appropriate compensation.

However, in exceptional cases, the amount determined under section 23(1) may not appropriately compensate a worker. In these cases, medical evidence confirms that the work injury makes it impossible for a worker to continue in the occupation at the time of injury or in an occupation of a similar type or nature. In addition, the worker is considered unable to adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.

For the purposes of this policy, a significant loss of earnings means the Board may conclude in these exceptional cases, that the loss of earnings a worker will experience as a result of the combined effect could not have been anticipated under the section 23(1) method of estimating a worker's long term loss of earning capacity.

An example of when the combined effect may be considered so exceptional is one where a work injury results in a significant disability of two digits on the dominant hand of a worker whose occupation requires fine motor skills. As a result of the disability, the worker is no longer able to perform fine motor skills, and consequently, is unable to continue in the pre-injury occupation, or another occupation of a similar type or nature. In addition, due to the disability, the worker is unable to adapt to another suitable occupation without incurring a significant loss of earnings.

As a result, the section 23(1) award may not be considered to appropriately compensate the worker for the impact of the combined effect, and may therefore result in a consideration under section 23(3).

#### **#40.01 Decision-Making Procedure under the Section 23(3) Method**

Section 23(3) assessments are undertaken if a permanent partial disability results from a worker's injury, and the Board makes a determination under subsection (3.1) with respect to the worker.

The Disability Awards Committee is ultimately responsible for the conclusion on permanent partial disability awards assessed under 23(3) of the *Act*. The Board officer in Disability Awards is required to conduct the necessary investigations and make a specific recommendation to the committee regarding a worker's eligibility for a section 23(3) assessment and, in cases where an assessment is undertaken, the worker's entitlement to an award.

It is the function of the Committee, following any further investigation it considers necessary, to agree or disagree with the Board officer's recommendation. If the committee agrees, the Board officer will implement the initial recommendation. If the committee disagrees with the Board officer's recommendation, it will either implement its findings or return the file for further investigation. The Disability Awards Committee consists of one senior representative from the Disability Awards, Medical, and Vocational Rehabilitation Services Departments.

The rules of evidence followed by Board officers in Disability Awards and the Disability Awards Committee are discussed in policy item #97.40.

Appeals from the decisions of Board officers in Disability Awards or the Disability Awards Committee are discussed in Chapter 13.

## **#40.10 Section 23(3) Assessment Formula**

This assessment is undertaken in exceptional cases where the Board determines that a worker is eligible for an assessment under section 23(3) of the Act. The following guidelines apply in considering a worker under section 23(3):

1. Long term average net earnings that the worker is earning after the injury will be determined in accordance with established policies in Chapter 9.
2. In considering the amount that better represents the worker's loss of earnings after the injury, the Board officer will compare the average net earnings that the worker is actually earning after the injury, with the average net earnings the Board estimates the worker is capable of earning in a suitable occupation after the injury. This comparison requires an employability assessment.
3. In estimating what a worker is capable of earning after the injury, a Board officer gives regard to the evidence, including the medical evidence, of the limitations imposed by the compensable disability and the fitness of the worker for different occupations. The Board also gives regard to the evidence of the Board officer in Vocational Rehabilitation Services about the suitability of the worker for occupations that could reasonably become available. Following these considerations, the Board officer will arrive at a conclusion about suitable occupations that the worker could be expected to undertake over the long-term future.
4. Average net earnings that maximize the worker's long-term potential up to the worker's pre-injury wage rate, will be selected from the occupations that are suitable and reasonably available over the long-term. Earnings in those occupations will be determined as at the time of the injury.
5. The possible award will then be 90% of the average net amount by which the earnings level thus established is less than the average net earnings prior to the injury.
6. Any increase that may be due to the worker because of a cost of living adjustment will then be added.
7. Since the assessment under section 23(3) 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.

These guidelines are discussed further in policy items #40.12 to #40.14.

**EFFECTIVE DATE:** November 1, 2002  
**APPLICATION:** To decisions made on or after November 1, 2002 on claims adjudicated under the *Act*, as amended by the *Workers Compensation Amendment Act, 2002*.

### **#40.12**      *Suitable Occupation*

An occupation differs from a “job” which is defined as a specific position with a particular employer. Occupation is a collection of jobs or employments that are characterized by a similarity of skills.

In estimating what a worker is capable of earning in a suitable occupation after the injury, the Board officer gives regard to the evidence, including the medical evidence of the limitations imposed by the compensable disability, and the ability of the worker to perform different occupations. Regard is also given to the suitability of the worker for occupations that could reasonably become available over the long run that will maximize the worker’s long-term earnings potential, up to the pre-injury wage rate. In most cases, “long-term” refers to three to five years.

The Board officer assesses the worker’s earning potential in light of transferable skills and all possible rehabilitation measures that may be of assistance, including the possibility of retraining or other measures that may be appropriate to the worker.

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

- If the worker has made all reasonable efforts to maximize his or her earnings, the job that the worker has actually obtained is generally accepted as being suitable, unless there is evidence that the job is transitory and jobs at another level of earnings within that occupation will be available to the worker in the near future.
- The occupation must, in practice, be reasonably available. The Board will, generally, only have regard to higher paying occupations which a person in the worker’s present job would ordinarily be expected to obtain. It would not be fair to assume that a worker will receive all possible promotions that might theoretically be made available.
- The worker has the skills, education and functional abilities that the occupation requires.

- A reasonably available occupation must be one that the worker is medically fit to undertake, and that does not endanger the worker's recovery or the health and safety of the worker and/or others.
- Where a suitable occupation 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.
- 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 job. If jobs in an occupation are subject to fluctuations in the economy but a lower-paying job in another suitable occupation appears more stable in the long run, then the other job may be considered the best-paying job in the long run.
- A reasonably available job is usually within a reasonable commuting distance of the worker's home. (See policy C11-88.90, "Relocation".)
- If the worker declines the best-paying reasonably available job because of a personal preference for a lower-paying job or for an alternative life-style, the wage rate in the best-paying reasonably available job will be used in the formula.

**EFFECTIVE DATE:**

November 1, 2002

**APPLICATION:**

To decisions made on or after November 1, 2002 on claims adjudicated under the *Act*, as amended by the *Workers Compensation Amendment Act, 2002*.

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

Sections 23(3)(c) and (d) set out the process for determining a worker's entitlement to a permanent partial disability award under this method. These subsections provide that the Board may pay a worker compensation that is a periodic payment that equals 90% of the difference between the average net earnings before the injury, and either the average net earnings that the worker is earning, or that the Board estimates the worker is capable of earning, after the injury.

