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March 2003

Update 2003 – 3

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

This update of the *Rehabilitation Services & Claims Manual* contains amendments to the *Manual* implemented since update 2003 – 2.

This amendment includes:

- consequential changes as a result of the adoption of the new *Assessment Manual*
- policy item #67.10 was amended to delete the reference to longshore workers
- amendments to Item C14-102.01 (Changing Previous Decisions – Reopenings) to ensure consistency with amendments brought into force by the *Workers Compensation Amendment Act (No. 2) 2002* (Bill 63)

A list of amendments has been included as part of the package.

If you have any questions regarding this update or the *Rehabilitation Services & Claims Manual*, please call Publications and Video Distribution at 1-866-271-4879.

DOUGLAS ENNS  
Chair, Board of Directors

Attachments

## **REHABILITATION SERVICES & CLAIMS MANUAL – VOLUME II**

### **SUMMARY OF AMENDMENTS – Update 2003 – 3**

Consequential changes as a result of the adoption of the new *Assessment Manual*

#5.00 – Coverage of Workers
#6.00 – Definitions of “Worker” and “Employer”
#6.10 – Nature of Employment Relationships
#6.20 – Voluntary and Other Workers Who Receive No Pay
#7.00 – Specific Inclusions in Definition of Worker
#8.00 – Admission of Workers, Employers, and Independent Operators
#48.48 – Unpaid Assessments
Chapter 7 Notes
#67.20 – Personal Optional Protection
#67.32 – Volunteer Firefighters and Ambulance Drivers and Attendants
Chapter 9 Notes
#82.40 – Transportation Provided by the Employer
#93.10 – Report to Employer
#94.10 – Report to the Board
#111.30 – Meaning of “Worker” and “Employer” under Section 10
#115.10 – Failure to Register as an Employer at the Time of Injury
#115.30 – Experience Rating
Chapter 17 Notes

Policy amended to delete the reference to longshore workers

#67.10 – Casual Workers
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Amendments to Item C14-102.01 (Changing Previous Decisions – Reopenings) to ensure consistency with amendments brought into force by the *Workers Compensation Amendment Act (No. 2) 2002* (Bill 63)

Chapter 14 C14-102.01 Changing Previous Decisions – Reopenings
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## CHAPTER 2

### WORKERS AND EMPLOYERS COVERED BY THE ACT

#### #3.00 INTRODUCTION

Section 2(1) of the *Act* states as follows:

“This Part applies to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the board.”

The employers and workers who are covered and those who are exempted are the subject of this chapter.

The *Act* does not apply to workers of the Federal Government of Canada. However, by section 4(2) of the *Government Employees Compensation Act*, an "employee" who is usually employed in this province is given the same rights to compensation as workers under the provincial *Act*. The persons considered "employees" are dealt with in this chapter.

#### #4.00 EXEMPTIONS AND EXCLUSIONS FROM COVERAGE

The criteria for the exemption of employers or workers may be found in policy in Item AP1-2-1 of the *Assessment Manual* along with general exemptions which are described in detail. The policy in Item AP1-2-1 also recognizes that some workers and employers are excluded from coverage under the *Act* as a matter of constitutional law or because they have no attachment to B.C. industry.

**EFFECTIVE DATE:** February 11, 2003 (as to deletion of references to the former Governors)

**APPLICATION:** Not applicable.

#### #5.00 COVERAGE OF WORKERS

It is a well established principle of workers' compensation that where an employer comes within the scope of the *Act*, all workers of that employer are covered for compensation. The coverage is not limited to those engaged in the manual part of the operation. Thus, in a wholesale establishment, for example, workers' compensation coverage extends to clerical and bookkeeping staff, and to corporate presidents, as well as those engaged in the receiving, handling, storage and transmission of goods. All of these functions are part of wholesaling.

This position is not changed where an employer divides up the manual and clerical parts of his operation and attaches a separate corporate identity to each. Nor does it depend on whether the clerical and manual staff are employed by affiliated corporations. The result would be the same if there were no corporate affiliation.

A worker's claim is not prejudiced by the fact that the employer has not complied with the obligation to register with the Board. This is subject to the principles set out in the policy in Item AP1-1-4 of the *Assessment Manual*.

**EFFECTIVE DATE:** March 18, 2003 (as to numerical reference to the policy in Item AP1-1-4 in the *Assessment Manual*)

**APPLICATION:** Not applicable.

## **#6.00 DEFINITIONS OF "WORKER" AND "EMPLOYER"**

The basic definitions of "worker" and "employer" in section 1 of the *Act* are as follows:

'Employer' includes every person having in their service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in work in or about an industry;

'Worker' includes

(a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise;

Detailed discussions concerning the definitions of worker and employer may be found in the policies in Items AP1-1-1, AP1-1-4 and AP1-1-5 of the *Assessment Manual*.

**EFFECTIVE DATE:** March 18, 2003 (as to numerical references to the policies in Items AP1-1-1, AP1-1-4 and AP1-1-5 in the *Assessment Manual*)

**APPLICATION:** Not applicable.

## **#6.10 Nature of Employment Relationship**

Where a person contracts with another to provide labour in an industry covered by the *Act*, the Board considers that the contract may create one of three types of relationship. The persons doing the work may be independent firms, labour contractors, or workers.

Very detailed registration rules concerning independent firms, labour contractors, and workers are outlined in the policies in Items AP1-1-2, AP1-1-3, AP1-1-5 and AP1-1-7 of the *Assessment Manual*.

**EFFECTIVE DATE:** March 18, 2003 (as to numerical references to the policies in Items AP1-1-2, AP1-1-3, AP1-1-5 and AP1-1-7 in the *Assessment Manual*)

**APPLICATION:** Not applicable.

## **#6.20 Voluntary and Other Workers Who Receive No Pay**

Usually a "worker" is paid. Therefore, it is not surprising that voluntary or other workers receiving no payment for their work are not generally considered workers under the *Act*. On the other hand, some workers of this type are expressly included within the scope of the *Act*, and the Board is given express power to admit others at its discretion. Furthermore, the receipt of some sort of payment by such workers may lead to their being workers under the *Act*. Further information about volunteers can be found in the policies in Items AP1-1-5 and AP1-3-1 of the *Assessment Manual*.

**EFFECTIVE DATE:** March 18, 2003 (as to numerical references to the policies in Items AP1-1-5 and AP1-3-1 in the *Assessment Manual*)

**APPLICATION:** Not applicable.

## **#7.00 SPECIFIC INCLUSIONS IN DEFINITION OF WORKER**

Section 1 includes within the *Act's* basic definition of "worker" certain classes of people who might otherwise not be covered. Those classes of people are discussed in detail in the policies in Items AP1-1-1, AP1-1-3, AP1-1-5, AP1-1-7 and AP1-97-1 of the *Assessment Manual*.

