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February 2006

Update 2006 – 2

**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 2006 - 1.

This amendment includes the following substantive policy changes effective **July 13, 2005**:

- Policy item #48.20, *Money Owing in Respect of Benefits Paid by Other Agencies*. Amendments clarify that restrictions on the attachment and assignment of compensation created by section 15 of the *Workers Compensation Act* do not generally apply to the Federal Government. As a result, in some instances, the Federal Government could also claim reimbursement for payments made under federal programs. This policy has been renamed *Money Owing by Worker to Other Agencies*.
- Policy item #48.21, *Employment Insurance*. Deletion of statement indicating that there is no provision under the *Workers Compensation Act* for the worker's obligation to repay employment insurance benefits to be enforced by the Board.
- Policy item #48.23, *Requirements to Pay*. New policy indicates that the Board will comply with Requirements to Pay issued under the *Income Tax Act* (Canada) or the *Excise Tax Act* (Canada).

Also included in this update are minor editorial amendments to the following policies effective **February 1, 2006**:

- Policy item #48.10, *Solicitors' Liens*
- Policy item #48.22, *Social Assistance Payments*
- Policy item #48.30, *Worker not Supporting Dependents*

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

If you have any questions regarding subscription information for updates to the *Rehabilitation Services & Claims Manual*, please call WorkSafeBC Customer Service at the following numbers:

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Roberta Ellis  
Vice-President  
Policy and Research Division

Attachments

**Rehabilitation Services & Claims Manual, Volume II**  
**SUMMARY OF AMENDMENTS – Update 2006 – 2**

Table of Contents	Pages xiii - xiv	<p>Policy item #48.23 <i>Requirements to Pay</i> has been added.</p> <p>Housekeeping changes made to page numbering</p>
Chapter 7	Pages 1 - 26	<ul style="list-style-type: none"> <li>• Policy item #48.10, <i>Solicitors' Liens</i>. Minor editorial amendments effective February 1, 2006.</li> <li>• Revised policy item #48.20, <i>Money Owing in Respect of Benefits Paid by Other Agencies</i>. The title has been revised to read: <i>Money Owing by Worker to Other Agencies</i>. Effective July 13, 2005.</li> <li>• Revised policy item #48.21, <i>Employment Insurance</i>. Effective July 13, 2005.</li> <li>• New policy item #48.23, <i>Requirements to Pay</i>. Effective July 13, 2005.</li> <li>• Policy item #48.22, <i>Social Assistance Payments</i>. Minor editorial amendments effective February 1, 2006.</li> <li>• Policy item #48.30, <i>Worker not Supporting Dependents</i>. Minor editorial amendments effective February 1, 2006.</li> </ul>



## **CHAPTER 7 – PROTECTION OF AND DEDUCTIONS FROM BENEFITS**

#47.00	INTRODUCTION	7-1
#47.10	ACTIONS BY EMPLOYERS	7-1
#47.11	Agreements to Waive or Forego Benefits	7-1
#47.20	Contributions from Workers to Employer	7-2
#48.00	ASSIGNMENTS, CHARGES OR ATTACHMENTS OF COMPENSATION	7-2
#48.10	Solicitors' Liens	7-2
#48.20	Money Owing by Worker to Other Agencies	7-3
#48.21	Employment Insurance	7-3
#48.22	Social Assistance Payments	7-4
#48.23	Requirements to Pay	7-5
#48.30	Worker Not Supporting Dependents	7-6
#48.40	Overpayments/Money Owed to the Board	7-6
#48.41	When Does an Overpayment of Compensation Occur?	7-7
#48.42	Recovery Procedures for Overpayments	7-7
#48.43	Recovery of Overpayments on Reopenings or New Claims	7-9
#48.44	Deduction of Overpayments from Permanent Disability Awards	7-9
#48.45	Deduction of Overpayments from Vocational Rehabilitation Payments	7-10
#48.46	Reviews and Appeals on Overpayments	7-10
#48.47	Waiver of Overpayment Recoveries	7-11
#48.48	Unpaid Assessments	7-12
#48.50	Payment to Widow or Widower Free from Debts of Deceased	7-12
#49.00	INCAPACITY OF A WORKER	7-12
#49.10	Worker Receiving Custodial Care in Hospital	7-13

	#49.11	Meaning of Custodial Care in Hospital or Elsewhere in Section 35(5)	7-13
	#49.12	Nature of the Board's Authority under Section 35(5)	7-14
	#49.13	Application of Section 35(5) in Cases of Temporary Disability	7-14
	#49.14	Application of Section 35(5) in Cases of Permanent Disability	7-16
	#49.15	Application of Section 35(5) on a Change of Circumstances	7-17
	#49.16	Administration of Section 35(5)	7-18
	#49.20	Imprisonment of Worker	7-18
	#49.30	Payment of Public Trustee and Committee Fees	7-20
#50.00		INTEREST	7-20
#51.00		COST OF LIVING ADJUSTMENTS TO PERIODIC PAYMENTS MADE TO A WORKER	7-21
	#51.20	Dollar Amounts in the <i>Act</i> – Non-Fatality Amounts	7-23
		NOTES	7-26

## **CHAPTER 8 – COMPENSATION ON THE DEATH OF A WORKER**

C8-52.00	Introduction
C8-53.00	Meaning Of "Dependant" And Presumptions of Dependency
C8-53.10	Meaning of "Child" or "Children"
C8-53.20	Meaning of "Federal Benefits"
C8-54.00	Funeral and Other Death Expenses
C8-55.00	Lump Sum Payment
C8-56.00	Calculation of Compensation – Widow or Widower with Children
C8-56.10	Calculation of Compensation – Widow or Widower with No Children
C8-56.20	Calculation of Compensation – Spouse Separated from Deceased Worker
C8-56.30	Calculation of Compensation – Common-Law Relationships
C8-56.40	Calculation of Compensation – Children

## CHAPTER 7

### PROTECTION OF AND DEDUCTIONS FROM BENEFITS

#### #47.00 INTRODUCTION

The *Act* contains provisions which prevent an employer from inhibiting a worker from claiming compensation and prevent persons from obtaining the funds which the Board owes to the worker. There are however, exceptional cases where benefits may be diverted to someone other than the worker or deductions made in respect of money the worker owes to others.