The latter figures are obtained by ascertaining the earnings in the occupations which have been found to be suitable and reasonably available according to the criteria set out in policy item #40.12 and determining the earnings figure which will maximize the worker's long-term earnings potential.

A worker's post-injury wage loss will be based on estimated earnings rather than on actual earnings in the following cases:

- The worker is employable but does not have a job; or
- The worker has a job but is not maximizing his or her earning capacity up to the pre-injury rate; or
- The worker has, for personal reasons, withdrawn from the workforce; or
- The worker fails to co-operate with the rehabilitation process.

The intention of the *Act* is to protect workers' earnings only up to the maximum wage rate. This is shown by section 33(3) which results in payments for total disability being limited to 90% of the maximum and by section 31 which ensures that, where a worker is already receiving payments for a disability, additional payments can be made for any further disability only to the extent that they do not take the total payments above the maximum. No award can be made under section 23(3) where, following the injury, the worker is earning or is able to earn at or above the maximum wage rate. Where a worker was earning at or above the maximum prior to the injury and it is projected that because of the injury earnings will be less than the maximum, a projected loss of earnings award can be made but only to the extent of the difference between the maximum and the projected earnings.

Although assessment of a permanent partial disability award will often be made some time after the original injury, it would not be fair to compare directly the actual pre-injury average earnings with the earnings the worker might now earn in the occupations available. The effect of inflation upon earnings levels would mean that the real loss would not be properly determined in that way. The practice of the Board is to use the earnings in the occupations available after the injury as they stood at the date of the injury. It occasionally happens that earnings in occupations at the time of the injury are not available. If this occurs, it may be necessary to use the earnings in those occupations as they were at another date and bring the pre-injury earnings into line by applying cost of living adjustments as described in policy item #51.00.

When calculating a worker's average net earnings for the purposes of the section 23(3) assessment, the Board will also consider the formulas used to determine the CPP contributions, EI premiums and income taxes applicable to the level of average earnings. The formulas used are those in effect on the earlier of the first day after the date temporary disability benefits have been payable to the worker for a cumulative period of 10 weeks; or on the effective date of a worker's permanent disability award.

**EFFECTIVE DATE:** November 1, 2002  
**APPLICATION:** To decisions made on or after November 1, 2002 on claims adjudicated under the *Act*, as amended by the *Workers Compensation Amendment Act, 2002*.

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

Workers are provided with a copy of a completed employability assessment before a decision is made on entitlement to a section 23(3) award. They have 30 days in which to provide a written submission. All such submissions received within this time frame will be considered before the final decision is made. Workers are also advised that, at their request, a copy will be made available to their treating physicians. If the details of the employability assessment and its impact on the section 23(3) award are known and agreed to, the 30-day waiting period may be waived.

#### **#40.30**      **Reviews of Permanent Partial Disability Awards under Section 23(3)**

The Board considers that reviews should be allowed for reasons other than a change in the worker's physical condition. Reviews can be carried out in a way that would increase the accuracy of section 23(3) assessments and without unduly interfering with the worker's privacy or rehabilitation.

The Board has decided that there should be an automatic review of a section 23(3) award at two years from the date of assessment or, if there is an appeal, two years from the date of the last decision resulting from the appeal process. Following that review, there will be no further automatic reviews, but the Board officer in Disability Awards has the discretion to set up a claim for reviews at future dates which he or she determines. If, for example, where a worker has not changed occupation, but there has been a change in the salary range of that occupation, usually because of a shift in market conditions, if the change is temporary, the file will be set up for further review. If the change is permanent, an adjustment will be made immediately. Neither a worker nor an employer will have the right to apply for a review of a section 23(3) award at any time unless there has been a change in the worker's physical condition.

In exercising discretion whether to set up an award for later review, an important factor considered by the Board officer is whether the review just conducted resulted in any change. The Board officer will normally set up a later review if there was a change in the award. If a review results in no alteration in the award, it may be reasonable to conclude that the long-term projection made at the time of the initial assessment was correct and that there is no need for further review. On the other hand, the Board officer may feel that at least one further review is required to ensure that the correct result is obtained. If a further review is set up and that review again results in no change, then the Board officer would not likely set up a further review. The Board officer should not continue to set up a claim for future reviews where such reviews are not likely to result in any change in the award.

To provide further encouragement to a worker's rehabilitation, the Board feels that it is reasonable to allow a worker to earn a certain amount above the amount projected without the award being affected. Allowance also should be made for the fact that in serious cases a disabled worker may work for small amounts for therapeutic reasons. The Board feels this concession is consistent with the overall concept of a projected loss of earnings system. Since the object of that system is to predict a worker's long-term earning capacity, it would not, in any event, be reasonable to alter the award simply because earnings are marginally different from the predicted amount. There is likely to be a certain degree of fluctuation in a worker's earnings which does not alter the long-term picture. The Board has concluded that if at the time of a review a worker's earnings or projected earnings are 5% or less over the earnings previously projected, the excess amount will be ignored. Conversely, if it turns out that earnings or projected earnings are 5% or less below what was previously projected, there will be no increase in the section 23(3) award.

In carrying out the reviews and determining whether a worker's current earnings are 5% or less above the amount projected, allowance will be made for the effect of inflation.

Where the assessment of a worker is made under section 23(3) on an application for reopening following a worsening of the condition, it is the loss at the time of the reopening, not at the time of the original injury, which is assessed.

#### **#40.32**      *Worsening or Improvement of Disability*

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

#### **#41.00**      **DURATION OF PERMANENT DISABILITY PERIODIC PAYMENTS**

Section 23.1 of the *Act* provides:

Compensation payable under section 22(1), 23(1) or (3), 29(1) or 30(1) may be paid to a worker, only

- (a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:
  - (i) the date the worker reaches 65 years of age;

- (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board, and
- (b) if the worker is 63 years of age or older on the date of injury, until the later of the following:
  - (i) 2 years after the date of injury;
  - (ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.

Section 23.1 of the *Act* recognizes age 65 as the standard retirement age for workers. Confirmation of age 65 as the standard retirement age may also be found in the contractual terms of some employer sponsored pension plans and collective agreements. As well, Statistics Canada information lends weight to the general view that, on average, workers retire at or before 65 years of age. (9)

Section 23.1 also permits the Board to continue to pay benefits where the Board is satisfied that the worker would retire after the age of 65 if the worker had not been injured.