**EFFECTIVE DATE:** March 18, 2003 (as to numerical references to the policies in Items AP1-1-1, AP1-1-3, AP1-1-5, AP1-1-7 and AP1-97-1 in the *Assessment Manual*)

**APPLICATION:** Not applicable.

## **#7.10 Members of Fire Brigades**

A volunteer member of a fire brigade is entitled to compensation for injuries arising out of and in the course of the activities of the fire brigade. This involves activities related to the process of firefighting even though not actually occurring while fighting a fire or during a drill or practice. It includes activities within the environs of the fire hall which are authorized and under the direction and control of the Fire Chief, such as activities involving maintenance to the building or

equipment, snow clearance, etc. Coverage applies in the case of participation in practices, but not to travel to and from practices. However, there would be coverage in an actual emergency where the member is travelling to the firehall or the fire in response to the siren or returning home or to the member's regular job after the fire.

## **#8.00          ADMISSION OF WORKERS, EMPLOYERS, AND INDEPENDENT OPERATORS**

The *Act* contains powers to admit workers, employers and independent operators.

A discussion of the situations where coverage may be extended under sections 2 and 3 of the *Act* is found in the policies in Items AP1-1-6, AP1-2-2, AP1-2-3 and AP1-3-1 of the *Assessment Manual*.

**EFFECTIVE DATE:**            March 18, 2003 (as to numerical references to the policies in Items AP1-1-6, AP1-2-2, AP1-2-3 and AP1-3-1 in the *Assessment Manual*)

**APPLICATION:**                Not applicable.

## **#8.10          Federal Government Employees**

The *Government Employees Compensation Act* grants "employees" of the Federal Government usually employed in the province the same rights to compensation as non-Federal employees. The definition of "employee" is given in section 2 of this *Act* and takes the form of five alternative definitions which are as follows:

- "(a)    any person in the service of Her Majesty who is paid a direct wage or salary by or on behalf of Her Majesty,
- (b)    any member, officer or employee of any department, company, corporation, commission, board or agency established to perform a function or duty on behalf of the Government of Canada who is declared by the Minister with the approval of the Governor in Council to be an employee for the purposes of this *Act*,
- (c)    any person who, for the purpose of obtaining employment in any department, company, corporation, commission, board or agency established to perform a function or duty on behalf of the Government of Canada, is taking a training course that is approved by the Minister for that person,

- (d) any person employed by any department, company, corporation, commission, board or agency established to perform a function or duty on behalf of the Government of Canada, who is on leave of absence without pay and, for the purpose of increasing his skills used in the performance of his duties, is taking a training course that is approved by the Minister for that purpose, and
- (e) any officer or employee of the Senate, the House of Commons or the Library of Parliament".

This definition is wide enough to cover most Federal employees, whether employed directly by the Government or by some statutory body. For example, it covers post office workers. The definition also includes certain persons taking training courses relating to their employment with the Government.

By section 3(1) of the *Act*, members of the regular force of the Canadian Forces or of the Royal Canadian Mounted Police are excluded from coverage.

Any person appointed by authority of the Chief Electoral Officer and the *Canada Election Act* to prepare for and hold a Federal election is considered as an employee of the Federal Government for the purposes of the *Government Employees Compensation Act*. This definition includes Returning Officers, Election Clerks, Enumerators, Stenographers, Typists, Poll Clerks and a Constable.

Effective November 10, 1976, employees of the Bank of Canada are considered employees under the *Government Employees Compensation Act*.



2. it is considered unreasonable or inadvisable to proceed with recovery.

In no case will recovery be waived if there was fraud or misrepresentation. Approval to waive recovery, when granted, does not constitute forgiveness of the debt. In some instances, at the discretion of the Vice-President (or Director for waivers under \$1,000), a recovery waiver may be granted even though a permanent disability award is being paid or will be paid. Should a further claim be recorded or a later reopening accepted where a prior waiver has been approved, the question of initiating recoveries must first be discussed with the Vice-President or Director who approved the waiver.

#### **#48.48      *Unpaid Assessments***

Unpaid and overdue assessments are treated in the same manner as overpayments if a claim is later received from an employer or principal of the limited company responsible for the debt or an independent operator who has purchased but not fully paid for personal optional protection coverage. If, at the time of the claim, the worker is working for another company or organization, the decision whether or not to recover the overdue assessment from benefit entitlements can only be made by the Board officer in the Finance Division who has been assigned that authority by the President, or a Compensation Services Director or a delegate. Recoveries will not be made from widows, widowers or dependants where the claim is the result of a fatality and the worker was employed with an employer other than the employer owing the assessments.

**EFFECTIVE DATE:**            March 18, 2003 (as to the removal of the title Manager, Collections, and the substitution of the Board officer in the Finance Division who has been assigned that authority by the President)

**APPLICATION:**            Not applicable.

#### **#48.50      **Payment to Widow or Widower Free from Debts of Deceased****

Any compensation owing or accrued to a worker for a period not exceeding three months before death may, at the discretion of the Board, be paid to a widow, widower, or a person who takes charge of the funeral arrangements, free from debts of the deceased. (3)

#### **#49.00      **INCAPACITY OF A WORKER****

Under section 12 of the *Act*, "A worker under the age of 19 years is sui juris for the purpose of this Part, and no other person has a cause of action or right to compensation for the personal injury or disablement except as expressly provided in this Part."

An exception is made by section 35(1) of the *Act* which provides in part that “. . . in the case of minors or persons of unsound mind who the board considers are incapable of managing their own affairs, . . .” payments of compensation “. . . may be made to the persons that the board thinks are best qualified in all the circumstances to administer the payments, whether or not the person to whom the payment is made is the legal guardian of the person in respect of whom the payment is being made.”

Compensation benefits due to a worker, where a public trustee has been appointed, will be issued in the name of the worker but sent to the public trustee.

### **#49.10 Worker Receiving Custodial Care in Hospital**

Section 35(5) provides that “Where a worker is receiving custodial care in a hospital or elsewhere, periodical payments of compensation due to the worker . . . may be paid to or for the benefit of

- (a) the worker to the extent the worker is able to make use of the money for his or her personal needs or is able to manage his or her own affairs; or
- (b) any person who is dependent on the worker for support, or in a case of temporary disability of the worker may be
- (c) applied to the maintenance of a home to which the worker is likely to return on his or her recovery; or
- (d) accumulated by the board for payment to the worker on his or her recovery,

or in a case of permanent disability may be applied toward the cost of the worker's maintenance, but, in that case and where the worker is conscious, there must be paid to, or for the use of, the worker a comfort allowance of at least . . .” the amount set out below out of each periodic payment.

January 1, 2002	—	December 31, 2002	\$181.86
January 1, 2003	—	December 31, 2003	\$187.62

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

“Subsection (5) applies, regardless of the date of the injury.” (4)

## NOTES

- (1) S.98(4)
- (2) Item AP1-15-1 of the *Assessment Manual*
- (3) S.35(4)
- (4) S.35(6)
- (5) Policy item #49.20
- (6) Policy item #48.30



If not supplied by the employer, earnings and tax status information for the required period of time prior to the injury must be provided by the worker. The information provided must be verified information from an independent source such as wage stubs, T-4's, or letters from the Income Tax Authorities or employers.