The standard of proof under the *Act* is on a balance of probabilities as described in policy item #97.00, Evidence. However, as age 65 is considered to be the standard retirement age, the Board requires evidence that is verified by an independent source to confirm the worker's subjective statement regarding his or her intent to work past age 65. Evidence is also required so that a Board officer can establish the worker's new retirement date for the purposes of concluding permanent disability award payments. If the worker's statement is not independently verifiable, the Board officer will make a determination based on the evidence available, including information provided by the worker.

Examples of the kinds of independent verifiable evidence that may support a worker's statement that he or she intended to work past age 65, and to establish the date of retirement, include the following:

- names of the employer or employers the worker intended to work for after age 65, a description of the type of employment the worker was going to perform, and the expected duration of employment
- information from the identified employer or employers to confirm that he or she intended to employ the worker after the worker reached age 65 and that employment was available
- information provided from the worker's pre-injury employer, union or professional association to confirm the normal retirement age for workers in the same pre-injury occupation

- information from the pre-injury employer about whether the worker was covered under a pension plan provided by the employer, and the terms of that plan

This is not a conclusive list of the types of evidence that may be considered. A Board officer will consider any other relevant information in determining whether a worker would have worked past age 65 and at what date the worker would have retired.

Where the Board is satisfied that a worker would have continued to work past age 65 if the injury had not occurred, permanent disability award periodic payments may continue past that age until the date a Board officer has established as the worker's retirement date. At the worker's age of retirement, as determined by a Board officer, periodic payments will conclude even if the worker's permanent disability remains.

In situations where a worker in receipt of a permanent disability periodic payments dies from causes unrelated to the disability, the periodic payments will continue for the full month in which the death occurred. The effect of this policy will be that no overpayments will be considered to have arisen for the period from the date of the worker's death up to the end of the month covered by the last periodic payment.

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

## **42.00 PAYMENT OF PERMANENT DISABILITY AWARDS**

Permanent disability awards under sections 22 and 23 are normally payable monthly until the worker reaches retirement age as determined by the Board. However, some are paid as lump sums. The cheques are mailed to the worker's home address or, if she or he elects, direct to their bank by electronic direct bank deposit.

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

### **#42.10 Commencement of Periodic Payments**

The general rule is that the permanent disability periodic payments commence at the date when the worker's temporary disability ceased and his condition stabilized or was first considered to be permanent.

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

There may, however, be the unusual situation where a worker has or could have returned to a significant level of employment with a minimal loss of income. Wage-loss benefits under section 30 would be 90% of the worker's average net earnings in this employment. Should the worker eventually be assessed at a permanent disability award rate which is higher than the rate paid for temporary benefits under section 30, it would appear that the worker may have suffered a loss of compensation income. The *Act*, however, precludes the payment of both temporary and permanent benefits for the same condition at the same time.

A problem of permanent disability award retroactivity also occurs when, although the worker had a temporary partial disability, the worker had or could have returned to full employment and has not, therefore, actually been paid any benefits under section 30. As previously stated, the *Act* requires that the Board recognize a disability as either temporary or permanent, but not both concurrently. When carrying out the final disability assessment, the Board officer in Disability Awards will have the benefit of the earlier examination, or at least some other documentary evidence on file, on which the decision was made to delay the award. If the findings on the latter examination are the same as the initial findings, or only show a minimal degree of change, it is reasonable to consider the condition as having plateaued from the date of the first examination. In that event, the date of the first examination should be the starting date of the permanent disability periodic payments. If, on the other hand, the latest examination shows a measurable and significant change since the first examination, the worker will be considered as having been, in the interim, temporarily disabled. In that event, the date of the last examination will be the starting date of the periodic payments.

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

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

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

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

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

In that circumstance, there is obviously entitlement to compensation as from the date when first suffering from the disability.

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

In a third case, it may appear that a different condition diagnosed by the Medical Review Panel has resulted from a recent change and, in such a case, it would be proper to commence the disability award from the date of the certificate. In a fourth case, it might appear that there was some progressive deterioration and, in that case, a sliding scale may be appropriate so that the revised disability award is partially retroactive, but not to the full amount.

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

## #42.12 *Retroactive Awards*

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

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

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

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

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

## #42.20 **Permanent Disability Award Adjustments**

If a permanent disability award to a worker or a dependant is paid or increased on the basis of a review board finding, and the finding is later reversed by the Appeal Division under section 96(4) of the *Act*, the permanent disability award payments are terminated or adjusted as of the date of the Appeal Division's decision. In such cases, the capitalization is adjusted by the reversal of an amount equivalent to the unused portion of the capitalization or, in the case of a modification, the adjustment applies to the amount of the capitalization affected by the modification. The policy regarding relief of costs to employers in such circumstances is detailed in policy item #113.10.

## #43.00 **DISFIGUREMENT**

Section 23(5) of the *Act* provides:

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

## **#43.10 Requirements for Award**

Section 23(5) establishes the following requirements:

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

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

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

The ultimate aim of disfigurement and permanent disability awards is to compensate for loss of earning capacity. The worker should not receive double compensation for the same loss. No disfigurement award is granted for something which is directly covered by a permanent disability award, for example, the deformity caused by the normal appearance of an amputated limb. A disfigurement award may be considered where the appearance of an impairment for which a permanent partial disability award has been granted is disfiguring to an exceptional degree.

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

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

## #43.20 Amount of Award

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

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

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

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

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

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

**January 1, 2003 – December 31, 2003**

	<b>Minimum</b>	<b>Maximum</b>
Head and Neck		
1.	\$ 0	\$ 4,804.32
2.	4,804.32	9,608.62
3.	9,608.62	29,186.14
4.	29,186.14	48,643.59
Each Hand		
1.	\$ 0	\$ 1,561.40
2.	1,561.40	3,242.91
3.	3,242.91	9,608.62
4.	9,608.62	16,214.52
Each Arm		
1.	\$ 0	\$ 1,201.06
2.	1,201.06	2,402.15

3.	2,402.15	7,326.55
4.	7,326.55	12,130.88
Each Leg (including the foot)		
1.	\$ 0	\$ 840.74
2.	840.74	1,561.40
3.	1,561.40	4,804.32
4.	4,804.32	8,047.21
Torso		
1.	\$ 0	\$ 840.74
2.	840.74	1,561.40
3.	1,561.40	4,804.32
4.	4,804.32	8,047.21

The above figures are adjusted on January 1 of each year. Effective June 30, 2002, the percentage change in the consumer price index determined under section 25.2 of the *Act*, as described in policy item #51.20 will be used.

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

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

#### Example 1

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

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

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

Amount awarded is \$325.

### Example 2

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

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

- A. Total points are 170.
- B. Average points are 34 (170/5). Disfigurement is in Class 2.
- C. Determine % which average points in line B bears to maximum points for Class 2 = 69% (34/49).
- D. Apply % from line C to maximum dollar amount for Class 2 for the torso area = \$897 (69% of \$1,300).

Amount awarded is \$897.

## **#44.00 PROPORTIONATE ENTITLEMENT**

Section 5(5) of the *Act* provides:

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

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

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

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

Three situations are distinguished:

1. In cases where it has been decided that the precipitating event or activity, and its immediate consequences, were so severe that the full disability presently suffered by the worker would have resulted in any event, regardless of any pre-existing disability, section 5(5) should not be applied.

2. In cases where the precipitating event or activity, and its immediate consequences, were of a moderate or minor significance, and where there is only x-ray evidence and nothing else showing a moderate or advanced pre-existing condition or disease, Proportionate Entitlement should not be applied. These cases should not be classified as a disability where there are no indications of a previously reduced capacity to work and/or where there are no indications that prior ongoing medical treatment had been requested and rendered for that apparent disability. In determining whether there has been ongoing treatment, regard will be had to the frequency of past treatments and how long before the injury they occurred.
3. Where the precipitating event or activity, and its immediate consequences, were of moderate or minor significance, but x-ray or other medical evidence shows a moderate to advanced pre-existing condition or disease, and there is also evidence of a previously reduced capacity to work and/or evidence of a request for and rendering of medical attention for that disability, section 5(5) should be applied.

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

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

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

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

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

Where a worker already has a pre-existing disability, and suffers a work injury resulting in an aggravation of the disability, wage-loss compensation is paid for

the period of any temporary total disability. If the aggravation was temporary only and the worker recovers from the aggravation so that she or he is restored to the position of the pre-existing disability, there is then no residual disability resulting from the work injury, and therefore no further compensation. However, where a pre-existing disability is permanently aggravated by the work injury, and the worker's condition has stabilized, the Board must then consider how much is the compensable aggravation.

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

The measure of the disability attributable to the personal injury or disease shall, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease. (10)

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

Consider the example of a worker whose average net earnings are \$1,000 per month and who, following a work injury, has a 10% disability. If the whole of that disability is attributable to the injury, the monthly permanent disability award granted under section 23(1) is 90% of 10% of \$1,000, i.e. \$90.00 a month. If, however, 3% out of the total impairment existed prior to the injury, section 5(5) requires that compensation only be awarded in respect of the 7% caused by the injury. The worker would therefore receive 90% of 7% of \$1,000 per month, i.e. \$63.00.

#### **#44.31      *Application of Proportionate Entitlement***

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

The Board feels that this is fair to workers in that it allows for the fact that their pre-injury earnings may already have been reduced by the pre-existing disability. On the other hand, it ensures that the Board does not become responsible for

loss of earnings which are really attributable to the delayed or progressive effect of non-compensable pre-existing disabilities. The Board recognizes that it is often difficult in practice to properly allocate the causes of a loss of earnings where there is pre-existing disability, but do not feel that it is any more difficult than other decisions that have to be made under the *Act*, or that this difficulty justifies a different interpretation of section 5(5).

#### **#44.50      Limitations Following a Medical Review Panel Certificate**

Refer to policy item #103.54 for the practice on the matter of apportionment following a Medical Review Panel certificate.

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

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

The Board may in its discretion

- (a) commute all or part of the future amounts that are to be set aside for payment of a retirement benefit and the periodic payments due or payable to the worker to one or more lump sum payments, to be applied as directed by the Board; and
- (b) divide into periodic payments compensation payable in a lump sum.

In case of death or permanent total disability or in case of permanent partial disability where the impairment of earning capacity exceeds 10% of the worker's earning capacity at the time of the injury, no commutation of periodic payments can be made under subsection (2) except upon the application of and at an amount agreed to by the dependant or worker entitled to such payments. (11)

#### **#45.10      Permanent Disability Periodic Payment Categories/Lump Sum Awards**

Category A:

Where

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

a lump sum will be awarded in lieu of a monthly permanent disability periodic payment and the additional future amounts to be set aside by the Board for the payment of a retirement benefit under section 23.2 of the *Act*.

#### Category B:

In any case not within Category A, where the permanent disability periodic payment is more than \$200.00 per month, the award will consist of a monthly permanent disability periodic payment and the additional future amounts to be set aside by the Board for the payment of a retirement benefit. A commutation will only be considered under the circumstances outlined below.

With the exception of the retirement benefit provision, this policy applies similarly to periodic payments of compensation made to a dependant of a deceased worker.

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

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

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

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

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

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

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

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

In considering a commutation, the following will apply:

1. A commutation must be for a specific purpose.
2. A commutation will, in general, only be allowed for purposes that are calculated to enhance the income position of the worker.
3. The applicant must have a stable source of income other than the disability award.
4. A commutation will not be allowed where the applicant is a person whom the Board considers incapable of managing his or her own affairs or who has a demonstrated incapacity for money management.
5. Where there is an application by a widow or widower to commute an award which is paid in whole or part for the children regard may have to be had to the separate interests of the children.
6. If the other requirements are met, a commutation may be in the worker's long-term interests, notwithstanding the worker's medical condition may not have settled or involves a significant risk of deterioration. However, while a potential deterioration in the worker's condition will not automatically bar a request, it is a relevant factor to be considered. It might, for instance, lead to a conclusion that the worker's existing income from other sources would not be stable from a long-term point of view.

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

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

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

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

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

1. Benefits payable to a disabled worker.

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

No compensation under the first heading can validly be awarded in respect of future disability after the death of a worker. Where future benefits have been issued after the death of a worker, the benefit will be cancelled and recalculated up to the date of the worker's death. The letter of decision sent by the Disability Awards Officer was therefore void, and no payment was due under it.

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

Where a total or partial commutation of a permanent disability award is granted, the corresponding portion of the future amounts that are to be set aside for payment of a retirement benefit will also be commuted.

For partial commutations, any remaining future amounts to be set aside on the future reduced permanent disability periodic payments, will continue to be set aside by the Board for payment to the worker on reaching retirement age.