If, at the earlier of: the day after 10 cumulative weeks of benefits have been paid to the worker; or the effective date of a permanent disability award there is insufficient information on which to complete the 10-week rate review, a provisional rate may be set until sufficient information is received. (3)

In situations where a worker is being maintained on full salary by the employer, the Board officer will still be required to carry out a rate review of this kind and, if a reduction is warranted, to make the necessary adjustment. If the worker's long-term earnings average out in excess of the rate set at the time of the injury and the figure being paid by the employer, it is conceivable that the worker could be in a less advantageous position than other workers with a similar earnings pattern. As such, a rate increase can be initiated and the difference between the new rate and what is being refunded to the employer made payable to the worker. This would not apply if the employer is paying the worker at the maximum applicable to the claim. If an employer ceases to make payments to a worker, the Board will begin to pay the worker directly.

No refunds are made to the employer when workers covered under the *Government Employees Compensation Act* are maintained on full salary, no 10-week rate review is carried out and no payments are made to the worker. If payments made by the employer are discontinued at any time beyond ten weeks of disability and a worker is still disabled, a 10-week rate review is carried out at that time. Long-term earnings data is normally obtained where there is an indication that a permanent partial disability pension may be payable.

## **#67.00 EXCEPTIONS TO THE GENERAL RULES FOR DETERMINING AVERAGE EARNINGS**

The *Act* provides a number of exceptions to the general rules in setting a worker's short-term and long-term average earnings. The Board's policies with respect to each of these exceptions are presented below. If a worker's circumstances do not fit within any of the exceptions, the applicable general rule for determining a worker's average earnings applies.

Section 33.1(3), the *Act* provides that if two or more exceptions to the general rules for determining average earnings apply to a worker, the Board must determine and apply the section that best reflects the worker's circumstances. In making this determination, "best" does not mean the highest rate possible, but rather, the rate that most closely reflects the actual loss incurred. This situation could arise if, for example, a worker was an apprentice (section 33.2) who had been employed less than 12 months (section 33.3). In this situation, the Board

would apply the section that most accurately reflects the worker's average earnings and earning capacity at the time of injury.

## **#67.10 Casual Workers**

Section 33.5 of the *Act* provides:

If a worker's pattern of employment at the time of the injury is casual in nature, the Board's determination of the amount of average earnings under section 33.1 from the date of the injury must be based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury.

This is an exception to both general rules for determining a worker's average earnings. For a casual worker, the Board officer must use the worker's gross earnings for the 12-month period immediately before the date of the injury to establish the worker's average earnings. There is no 10-week average earnings review. Thus, the worker's average earnings determined at the outset of the casual worker's claim are also the worker's long-term average earnings.

A casual worker is a worker who has a short-term/sporadic attachment to employment. Generally the employment lasts less than three consecutive months. A worker who works "on call" for one or more employers may also be a casual worker.

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

**EFFECTIVE DATE:** March 18, 2003

**APPLICATION:** To adjudicative decisions on or after the effective date.

## **#67.20 Personal Optional Protection**

Section 33.6 of the *Act* provides:

If an independent operator or employer, to whom the Board directs that this Part applies under section 2(2), has purchased coverage under this *Act*, the Board must determine the amount of average earnings under section 33.1 from the date of injury based on the gross earnings for which coverage is purchased.

This is an exception to both general rules for determining average earnings. The average earnings of a person entitled to personal optional protection under section 2(2) of the *Act* (4) are the earnings for which coverage has been purchased. There is no 10-week average earnings review.

The maximum and minimum amount of earnings for which coverage can be purchased may be obtained by contacting the Board.

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

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

Where a claim is made in respect of an injury, a disablement from an occupational disease, or a death from either cause occurring on or after January 1, 1978, the minimum amounts of compensation provided for in sections 22(2), 23(4), 29(2) and 30(2) have no application to persons who have purchased personal optional protection. (5) However, the minimum average earnings provided for in section 17(3)(g) does apply. (6)

The amount of personal optional protection purchased will be used to calculate a person's average net earnings. Compensation will be based on 90% of the person's average net earnings calculated as set out in policy item #71.00.

Compensation payable to persons entitled to personal optional protection is subject to the same cost of living adjustments as compensation payable to other persons.

**EFFECTIVE DATE:** March 18, 2003 (as to where the maximum and minimum wage rate figures may be obtained)  
**APPLICATION:** Not applicable.

## **#67.30 Workers with No Earnings**

Section 33.7 of the *Act* provides:

If a worker had no earnings at the time of injury, the Board must determine the amount of average earnings of a worker under section 33.1 from the date of injury in a manner that the Board considers appropriate.

This is an exception to both general rules for determining average earnings. There is no 10-week average earnings review.

Persons working without pay are not generally considered as “workers” under the *Act*. However, there are some exceptional situations of this type which are covered and for which the *Act* or the Board has specified the earnings on which compensation is to be based. These situations are described in policy items #67.31 - #67.34.

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

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

January 1, 2002	—	December 31, 2002	\$101.47
January 1, 2003	—	December 31, 2003	\$104.68

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

The minimum wage set out above is subject to cost of living adjustments as described in policy item #51.20.

### **#67.32 *Volunteer Firefighters and Ambulance Drivers and Attendants***

The average earnings of volunteer ambulance drivers and attendants and members of fire brigades working without remuneration is deemed to be the same in amount as the average earnings in their regular employment or employments, not, however, to be less than the amount on which the employer has been assessed. (7)

In order to provide a minimum level of coverage to volunteers who have no attachment to the labour force, the employer is assessed \$75.00 per month (\$17.30 per week) for each person, unless the municipality concerned has arranged with the Board for, or pays the claimant, a higher amount. Compensation is based on this rate unless or until wages are confirmed as being lost at another job. In the latter case, the rate can be increased to the rate on the job, but the \$17.30 cannot be combined with it. If the volunteer is unemployed, but has an attachment to the labour force in the sense that the volunteer is seeking employment, wage-loss benefits are determined on the average earnings from the last regular employment. The fact that the volunteer is collecting Employment Insurance benefits confirms for compensation purposes an attachment to the labour force. The 12 months immediately preceding the volunteer's date of injury will be used to determine the level of benefits. See policy item #68.40 with respect to employment insurance income and the composition of average earnings. If a firefighter is paid wages by the fire brigade these can be combined with earnings from another job, but not to exceed the maximum wage rate.

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

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

Firefighters, other than those referred to in the policies in Items AP1-1-5 and AP1-38-3 of the *Assessment Manual* or firefighters whose employers are not covered by Part 1 of the *Act*, but to whom personal optional protection has been given, are to be assessed and paid on the same basis as above.