Any amounts that have already been set aside by the Board in the retirement reserve will be held in the reserve until the worker reaches retirement age. These amounts will not be commuted. Please refer to Chapter 18, Retirement Benefits, for further information regarding the provision of this benefit.

There are basically four types of commutations that the Board may permit:

1. A partial commutation by way of a term of years resulting in a total suspension of both the permanent disability periodic payments and the corresponding additional future amounts to be set aside by the Board for the payment of a retirement benefit for a fixed period. After which, the permanent disability periodic payments, and the additional future amounts to be set aside by the Board, resume with full payments.
2. A partial commutation by way of a reduced level of permanent disability periodic payments and a reduced level of the corresponding additional future amounts set aside by the Board for the payment of a retirement benefit for a term of years. After which, the full periodic payments as well as the amounts to be set aside by the Board resume.
3. A partial commutation resulting in a reduced level of permanent disability periodic payments and the corresponding additional future amounts set aside by the Board for the payment of a retirement benefit, until the worker reaches 65 years of age.

4. A total commutation of the whole permanent disability award and the additional future amounts set aside by the Board for the payment of a retirement benefit.

With the exception of the retirement benefit provisions, the Board permits the same types of commutations of periodic payments of compensation made to a dependant of a deceased worker.

A commutation for a term of years will be made only for units of whole years.

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

## **#45.40 Purpose of Commutations**

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

### **#45.41 *Paying Off Debts***

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

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

#### **#45.42**      *Investments*

A commutation will not be allowed for investment purposes.

#### **#45.43**      *Starting a Business*

From a purely financial standpoint, it may be difficult to distinguish between investing in one's own business and other forms of investment. It is, moreover, often difficult for officers of the Board to determine with any degree of certainty whether what the worker wishes to undertake is a sound business venture.

Investing in one's own business, however, may be in the worker's best interests where there is a strong element of rehabilitation involved and the worker will be an active participant in operating the business. Any application for a commutation for the purpose of starting a business will be thoroughly investigated with these considerations in mind.

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

#### **#45.44**      *Education*

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

## **#45.45**     *Buying a Home*

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

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

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

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

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

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

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

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

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

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

When a permanent disability award reserve and a retirement reserve are established or a liability is calculated for an award and a retirement benefit, the monthly payment amount and the periodic future amounts to be set aside by the Board for the payment of a retirement benefit, are converted to a lump sum by applying an actuarial net discount rate. This provision also applies where a reserve is established or a liability is calculated for periodic payments of compensation made to a dependant of a deceased worker. The actuarial net discount rate is set by the Board and represents the anticipated difference between long term future investment returns and long term future inflation.

Similarly, when a permanent disability award commutation is granted, the monthly permanent disability award amount and the periodic amounts set aside by the Board for a retirement benefit are converted to a lump sum by applying a commutation net discount rate. For permanent disability awards and the future amounts to be set aside by the Board for the payment of a retirement benefit that are automatically commuted by the Board without a request from the worker, the commutation net discount rate used will be equal to the actuarial net discount rate. For permanent disability awards and the future amounts to be set aside by the Board for the payment of a retirement benefit that are commuted by the Board at the worker's request, the commutation net discount rate used will be equal to the actuarial net discount rate increased by .5 percentage points. The increased net discount rate also applies to a commutation granted by the Board at the surviving dependant's request.

## **#45.61      *Implementation of Decision***

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

If a review board finding results in a lump-sum payment (Category A of policy item #45.10) or they find that a commutation (Category B of policy item #45.10) should be paid, the lump sum or commutation will not be processed unless, and until, the 30-day period for appealing the finding to the Appeal Division has expired. If an appeal is submitted within this time period, or a referral of the review board finding is made to the Appeal Division under section 96(4) of the *Act*, no lump sum or commutation will be processed until the proceedings before the Appeal Division have been concluded. Any finding of the review board which would normally result in a lump-sum payment will be paid as a periodic payment pending the decision of the Appeal Division.

The lump sum or commutation may be paid during the 30-day period for appealing the finding to the Appeal Division, if:

1. the worker has requested it, **and**
2. the employer confirms in writing that they do not intend to appeal to the Appeal Division, **and**
3. no referral under section 96(4) will be made.

The same procedures apply, in the case of medical decisions, to the 90-day period between an Appeal Division decision and a Medical Review Panel appeal.

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

## **#46.00 REVIEW OF OLD PENSIONS UNDER SECTION 24**

Section 24(2) of the *Act* provides:

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

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

Section 24(1) provides that

This section applies to the claims for compensation that the Board may by regulation determine, provided that

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

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

1. The regulations come into effect on the 1st day of December, 1982.
2. The regulations with respect to the review of old disability pensions, promulgated by the Board on the 21st day of July, 1975, the 13th day of November, 1975, and the 19th day of August, 1976 (B.C. Regulations 524/75, 746/75 and 492/76) are hereby repealed.
3. Unless the Board otherwise determines, section 24 of the *Act* applies to claims in which all of the following conditions are present:
  - (1) The worker is still suffering from a compensable disability sustained more than ten years previous to the application under section 24(2).
  - (2) A permanent disability award was made by the Board based on a percentage of total disability of 12% or greater, a disability award was made for an injury involving the spinal column, or a disability award was made for an injury to a part of the body other than the spinal column on or after October 1, 1977. Where the worker is still suffering from two or more compensable disabilities, this condition is satisfied if permanent disability awards were made by the Board which in aggregate were based on a percentage of total disability of 12% or greater, provided that a minimum of 5% of total disability was attributed to an injury or injuries sustained more than ten years previous to the application under section 24(2).

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

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

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

Notwithstanding that a worker suffering a permanent disability has received an award that has been wholly or partly commuted, or an award for a fixed term, the worker may apply under this section, but he shall be deemed to be still receiving the periodic payments that have been commuted, or the life equivalent of the periodic payments made for a fixed term. (12)

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

Where a worker is under the age of 65 years, compensation is considered adequate for the purposes of this section if it equals 75% of the projected loss of earnings resulting from the disability. (13)

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

Where a worker is under the age of 65 years, periodical payments established or raised under this section are subject to readjustment by reference to subsection (4) upon the worker attaining the age of 65 years. (14)

The calculation of benefits is made in the manner the Board determines. (15)

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

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

These calculations are made primarily by reference to evidence in the particular case, with two exceptions. A table of monthly average wage rates in BC (see Supplement No. 1, Appendix 5) is used to establish two of the variables; and an

age factor is applied to those cases where the disability was suffered when the worker was under the age of 23. With regard to the former, a projection of the pre-disability earning capacity is made by comparing the claimant's actual pre-injury earnings, limited by the maximum in effect at the time of injury, with the monthly average wage rate in the table for that year and applying the same ratio to the average wage in the table for the year when the calculation is being made. In making this projection, no account is taken of promotions which the claimant might have obtained if he had not been injured.

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

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

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

The first relates to retirement income from savings. Many workers save part of the earnings accrued during their working lives, and these savings, or income from the savings, become part of retirement income. The Board must consider, therefore, the loss of this element of retirement income resulting from the disability. To determine loss of retirement income from savings, a standard formula is used, based on such evidence as the Board has been able to obtain from aggregated data relating to the savings habits of Canadian families.

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

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

1. When an adjustment is made to a pension for a worker who is under the age of 65, that adjustment will be diarized for review three months prior to the worker attaining the age of 65.

2. When the matter comes up for review, the file will be considered in accordance with the procedures developed for calculating awards for workers aged 65 or over. For the purpose of this calculation, the original functional award in effect prior to any previous adjustment under section 24, plus applicable cost of listing adjustment as described in policy item #51.00, will be regarded as the permanent disability award in effect at age 65.
3. The term adjustment payable to age 65 will automatically terminate when the worker reaches age 65. The adjustment calculated as per item (2) above will then come into effect. This new pension will be the higher of the original pension award plus cost of living adjustments as described in policy item #51.00 or the adjusted permanent disability award determined in reference to the calculation for workers aged 65 or over.

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

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

Section 31 applies to the calculation of compensation under section 24, but the calculation is not limited by reference to average earnings at the time of injury. (16)

The periodic payments awarded to a worker following a review under this section shall not exceed the maximum that the Board would award to a worker in an occupational category similar to the occupation of the applicant worker before the injury if she or he had, at the effective date of the review under this section, suffered a compensable disability similar to the compensable disability being suffered by the applicant worker. (17)

No decision under this section shall result in periodical payments to any worker being lower than they would if no application had ever been made under this section. (18)

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

Where a worker whose disability occurred before January 1, 1965 applies under this section within one year of the earliest date on which becoming eligible to do so, an increase or establishment of benefits under section 24 is effective from September 1, 1975 and, in all other cases, the effective date for the commencement of an increase or establishment of benefits under the section is the date on which the application is received at the Board. (19)

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

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

#### **#46.05**      *Reapplication under Section 24*

A worker may reapply under this section for reconsideration of his compensation benefits after a further 10 years have elapsed since the last previous application under this section. (20)

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

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

- (a) the award was for a percentage of total disability of 12% or greater, and the whole of the periodical payments was commuted prior to that date;
- (b) a portion of the periodical payments equivalent to 12% of total disability or greater was commuted prior to that date; or
- (c) the award was for a percentage of total disability of 12% or greater and was of periodical payments for a fixed term, and where the worker to whom the award had been made is still suffering from the disability, the Board may, on the application of the worker, establish new periodic payments, which are to commence for the month in which the application is received at the Board.”

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

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

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

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

A.	True percentage of total disability awarded (as varied by age and wage factors)	61.20
B.	Monthly wage rate prior to injury	100.00
C.	Life value of pension per month	38.25
D.	Monthly amount of 1952 commutation	6.75
E.	1952 commutation as percentage of whole disability $\frac{D \times A}{C} = \frac{6.75 \times 61.20}{38.25}$	10.80
F.	Remaining percentage of total disability (A-E)	50.40
G.	Balance of monthly pension (C-D)	31.50
H.	Recalculation of monthly pension following policy item #39.61 $31.50 \times \frac{66-2/3}{62-1/2} \times \frac{2,000.00}{12 \times 100.00}$	56.00
I.	Monthly amount of 1955 commutation	2.00
J.	1955 commutation as percentage of whole disability $\frac{I \times F}{H} = \frac{2.00 \times 50.40}{56.00}$	1.80
K.	Total percentage of disability commuted (E + J)	12.60

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

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

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

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

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

#### *#46.13 Term Pensions*

Where the award was for a fixed term that has not expired or been commuted, section 26 applies upon the expiry of the term. (21) The worker must also wait for the expiry of the term if he or she has to combine an expired or commuted pension with the term pension to satisfy the 12% requirement.

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

## #46.14 Rate of New Periodic Payments

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

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

The rate of the new periodical payments is the amount calculated under clause (b). (22)

Consider the following examples:

1. Worker injured in 1938. Term award which expired in 1952. Application under section 26 in February, 1976.
  - A. True percentage of total disability awarded (as varied by age and wage factors) 18.58%
  - B. Monthly wage rate prior to injury \$80.00
  - C. Life value of permanent disability award per month (23)  
 $\frac{18.58}{100} (A) \times \frac{62-1/2}{100} \times 80.00 (B)$  \$9.29
  - D. Monthly permanent disability award that would have been payable if there had been no term award under provision in policy item #39.61 (section 33(4))  
 $9.29 (C) \times \frac{66-2/3}{62-1/2} \times \frac{2,000.00}{12} \times 80.00 (B)$  \$20.64
  - E. Provision in #39.62 inapplicable as would result in permanent disability award less than under policy item #39.61

F.	C.P.I. from January 1, 1966 to January 1, 1976, on \$20.64 (D) 76.3452% of \$20.64	\$15.75
G.	New monthly periodical payments under section 26 commencing February 1, 1966	\$15.75
2. Claimant injured in December, 1944. Commuted part of permanent partial disability pension in 1950. Application under section 26 in November, 1974.		
A.	True percentage of total disability awarded (as varied by age and wage factors)	40.97%
B.	Monthly wage rate prior to injury	\$150.00
C.	Life value of pension per month $\frac{40.97}{100} (A) \times \frac{66-2/3}{100} \times 150.00 (B)$	\$40.97
D.	Monthly amount commuted	\$14.95
E.	Percentage of total disability commuted $\frac{14.95}{40.97} (D) \times 40.97 (A)$	14.95%
F.	Provision in policy item #39.61 inapplicable as injury occurred after March 18, 1943	
G.	Additional monthly pension that would have been payable had there been no commutation under provision in policy item #39.62 $\frac{14.95}{100} (E) \times 130.00$	\$19.44
H.	C.P.I. on additional monthly pension (G) from January 1, 1966 to July 1, 1974 49.85% of \$19.44	\$9.69
I.	Additional monthly periodical payments under section 26 commencing November 1, 1974 (to be added to existing pension)	\$9.69

### #46.15 *Cost of Living Adjustment After Reinstatement*

Cost of living adjustments after the establishment of the new periodical payments are based on the sum of the amounts calculated under clauses (a) and (b) in policy item #46.14. (24) A formula for calculating these adjustments, which applies both in cases of total and partial commutation is set out below.