**EFFECTIVE DATE:** March 18, 2003 (as to numerical references to the policies in Items AP1-1-5 and AP1-38-3 in the *Assessment Manual*)

**APPLICATION:** Not applicable.

### **#67.33**      *Sisters in Catholic Institutions*

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

## #67.34 *Emergency Services Workers*

Average earnings used in claims by Emergency Services Workers are based on the earnings in the worker's ordinary employment but where the worker has no regular employment are fixed by the Board at a figure not less than \$25.00 per week nor more than the maximum under the *Act*. (8)

## #67.40 **Apprentice or Learner**

Section 33.2 of the *Act* provides:

If a worker at the time of injury is an apprentice in a trade, an occupation or a profession or is a person referred to in paragraph (b) of the definition of "worker", the Board's determination of the amount of average earnings under section 33.1(2) must be based on the gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury, of a qualified person employed at the starting rate in the same trade, occupation or profession

- (a) by the same employer, or
- (b) if no person is so employed, by an employer in the same region.

This is an exception to the general rule for determining long-term average earnings.

The Board considers that an "apprentice in a trade" is an apprentice as defined under the terms and conditions in the provincial *Industry Training and Apprenticeship Act* or equivalent statute. The *Industry Training and Apprenticeship Regulation* or equivalent provides a list of trades that require compulsory certification.

The Board considers that an "apprentice in an occupation or profession" is a worker who must complete an "apprenticeship" in order to obtain the license or professional designation required to work in the occupation.

Section 33.2 of the *Act* includes a worker referred to in paragraph (b) of the section 1 definition of "worker". Paragraph (b) of the definition of "worker" provides that a worker includes:

a person who is a learner, although not under a contract or apprenticeship, who becomes subject to the hazards of an industry within the scope of Part 1 for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment.

## **#71.40      Adjustments**

The Board may adjust a worker's average net earnings where they were based upon incorrect information. If the adjustment results in a decrease in the net value of the worker's earnings, the Board officer will consider policy item #48.41 in determining whether to declare an overpayment. If it results in an increase, a retroactive adjustment will be made.

## NOTES

- (1) See policy item #34.40
- (2) See policy item #34.20
- (3) See policy item #65.04
- (4) See policy item #34.20; #35.23; #37.20; #39.60
- (5) See Item AP1-2-3 of the *Assessment Manual*
- (6) See policy item #55.26
- (7) See Item AP1-1-5 of the *Assessment Manual*
- (8) See Item AP1-3-1 of the *Assessment Manual*
- (9) See policy item #34.40
- (10) s.33(10)
- (11) s.33(9)
- (12) See policy item #70.20
- (13) See policy item #69.00
- (14) See policy item #69.10

Flat rate travel allowances to cover the cost of different forms of transportation from different starting points to different destinations may be established. This includes situations where part of the journey takes place outside the province.

These allowances should cover the normal cost of the journey in question including incidental costs such as parking, taxi, airporters, and meals which will usually be incurred in the journey. The amount of the allowance may be paid to the worker in place of actual expenses.

The worker in receipt of a flat rate payment may request reimbursement of actual expenses if, because of exceptional circumstances, expenses are incurred which are significantly higher than the amount of the flat rate. These expenses would have to meet the normal criteria for payment set out in this part of the manual.

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

**APPLICATION:** Not applicable.

### **#82.30 Manner of Payment**

Air travel is normally arranged through a travel agency used by the Board.

Travel arrangements may also be made by forwarding a cheque to the worker in advance of the scheduled trip. Normally, such advance payments will only be paid at the rate of the bus fare. In any exceptional situation where the cheque forwarded to the worker is to cover an air fare, but the worker elects to use other transportation that is less expensive, the Board will not ask for a refund of the difference in cost.

Where an advance payment has been made and the worker does not keep her or his appointment and another appointment cannot be arranged, the worker will be asked to return any transportation expenses that have been advanced. They will be treated as an overpayment. (24)

### **#82.40 Transportation Provided by the Employer**

Every employer shall, at its own expense, furnish to a worker injured in its employment, when necessary, immediate conveyance and transportation to a hospital, physician or qualified practitioner for initial treatment. (25) After such initial treatment, the Board provides any necessary transportation.

In the event a doctor is called to the scene of the accident, the employer shall be responsible for any charge made by the doctor with respect to mileage or travelling time. Where air transportation is utilized, stretchers suitable for use in planes shall be provided.

The transportation of an injured fisher to a hospital or physician or qualified practitioner is discussed in section 13 of the *Fishing Industry Regulations*.

**EFFECTIVE DATE:** March 18, 2003 (as to the deletion of reference to the *Workers' Compensation Reporter* Decision No. 223)

**APPLICATION:** Not applicable.

## **#82.50 Flight Changes**

Because of advance bookings, flight reservations made by the Board are normally at a preferred rate.

A worker may change a flight reservation or elect to fly after having previously advised that he or she will use some other means of transportation. This may result in increased flight cost. The Board officer will investigate the reasons for the change. If the investigation establishes that the change was necessitated for some emergency or other unavoidable reason, the Board will pay the costs incurred. If, however, it is shown that the change was due to a personal choice or preference on the part of the worker, the worker will either not be entitled to reimbursement of the additional costs incurred or may be required to reimburse that amount to the Board. The latter may be accomplished through a deduction from future wage-loss entitlements.

Workers scheduled to travel by air are advised in advance of this policy.

## **#83.00 SUBSISTENCE ALLOWANCES**

The Board may make a daily allowance to an injured worker for subsistence when, under its direction, the worker is undergoing treatment at a place other than the place of residence. The power of the Board to make a daily allowance for subsistence extends to an injured worker who receives compensation, regardless of the date of first becoming entitled to compensation. (26)

### **#83.10 Eligibility for Subsistence**

Subsistence may be paid where a journey, for which the Board is paying transportation expenses (see policy item #82.10), requires the worker to spend one or more nights away from home. It may continue to be paid for the duration of a treatment or vocational rehabilitation program which has been approved by the Board, and which requires the worker to spend a period of time away from home.

In determining whether a journey or program requires a worker to stay from home overnight, regard will be had to whether the worker can travel from home and return daily for a cost less than the amount that would be paid for subsistence.

## CHAPTER 12

### CLAIMS PROCEDURES

#### #92.00 INTRODUCTION

This chapter relates to the roles and responsibilities of workers, employers, physicians, and the Board in the making and adjudicating of compensation claims.

#### #93.00 RESPONSIBILITIES OF CLAIMANTS

##### #93.10 Report to Employer

Section 53(1) provides that "In every case of an injury or disabling occupational disease to a worker in an industry within the scope of this Part, the worker, or in case of death the dependant, must as soon as practicable after the occurrence inform the employer by giving information of the disease or injury to the superintendent, first aid attendant, supervisor, agent in charge of the work where the injury occurred or other appropriate representative of the employer, and the information must include the name of the worker, the time and place of the occurrence, and, in ordinary language, the nature and cause of the disease or injury."