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

The formula is:

1.	The amount of pension benefits being paid for the month preceding the cost of living adjustment	\$
	PLUS	
2.	The monthly amount of pension that had been commuted	\$
	Subtotal	\$
3.	The application of the indexing factor described in policy item #51.00 to that subtotal	\$
	Second Subtotal	\$
	LESS	
4.	The monthly amount of pension that had been commuted	\$
	Total	\$

The resulting total is the monthly pension that will be applicable after the cost of living adjustment.

### #46.16 *Commutation of New Periodic Payments*

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

## NOTES

- (1) See policy item #65.04
- (2) See policy item #40.00
- (3) S.23(2)
- (4) Permanent Disability Evaluation Schedule Appendix 4
- (5) See policy item #25.10
- (6) S.23(4); See policy item #34.20
- (7) See policy item #37.21
- (8) S.33(4)
- (9) Earnings and Employment Trends, Jan/Feb 2001, BC Stats, Ministry of Finance and Corporate Relations, Province of British Columbia
- (10) S.5(5)
- (11) S.35(3)
- (12) S.24(7)
- (13) S.24(3)
- (14) S.24(5)
- (15) S.24(6)
- (16) S.24(8)
- (17) S.24(9)
- (18) S.24(12)
- (19) S.24(11)
- (20) S.24(10)
- (21) S.26(2)
- (22) S.26(4)
- (23) The 62-1/2% shown in the equation is the percentage of average earnings used in 1938 for calculating compensation, the equivalent of the present 75%
- (24) S.26(4)

## #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. (28)

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. (29)

## **#97.35**      *Termination of Benefits*

Where a treating physician expresses an opinion that a worker 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 #39.01.

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.

## #98.11 *Powers of Officers of the Board*

Section 88(1) provides that “The board may act on the report of any of its officers, and any inquiry which it is considered necessary to make may be made by an officer of the board or some other person appointed to make the inquiry, and the board may act on his or her report as to the result of the inquiry.”

The officer and every other person appointed to make an inquiry has for the purposes of an inquiry under subsection (1), and the review board has, all the powers conferred upon the Board by section 87. (30)

Every officer or person authorized by the Board to make examination or inquiry under this section may require and take affidavits, affirmations or declarations as to any matter of the examination or inquiry, and take affidavits for the purposes of this *Act*, and in all those cases to administer oaths, affirmations, and declarations and certify that they were made. (31)

Section 71(8) provides that “An officer of the board may investigate an accident resulting in injury to, or the death of, a worker, and may inspect and inquire with respect to health and safety matters at any place of employment, and may make the inquiries and inspect the documents he or she considers necessary for these purposes, and any employer, worker or other person who withholds information from the officer making inquiries, or who otherwise obstructs or interferes with the officer in the exercise of the officer's functions under this section, commits an offence and is liable on conviction to a fine not exceeding . . .” the amount set out in Part 3 of Appendix 6, “. . . or to imprisonment not exceeding 3 months, or to both.”

The Board has ruled that, for the purpose of Sections 88 and 71, employees of the Board, who, in the performance of their prescribed duties, do those things which are reserved to be done by an officer of the Board, are, and have been, for matters arising out of Part 1 of the *Act*, appointed officers of the Board.

## #98.12 *Examination of Books and Accounts of Employer*

Section 88(3) provides that “The board, an officer of the board or a person authorized by it for that purpose, may examine the books and accounts of every employer and make any other inquiry the board considers necessary to ascertain . . . whether an industry or person is within the scope of this Part. For the purpose of the examination or inquiry, the board or person authorized to make the examination or inquiry may give to the employer or the employer's agent notice in writing requiring the employer to bring or produce before the board or person, at a place and time to be mentioned in the notice, which time must be at least 10 days after the giving of the notice, all documents, writings, books, deeds and papers in the possession, custody or power of the employer touching or in

any way relating to or concerning the subject matter of the examination or inquiry referred to in the notice, and every employer and every agent of the employer named in and served with the notice must produce at the time and place required all documents, writings, books, deeds and papers according to the tenor of the notice.”

An employer and every other person who obstructs or hinders the making of an examination or inquiry mentioned in subsection (3), or who refuses to permit it to be made, or who neglects or refuses to produce the documents, writings, books, deeds, and papers at the place and time stated in the notice mentioned in Subsection (3), commits an offence. (32) The maximum fine for committing this offence is set out in Part 1 of Appendix 6.

### **#98.13**      *Medical Examinations and Opinions*

The authority of the Board to require a worker to be medically examined is dealt with in policy item #78.20.

The medical resources of the Board cannot be used to provide a medical opinion to anyone on request. A Board Medical Advisor will, therefore, decline to provide a medical opinion if the request does not come from someone authorized to make the request. Those authorized are officers of the Board responsible for claims decisions, other Board staff where duties require an input of medical advice, members of the review board, and members of the Appeal Division. Advice to treating doctors may, however, be provided according to the judgment of the Board Medical Advisor.

A Workers' Adviser and an Employers' Adviser have access to medical opinions already on file, but have no right to require any further medical opinions to be produced.

### **#98.20**      **Conduct of Inquiries**

The Board operates on an inquiry as opposed to an adversary system. It does not, like a court operating under the adversary system, decide between the arguments and evidence submitted by two opposing parties at a hearing and limit itself to the material presented at that hearing. While the judge under the adversary system has little or no authority to carry out investigations, the Board is obliged by section 96 of the *Act* both to investigate and to adjudicate claims for compensation. Oral hearings or interviews are not always conducted before a decision is reached and, when they are conducted, provide only part of the information relied on by the Board. The other written reports on the file will also be considered. Such hearings are informal in nature and not subject to the formal rules of evidence and procedure followed in court hearings.

### *#98.21 Place of Inquiry*

For the purposes of claims adjudication, an Adjudicator may enter premises and make such inspections as considered necessary, notwithstanding that another agency may have inspection jurisdiction for accident prevention purposes. Where an inspection is of a technical nature and can only be carried out by someone technically qualified, perhaps an Occupational Hygiene Officer, such technical personnel may be used to make an inspection for the purposes of claims adjudication.