Where the worker's condition results from a series of injuries rather than just one injury, section 53(1) is complied with if the report to the employer is made as soon as practicable after the last injury in the series.

In the case of an occupational disease, the employer to be informed of the death or disablement is the employer who last employed the worker in the employment to the nature of which the disease was due. (1)

Where the injury or disease is suffered by a commercial fisher, the "employer" to whom the fisher must report is set out in section 10 of the *Fishing Industry Regulations*.

**EFFECTIVE DATE:** March 18, 2003 (as to the deletion of reference to the *Workers' Compensation Reporter* Decision No. 223)

**APPLICATION:** Not applicable.

### *#93.11 Procedure for Reporting*

There is no requirement as to the form of the notice. It may be written or oral. However, the worker shall, if fit to do so and on request of the employer, provide to the employer particulars of the injury or occupational disease on a form prescribed by the Board and supplied by the employer. (2)

For the convenience of employers, the Board has prepared a form for the worker's report. This form, "Worker's Report of Injury or Occupational Disease to Employer", is called Form 6A. As long as the employer uses exactly this form prescribed by the Board, the worker is required by law to complete the form as long as fit to do so, and requested to do so by the employer.

There is no law which prevents an employer from using another form for the purpose of a worker's report, and including such questions as the employer may wish. But if another form is used, it must not be described as a form supplied or prescribed by the Board, and the worker is not required by law to complete it.

If the employer does not have all of the information requested on the Form 7, (3) the employer is not required to obtain it from the worker. The obligation of an employer, when completing a Form 7, is to investigate the reported injury or occupational disease and to provide the Board with the information obtained. (4)

Many employers set up their own system of reporting to assist them in carrying out their obligations. If the worker, however, reports to some other company official who was not designated by the employer, this does not mean there is no compliance with his or her responsibilities under the *Act*.

### *#93.12 Failure to Report*

Section 53(4) provides that a "Failure to provide the information required by this section is a bar to a claim for compensation . . . , unless the board is satisfied that

- (a) the information, although imperfect in some respects, is sufficient to describe the disease or injury suffered, and the occasion of it;
- (b) the employer or the employer's representative had knowledge of it; or
- (c) the employer has not been prejudiced, and the board considers that the interests of justice require that the claim be allowed."

The application of the above provisions to claims by commercial fishers is discussed in sections 4 and 10 of the *Fishing Industry Regulations*.

**EFFECTIVE DATE:** March 18, 2003 (as to the deletion of references to the *Workers' Compensation Reporter* Decision Nos. 223 and 224)

**APPLICATION:** Not applicable.

### **#94.11**      *Form of Report*

The report shall be on the form prescribed by the Board and shall state:

1. the name and address of the worker;
2. the time and place of the disease, injury, or death;
3. the nature of the injury or alleged injury;
4. the name and address of any physician or qualified practitioner who attended the worker; and
5. any other particulars required by the Board or by the regulations, and may be made by mailing copies of the form addressed to the Board at the address the Board prescribes.

The Board has prescribed forms for employers to report injuries, deaths, or occupational diseases. These are as follows:

- |         |   |
|---------|---|
| Form 7  | Employer's Report of Injury or Occupational disease   |
| Form 7A | First Aid Report (Supplementary to Employer's Form 7. It is completed by the first aid attendant, or other person rendering first aid.)                         |
| Form 9  | Employer's Subsequent Statement (Completed at the employer's option or at the Board's request, as soon as the injured worker has returned, or is able to work.) |

The report must be approved by an authorized official of the employer other than the worker.

### **#94.12**      *What Injuries Must Be Reported*

A reportable injury is an injury arising out of and in the course of employment, or which is claimed by the worker concerned to have arisen out of and in the course of such employment, and in respect of which any one of the following conditions is present or subsequently occurs.

1. The worker loses consciousness following the injury, or
2. The worker is transported, or directed by a first aid attendant or other representative of the employer to a hospital or other place of medical treatment, or is recommended by such person to go to such place, or
3. The injury is one that obviously requires medical treatment, or
4. The worker states an intention to seek medical treatment, or
5. The worker has received medical treatment for the injury, or
6. The worker is unable or claims to be unable by reason of the injury to return to his or her usual job function on any working day subsequent to the day of injury, or
7. The injury or accident resulted or is claimed to have resulted in the breakage of an artificial member, eyeglasses, dentures, or a hearing aid, or
8. The worker or the Board has requested that an employer's report be sent to the Board.

Section 54(6) provides that “. . . the board may by regulation

- (a) define and prescribe a category of minor injuries not required to be reported under this section; . . .”

Where none of the conditions listed 1 to 8 above are present, an injury is a minor injury and not required to be reported to the Board unless one of those conditions subsequently occurs.

### **#94.13      *Commencement of the Obligation to Report***

The obligation of the employer to report the injury to the Board commences when a supervisor, first aid attendant, or other representative of the employer first becomes aware of any one of the conditions listed in policy item #94.12, or when notification of any such condition is received by mail or telephone at the local or head office of the employer. (10)

An employer who protests a claim should take care not to delay the submission of the Form 7 employer's report to the Board. If the employer wishes to investigate further, the employer should submit the Form 7 stating that an investigation report will follow, and give reasons for the delay.

**RE: Changing Previous Decisions –  
Reopenings**

**ITEM: C14-102.01**

## **BACKGROUND**

### **1. Explanatory Notes**

The Board may, at any time, reopen a matter that has been previously decided by the Board or an officer or employee of the Board, if certain circumstances exist.

### **2. The Act**

Section 96 states, in part:

.....

- (2) Despite subsection (1), any time, on its own initiative, or on application, the Board may reopen a matter that has been previously decided by the Board or an officer or employee of the Board under this Part if, since the decision was made in that matter,
  - (a) there has been a significant change in a worker's medical condition that the Board has previously decided was compensable, or
  - (b) there has been a recurrence of a worker's injury.
  
- (3) If the Board determines that the circumstances in subsection (2) justify a change in a previous decision respecting compensation or rehabilitation, the Board may make a new decision that varies the previous decision or order.

.....

## **POLICY**

### **(a) General**

The reopening of a previous decision does not affect the application of the decision to the period prior to the significant change in the worker's medical condition or the recurrence of the worker's injury. Rather, it allows compensation or rehabilitation to be varied subsequent to, and as a result of, the significant medical change or recurrence. A reopening involves the adjudication of new matters.

**(b) A reopening is not a reconsideration**

A reopening is to be distinguished from a reconsideration of a previous decision.

A reconsideration occurs when the Board considers the matters addressed in a previous decision anew to determine whether the conclusions reached about these matters reached were valid. Where the reconsideration results in the previous decision being varied or cancelled, it constitutes a redetermination of those matters.

**(c) Grounds for reopening**

A decision may be reopened if, since it was made:

- there has been a significant change in a worker's medical condition that the Board has previously decided was compensable; or
- there has been a recurrence of a worker's injury.

"A significant change in a worker's medical condition that the Board has previously decided was compensable" means a change in the worker's physical or psychological condition. It does not mean a change in the Board's knowledge about the worker's medical condition.

A "significant change" would be a physical or psychological change that would, on its face, warrant consideration of a change in compensation or rehabilitation benefits or services. In relation to permanent disability benefits, a "significant change" would be a permanent change outside the range of fluctuation in condition that would normally be associated with the nature and degree of the worker's permanent disability.

A claim may be reopened for repeats of temporary disability, irrespective of whether a permanent disability award has been provided in respect of the compensable injury or disease. A claim may also be reopened for any permanent changes in the nature or degree of a worker's permanent disability.

**(d) A recurrence of injury is not a new injury**

A recurrence of injury that entitles a worker to request a reopening of an existing claim is to be distinguished from a new injury that entitles the worker to make a new claim.

"Recurrence" refers to a recurrence of the original injury without a second compensable injury. For example, where a compensable injury is aggravated by a second compensable injury, the first injury has not "recurred". Rather a new injury has occurred that will result in a new claim. The decision whether to reopen the existing claim or initiate a new claim will depend upon the evidence in each case.

**(e) Right to request a review**

Section 96.2(2)(g) of the *Act* provides that no request may be made to a review officer under section 96.2(1) to review a decision to reopen or not to reopen a matter on an application for a reopening under section 96(2). Section 240(2) provides that a decision to reopen or not to reopen a matter on an application may be appealed directly to the Workers' Compensation Appeal Tribunal ("WCAT").

The effect of these provisions is that the preliminary or threshold question whether the grounds for a reopening on an application have been met under section 96(2)(a) and (b) may not be the subject of a review by a review officer. A party who wishes to dispute the Board's decision in this respect must appeal directly to WCAT.

However, once it is determined that the grounds for a reopening have been met, the Board's decision on the compensation or rehabilitation to be paid or provided as a result of the reopening may be the subject of a request for a review by a review officer under section 96.2(1). The review officer's decision may then be appealed to WCAT under section 239(1).

## **PRACTICE**

For any relevant PRACTICE information, readers should consult the Rehabilitation and Compensation Services Division's Practice Directives available on the WCB website.

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<b>EFFECTIVE DATE:</b>	March 18, 2003
<b>AUTHORITY:</b>	ss. 96(2), (3), <i>Workers Compensation Act</i>
<b>CROSS REFERENCES:</b>	Changing Previous Decisions - General (C14-101.01), Changing Previous Decisions - Reconsiderations (C14-103.01), Changing Previous Decisions - Fraud and Misrepresentation (C14-104.01), Changing Previous Decisions - Reviews (C14-105.01)
<b>HISTORY:</b>	New Item consequential to the <i>Workers Compensation Amendment Act (No. 2), 2002</i> approved effective March 3, 2003. Subsequent amendments effective March 18, 2003 to clarify that a reopening allows compensation or rehabilitation benefits to be "varied" and that disputes over a decision to reopen or not to reopen a matter "on application" are appealable directly to WCAT under section 240(2)
<b>APPLICATION:</b>	Applies to all decisions on and after March 18, 2003



## **#111.26    *Failure to Recover Damages***

Where the Board is unsuccessful either in total or in part in recovering damages from a third party and the third party has an entitlement to benefits from the Board, the recovery will be made from such benefits. If there is no existing entitlement to benefits, a record of the indebtedness will be made by the Board and should any future entitlement to benefits accrue, a recovery will be made from that entitlement. As a general guideline, this recovery will follow the limits set out in the *Court Order Enforcement Act*. Such limitations would not apply in the case of a permanent disability award where the indebtedness may be recovered from the permanent disability award capital reserve.

## **#111.30    **Meaning of "Worker" and "Employer" under Section 10****

In the provisions discussed in policy items #111.10 to #111.24, "worker" and "employer" have the meaning given to them in Chapter 2.

For the purpose of section 10, "worker" includes an employer entitled to personal optional protection. (10) However, this does not affect status as an employer under this section in regard to other workers.

The meanings of "employer", "worker", and "employment" for the purpose of section 10 in claims concerning commercial fishers are discussed in section 14 of the *Fishing Industry Regulations*.

**EFFECTIVE DATE:**            March 18, 2003 (as to the deletion of reference to the *Workers' Compensation Reporter Decision No. 223*)

**APPLICATION:**             Not applicable.

## **#111.50    **Federal Government Employees****

The provisions discussed in policy item #111.00-40 above have no application to employees entitled under the *Government Employees Compensation Act*.

Rules similar to those set out in policy item #111.00-40 are set out in section 9 of that *Act*. In general, the claimant is precluded from suing the government in respect of an employment accident, but must claim compensation. Where the circumstances of the accident give rise to a right of action against someone other than the government, the claimant must elect either to sue that other person or claim compensation. If the claimant does the latter, the government is subrogated to the right of action. These subrogated actions are administered by the Federal Government directly. The Board is not concerned in them.

## **#112.00 INJURIES OCCURRING OUTSIDE THE PROVINCE**

Section 5(1) provides in part that compensation is payable where “. . . personal injury or death arising out of and in the course of the employment is caused to a worker . . .” It places no limitation on the place of injury. On the face of it, it might be held to apply to all employment injuries, whether they occur inside or outside the province. The Board has, however, concluded that the section could not be intended to have such a broad effect. The *Act* only applies to injuries occurring outside the province where its provisions expressly provide for this, or do so by necessary implication. There are two main situations that have to be considered which are discussed in policy items #112.10 and #112.20.

The payment of health care benefits for costs incurred outside the province is discussed in policy item #73.50.

### **#112.10 Claimant is Working Elsewhere than in the Province**

Section 8(1) provides that “Where the injury of a worker occurs while the worker is working elsewhere than in the Province which would entitle the worker or the worker's dependants to compensation under this Part if it occurred in the Province, the board must pay compensation under this Part if

- (a) a place of business of the employer is situate in the Province;
- (b) the residence and usual place of employment of the worker are in the Province;
- (c) the employment is such that the worker is required to work both in and out of the Province; and
- (d) the employment of the worker out of the Province has immediately followed the worker's employment by the same employer within the Province and has lasted less than 6 months,

but not otherwise.”

Section 8 does not apply to commercial fishers.

Obviously, if a worker suffers an injury and there is no evidence of any pre-existing disease, condition or disability, the subsection is inapplicable. Similarly, where there is confirmation of a pre-existing disease, condition or disability of a minor degree, but the incident which precipitated the instant claim was of a severe nature, the section may be considered but will normally not be applicable. However, the section will clearly be applicable to those situations where a worker suffered a relatively minor injury at the time the instant claim was initiated, but there is evidence that the recovery period was prolonged, or a permanent disability was enhanced, by reason of a pre-existing disease, condition or disability. The fact that a disability has been prolonged or enhanced by other factors than a pre-existing condition is not a ground for relief under section 39(1)(e).