Where a Board officer visits the work place to investigate a claim, the worker, where possible, should be offered the opportunity to accompany the Adjudicator.

### *#98.22 Failure of Worker to Appear*

If the worker fails or refuses to appear at an inquiry, her or his claim may be suspended, or decided in her or his absence, or a further appointment may be arranged.

### *#98.23 Representation*

A worker has a right to bring a representative to any enquiry, both at first instance and on appeal.

If the worker is unable to communicate effectively in English, an interpreter is arranged.

### *#98.24 Presence of Employer*

If a worker is unrepresented, and the employer or employer's representative appears, it must be determined whether the employer is appearing on behalf of the worker. If the employer is appearing on behalf of the worker, the worker will be asked (but not in the presence of the employer) whether he or she has any objection to the employer being present. If there is no objection, the employer can be invited to attend the interview. If the worker does object, the employer will be asked to wait outside, and can be interviewed separately.

If appearing against the worker, the employer is not allowed to be present at the interview with the worker and must be interviewed separately. If there is any doubt as to the employer's intentions, the employer will be interviewed separately.

If a worker is represented, an employer may be permitted to be present even if the employer is appearing against the worker.

## #98.25 *Oaths*

The oath is not administered as a normal routine in every inquiry, but is used when considered appropriate.

If:

1. a person called to give evidence objects to taking an oath, or is objected to as incompetent to take an oath, and the Board is satisfied of the sincerity of the objection of the witness from conscientious motives to be sworn or that the taking of an oath would have no binding effect on his or her conscience; or
2. the Board is satisfied that the form of oath which a person called to give evidence declares to have a binding effect on his or her conscience is not such that it can be taken in the place where the inquiry is being held, or that it is not fitting so to do, and the Board so directs,

the person shall, instead of taking an oath, make an affirmation. (33) An employer or representative or a worker's representative need not be placed under oath unless they have something specific or pertinent to contribute to the inquiry.

## #98.26 *Witnesses and Other Evidence*

A worker may bring to an inquiry such witnesses, and may submit such verbal and documentary evidence, as she or he thinks will be of assistance.

Wherever possible, witnesses will be interviewed separately without the worker being present. They will not be present while the worker is being interviewed.

## #98.27 *Cross-examination*

Under the inquiry system (contrary to the adversary system), there is no right of cross-examination of the parties or witnesses. If, in the process of an inquiry, one of the parties wishes to ask a question of the person whose evidence is being taken, the question should be referred to the interviewer conducting the inquiry who, in turn, can relay the question if it is felt it would be helpful.

Cross-examination may, however, sometimes be permitted.

## **#99.00 DISCLOSURE OF INFORMATION**

The Workers' Compensation Board, for the purposes of administering the *Workers Compensation Act (Act)*, collects and maintains information for the purpose of adjudication and managing claims for workers or their dependants. In order to carry out all aspects of this activity, the Board in a variety of situations discloses information contained in claim files.

Provincial legislation, known as *Freedom of Information and Protection of Privacy Act (F.I.P.P.)* provides access for the public to the information maintained by the Board while at the same time protecting personal privacy.

F.I.P.P. differentiates among "personal information", information relating to third party business interests and other types of information in the possession of a Public Body such as the Board. Personal information means recorded information about an identifiable individual.

Freedom of information and protection of privacy can be competing principles in many situations. Which principle is to be paramount in any particular case is sometimes difficult to determine. Until advised otherwise by the Information and Privacy Commissioner appointed under section 37 of F.I.P.P., openness prevails as far as possible in the area of compensation services. Exceptions to access should be narrowly construed. Since claim files deal with an identifiable individual, they sometimes contain personal and sensitive information. The privacy provisions of F.I.P.P. will, therefore, prevail other than for the specific exceptions contained in F.I.P.P. Examples of such exceptions include the rights in section 3(2) of a party to a proceeding to access information, or the variety of exceptions listed in section 33 such as the need to comply with the requirements of a specific *Act*. The statutory access to records by the Ombudsman, appeal bodies or the Workers' and Employers' Advisers remains unchanged.

Section 3(2) of the *Freedom of Information and Protection of Privacy Act* states that the *Act* does not limit the information available by law to a party to a proceeding. A proceeding does not take place until either the worker or the employer has initiated a formal appeal.

Before an appeal is initiated, the WCB must apply F.I.P.P. to requests for claim information. A request by a worker should be directed to a Manager in the appropriate Service Delivery Location. The Manager will comply with the request in accordance with the F.I.P.P. rules. Before an appeal is initiated, an employer is not entitled to a copy of the worker's claim file. Disclosure to an employer in such circumstances, is limited to that information necessary for the adjudication or administration of the claim, that is on a "need to know" basis. Once an appeal has been initiated, full disclosure is available to either a worker or an employer. These disclosure rules are considered to be in accordance with F.I.P.P. and the rules of natural justice.

Requests for disclosure for information in a situation not covered by the policies in this Manual should be directed to the F.I.P.P. Department of the Board. These requests will be considered on an individual basis in accordance with F.I.P.P.

### *Dispute Resolution*

A request for a review of the F.I.P.P. Department's decision by the Information and Privacy Commissioner may be made within 30 days of the date the person asking for the review is notified of the latest decision.

The Chairman, as the head of the W.C.B., has ultimate responsibility within the Board for implementation of F.I.P.P. for the purposes of workers' compensation.

RELEVANT SECTIONS OF F.I.P.P. HAVE BEEN REPRODUCED BELOW FOR THE CONVENIENCE OF THOSE USING THIS MANUAL.

### *Section 3 Scope of this Act*

- (2) This Act does not limit the information available by law to a party to a proceeding.

### *Section 9 How access will be given*

- (3) If the applicant has asked to examine the record under section 5(2) or if the record cannot reasonably be reproduced, the applicant must
  - (a) be permitted to examine the record or part of the record, or
  - (b) be given access in accordance with the regulations.

### *Section 15 Disclosure harmful to law enforcement*

- (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
  - (a) harm a law enforcement matter,
  - (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
  - (d) reveal the identity of a confidential source of law enforcement information,
  - (e) endanger the life or physical safety of a law enforcement officer or any other person,
  - (f) reveal any information relating to or used in the exercise of prosecutorial discretion,
  - (j) facilitate the commission of an offence under an enactment of British Columbia or Canada, or
  - (k) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.