How much disability stems from the injury and how much from the enhancement of the disease, condition or disability and, therefore, to what extent costs should be charged under section 39(1)(e) can never be more than an estimate and will always be difficult to determine. In cases of continuing wage-loss and health care benefits, it will be appropriate for the Board officer to determine that all of the costs of these benefits after a particular point in time should be charged under section 39(1)(e). In some instances, it may be appropriate for the Board officer to charge such costs on a percentage, rather than a time basis. In respect of permanent partial or permanent total disabilities, it will be necessary for the Board officer in Disability Awards, using her or his own best judgment and having reference to the advice of the Disability Awards Medical Advisor, to establish a percentage applicable to the pre-existing condition and to charge the relevant costs accordingly.

#### *#114.41 Relationship Between Sections 5(5) and 39(1)(e)*

It is important to distinguish between the provisions of section 5(5) discussed in policy item #44.00 and section 39(1)(e). Section 5(5) deals with the situation where a disability resulting from a work injury is superimposed on a pre-existing disability in the same part of the body and increases that disability. (As outlined in policy item #44.31, section 5(5) can also apply if a permanent disability award is being assessed on a loss of earnings basis under section 23(3) of the *Act* and the disability is deemed to be partly the result of a disability in another part of the body.) It may result in a reduction in the amount of compensation paid to the worker. Section 39(1)(e) is concerned only with the class to which the costs of the claim are to be charged and cannot affect the entitlement of the worker. It can apply in cases where section 5(5) does not apply and the whole of the worker's disability results from the injury or, if section 5(5) does apply, to the portion of disability for which the Board is responsible. It provides relief for the class of the worker's employer when the disability or portion of disability accepted under the claim is worse because of a pre-existing disease, condition or disability than it otherwise would be. That condition might well be in a different part of the worker's body.

### *#114.42 Application of Section 39(1)(e) to Occupational Diseases*

Section 39(1)(e) will not be applied to occupational disease claims simply because the disease results from exposure in several different employments. That situation is dealt with in policy item #113.20. However, there may be cases where the disability caused by an occupational disease was enhanced by a pre-existing condition. Section 39(1)(e) can be applied in such cases if the criteria outlined in policy item #114.40 are met.

### *#114.43 Procedure Governing Applications under Section 39(1)(e)*

The Board has the responsibility to initiate consideration with or without a specific request or application by an employer, and to decide upon the applicability of the subsection on a claim. If a decision is made to apply this subsection, the employer will be notified. If relief has been requested, the employer will be advised if it has been denied. If there is a disagreement with such a decision, the employer may request a review by the Review Division.

**EFFECTIVE DATE:** March 3, 2003 (as to reference to review)

**APPLICATION:** Not applicable.

### **#114.50 Sections 39(1)(d), 39(1)(e) and Federal Government Claims**

The Federal Government does not contribute to the Accident Fund, therefore no relief of costs can be made where the Federal Government is recorded as the injury employer, i.e. Class 19 Claims.

### **#115.00 PROVISIONS CHARGING INDIVIDUAL EMPLOYERS**

One provision of this nature has been discussed in policy item #94.15. Section 54(8) permits the Board to charge an employer with the costs of a claim where late in submitting a report of injury to the Board.

Other provisions of this nature are discussed below.

### **#115.10 Failure to Register as an Employer at the Time of Injury**

Where an employer is an employer to which the *Act* extends compulsory coverage, failure to register with the Board as an employer will not prejudice any claim by the employees unless the provisions set out in the policy in Item

AP1-1-4 of the *Assessment Manual* apply. However, the employer may be faced with paying the costs of the claim under section 47(2), which provides as follows:

An employer who refuses or neglects to make or transmit a payroll return or other statement required to be furnished by the employer under section 38(1), or who refuses or neglects to pay an assessment, or the provisional amount of an assessment, or an instalment or part of it, must, in addition to any penalty or other liability to which the employer may be subject, pay the Board the full amount or capitalized value, as determined by the Board, of the compensation payable in respect of any injury or occupational disease to a worker in the employer's employ which happens during the period of that default, and the payment of the amount may be enforced in the same manner as the payment of an assessment may be enforced.

Section 38(1) provides that "Every employer must

- (a) keep at all times at some place in the Province, the location of which the employer has given notice to the Board, complete and accurate particulars of the employer's payrolls;
- (b) cause to be furnished to the Board
  - (i) when the employer becomes an employer within the scope of this Part; and,
  - (ii) at other times as required by a regulation of the Board of general application or an order of the Board limited to a specific employer, an estimate of the probable amount of the payroll of each of the employer's industries within the scope of this Part, together with any further information required by the Board; and
- (c) furnish certified copies of reports of the employer's payrolls, at or after the close of each calendar year and at the other times and in the manner required by the Board."

The Board may, under section 47(3), if satisfied that the default was excusable, relieve an employer in whole or in part from liability under section 47(2).

The Board has decided that section 47(2) applies to claims for fatalities.

The charge made under section 47(2) is in addition to any ordinary assessments which the employer may be liable to pay for the period prior to the occurrence of the injury.

Policy item #113.30 dealt with the rules followed in charging the costs of claims where an employer is carrying on business in two or more provinces and is

required to register in both. Where such an employer is not registered in this province at the time of an injury, there may be personal liability for the costs of the claim under section 47(2) in any situation where, under the provisions of the Interjurisdictional Agreement or otherwise, the employer's class would ordinarily be charged.

**EFFECTIVE DATE:** March 18, 2003 (as to numerical reference to the policy in Item AP1-1-4 in the *Assessment Manual*)  
**APPLICATION:** Not applicable.

### **#115.11 Procedure for Applying Section 47(2)**

Following the acceptance of a claim, the Board officer will write to the employer and advise of the potential for liability under section 47(2). The employer will be invited to make comments as to why he or she should not be charged with the costs of the claim. A decision on the employer's liability, and whether or not to provide relief from any liability, will then be made by a committee comprised of the Board's General Counsel or delegate and the Director or Manager, Assessment Policy, of the Assessment Department. The employer may request a review by the Review Division of the decision.

The committee, when reviewing a claim for the purpose of section 47(2), will not consider arguments made by the employer which question the validity of the Board officer's decision to accept the claim. If the employer wishes to challenge that decision, he or she must exercise the right to request a review by the Revision Division with respect to the acceptance of the claim.

**EFFECTIVE DATE:** March 3, 2003 (as to references to review)  
**APPLICATION:** Not applicable.

### **#115.20 Significance of Employers Conduct in Producing Injury**

Generally speaking, whether or not an employer was at fault is not a material factor when determining how the costs of a claim are to be charged. The rules set out in policy item #113.00 apply both when the employer's negligence or misconduct caused an injury and when the injury was due to circumstances beyond the employer's control. However, an exception is provided by section 73(2), which states as follows:

Where an injury, death or disablement from occupational disease in respect of which compensation is payable occurs to a worker, and the Board considers that this was due substantially to the gross negligence of an employer or to the failure of an employer to adopt reasonable means for the prevention of injuries or occupational diseases or to comply with the orders or directions of the Board, or with the regulations made under this Part, the Board may levy and collect from that employer as a

contribution to the accident fund the amount of the compensation payable in respect of the injury, death or occupational disease, not exceeding in any case \$11,160.08, and the payment of that sum may be enforced in the same manner as the payment of an assessment may be enforced.

The Board has a discretion whether to charge an employer with the costs of a claim under this provision, but once it has decided to exercise that discretion, it has no choice but to charge the whole of the costs of the claim up to the maximum amount. It has no authority to charge a lesser amount or to relieve the employer in part.

The maximum amount is subject to Consumer Price Index adjustments, the figure set out above being applicable in the period January 1 to June 30, 1975. The amounts applicable in other periods are set out below:

July 1, 1995–December 31, 1995	\$36,188.70
January 1, 1996–June 30, 1996	36,297.21
July 1, 1996–December 31, 1996	36,704.13
January 1, 1997– June 30, 1997	36,948.28

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

The maximum in force at the date of the accident is the one that applies in any case.

As an alternative to the charge under section 73(2), penalty assessment may be levied under section 73(1). These are general provisions allowing the Board to penalize employers for infractions of Occupational Safety and Health or First Aid Regulations or for other unsafe practices which apply whether or not an injury has occurred. Levies made under any of these sections are additional to the employer's ordinary liability to pay assessments and are credited to the Board's general funds rather than to the employer's class or subclass.

**EFFECTIVE DATE:** March 3, 2003 (as to deletion of reference to process for levies and penalties)

**APPLICATION:** Not applicable.

### **#115.30 Experience Rating**

Section 42 provides as follows.

The Board must establish subclassifications, differentials and proportions in the rates as between the different kinds of employment in the same class as may be considered just; and where the Board thinks a particular

industry or plant is shown to be so circumstanced or conducted that the hazard or cost of compensation differs from the average of the class or subclass to which the industry or plant is assigned, the Board must confer or impose on that industry or plant a special rate, differential or assessment to correspond with the relative hazard or cost of compensation of that industry or plant, and for that purpose may also adopt a system of experience rating.

The Board has adopted an experience rating plan (ER) under this section. The plan compares the ratio between an employer's claim costs and assessable payroll with the ratio between the total claim costs and assessable payroll of the employer's class. Subject to maximums, discounts are assigned for favourable ratios and surcharges for unfavourable ratios. The discount or surcharge takes the form of a percentage increase or decrease in the usual assessment rate. Details of ER can be found in the policy in Item AP1-42-1 of the *Assessment Manual*.

As a general rule, all acceptable claims coded to a particular employer are counted for experience rating purposes. It makes no difference whether the injury was or was not the employer's fault. There are, however, some types of claim costs which are excluded from consideration. These are:

1. Costs recovered by way of a third party action (see policy item #111.25).
2. Investigation and/or compensation costs paid out prior to the disallow of a claim or reversal of a decision by a Board officer, the Review Division, the Workers' Compensation Appeal Tribunal or Medical Review Panel (see policy item #113.10).
3. Costs transferred to the class of another employer under section 10(8) (see policy item #114.10).
4. Costs assigned to the funds created by section 39(1)(d) and (e) (see policy item #114.30 and policy item #114.40).
5. Occupational disease claims which on average require exposure for, or involve latency periods of, two or more years before manifesting into a disability. The diseases presently excluded on this ground are:

Non-traumatic hearing loss, excluding hearing loss resulting from other injuries

Silicosis

Asbestosis

Other diagnosed pneumoconioses, for example, anthracosis and siderosis

Pneumoconioses not specifically diagnosed

Heart disease

Cancer

Hand-arm vibration syndrome, vinyl chloride induced Raynaud's phenomenon, disablement from vibrations

6. Until September 27, 2002, costs after 13 weeks where section 5(3) applies (see policy item #16.60). Effective September 28, 2002, costs after 10 weeks where section 5(3) applies (see policy item #16.60).
7. Costs from accidents substantially due to personal illness, e.g. epilepsy (see policy item #15.30).
8. Injuries during a retraining program sponsored by the Vocational Rehabilitation Department (see policy item #88.43, policy item #88.54).
9. The situations covered by policy item #115.31 and policy item #115.32 below.

The decision whether a claim falls within one of the exclusions will usually be made by an officer in the Compensation Services Division. In the case of third party actions (Exclusion 1), a Board solicitor makes the decision.

**EFFECTIVE DATE:** March 18, 2003 (as to the use of the terms discount and surcharge and to reflect numerical reference to the policy in Item AP1-42-1 in the *Assessment Manual*)

**APPLICATION:** Not applicable.

### **#115.31** *Injuries or Aggravations Occurring in the Course of Treatment or Rehabilitation*

Where there is an aggravation of an injury or a subsequent injury arising out of treatment for the primary injury, and the aggravation or subsequent injury is acceptable on the claim, compensation costs resulting from this secondary problem will be charged in the usual way. Exclusion from the employer's experience rating will only occur where:

1. the original injury was one that would not have been expected to result in death or permanent disability, and

2. the aggravation or subsequent injury occurred beyond the operations of the employer, and if the worker required transportation to a hospital or other place of medical treatment, after the employer had fulfilled the obligations under section 21(3) (see policy item #82.40), and
3. the aggravation or subsequent injury resulted in permanent disability or death.

The application of relief is limited to the permanent disability award reserve established for a fatality or permanent disability.

Consideration is automatically given by the Board officer to excluding the costs from experience rating in these cases. No request from the employer is required. The employer will be advised of the decision in writing and of the relevant review and/or appeal rights.

**EFFECTIVE DATE:** March 3, 2003 (as to deletion of references to the Review Board and the Appeal Division)

**APPLICATION:** Not applicable.

### *#115.32 Claims Involving a Permanent Disability Award and a Fatality*

ER does not include the actual cost of the fatal claims experienced by an employer. Rather, it includes for each claim the average cost for all fatal claims in the year.

A worker in receipt of a permanent disability award may die as a result of the injury or disease accepted under the claim. If pensions are payable to dependants, the cost otherwise included in ER may be reduced to the extent set out below:

1. Where the average cost of a fatal award is the same or less than that of the permanent disability award, the total cost of the fatal award is excluded.
2. Where the average cost of a fatal award is greater than that of the permanent disability award, a portion of the cost of the fatal award equal to the reserve charged to the employer for the permanent disability award is excluded.

## NOTES

- (1) See policy item #31.20
- (2) See Item AP1-38-4 of the *Assessment Manual*
- ~~(3) See policy item #112.30 Deleted~~
- ~~(4) See policy item #82.40 Deleted~~
- ~~(5) See policy item #82.40 Deleted~~
- ~~(6) S.96(6) and 96(7) Deleted~~