The *Act* and the Board's policies also contain provisions which ensure that the monetary value of benefits is not unfairly reduced because of inflation or delays in payment by the Board.

#### #47.10 ACTIONS BY EMPLOYERS

The obligations of an employer to report the occurrence of industrial injuries and diseases to the Board and to refrain from inhibiting a worker from reporting such occurrences to the Board are discussed in policy item #94.00. Set out below are some additional provisions which prevent an employer from directly or indirectly attempting to prevent a worker from exercising his or her right to receive workers' compensation.

#### #47.11 Agreements to Waive or Forego Benefits

Section 13(1) provides that "A worker may not agree with his or her employer to waive or to forego any benefit to which the worker or the worker's dependants are or may become entitled . . . , and every agreement to that end is void."

This provision is applicable whether a contract provides in express terms that no benefits under the *Act* are payable to a worker of the employer, or whether it seeks to achieve the same objective by more subtle means, such as by describing the parties as independent contractors in circumstances in which the relationship is, in substance, one of employment. Where there is any suggestion that section 13 has been violated, the claim should be referred immediately to a Director, Compensation Services Department.

## **#47.20 Contributions from Workers to Employer**

Section 14 provides as follows:

- “(1) It is not lawful for an employer, either directly or indirectly, to deduct from the wages of the employer's worker any part of a sum which the employer is or may become liable to pay into the accident fund or otherwise under this Part, or to require or to permit his worker to contribute in any manner toward indemnifying the employer against a liability which the employer has incurred or may incur under this Part.
- (2) Every person who contravenes subsection (1) commits an offence . . . and is liable to repay to the worker any sum which has been so deducted from his or her wages or which he or she has been required or permitted to pay in contravention of subsection (1).”

The maximum fine for the offence referred to in subsection (2) is set out in Part 1 of Appendix 6.

## **#48.00 ASSIGNMENTS, CHARGES OR ATTACHMENTS OF COMPENSATION**

Section 15 of the *Act* provides that “A sum payable as compensation or by way of commutation of a periodic payment in respect of it is not capable of being assigned, charged or attached, nor must it pass by operation of law except to a personal representative, and a claim must not be set off against it, except for money advanced by way of financial or other social welfare assistance owing to the Province or to a municipality, or for money owing to the accident fund.”

### **#48.10 Solicitors' Liens**

The statutory lien provided for solicitors under section 79 of the *Legal Profession Act* is not applicable to workers' compensation. If the solicitor had any right to a lien at common law or in equity, that right is abrogated by the terms of section 15 of the *Act*. Compensation funds cannot, therefore, be paid to a solicitor acting for a worker. Nor would the Board induce the same result by making the cheque payable to the worker and sending it in care of the solicitor.

**EFFECTIVE DATE:** February 1, 2006 (minor editorial amendments)

**APPLICATION:** Minor editorial amendments made on February 1, 2006 do not affect the application of this policy.

## **#48.20 Money Owing by Worker to Other Agencies**

A worker may receive benefits from other governmental or non-governmental agencies while awaiting the adjudication or a review or appeal of his or her compensation claim. If the worker eventually receives compensation benefits for the same period, the agency may have a claim against the worker for reimbursement of the funds advanced by it. A Provincial Government agency or a municipality can claim reimbursement for money advanced to the worker as financial or other social welfare assistance.

The restrictions on the attachment and assignment of compensation created by section 15 of the *Act* do not generally apply to the Federal Government. As a result, in some instances, the Federal Government could also claim reimbursement for payments made under federal programs.

In the case of health and welfare plans or similar insurance plans, while the *Act* in section 15 does not permit direct refunds to such agencies, the Board may, on receipt of a worker's signed authorization, mail cheques payable to the worker in care of the agency.

In those cases where an inquiry is received from an insurance company or other health and welfare plan, the Board officer may provide the requested information as long as a signed consent from the worker is on file identifying both the Workers' Compensation Board and the insurance company. See also policy item #99.80.

**EFFECTIVE DATE:** July 13, 2005  
**APPLICATION:** Benefits, including retroactive awards of benefits, payable under the *Workers Compensation Act* on or after July 13, 2005.

## **#48.21 Employment Insurance**

The essence of the arrangement between the Human Resources Development Canada and the Board, as reflected in the respective statutes, is that where a person is eligible for workers' compensation, the Board is in the position of first payer. If a worker receives Employment Insurance benefits and subsequently receives workers' compensation benefits in respect of the same period, under the *Unemployment Insurance Act* the worker is under an obligation to reimburse the Human Resources Development Canada; but that is a matter between the worker and the Commission. There is no provision under the *Workers Compensation Act* for compensation benefits to be withheld because of the receipt of Employment Insurance benefits.

**EFFECTIVE DATE:** July 13, 2005

**APPLICATION:** Benefits, including retroactive awards of benefits, payable under the *Workers Compensation Act* on or after July 13, 2005.

#### **#48.22 Social Assistance Payments**

Deductions from compensation may be made in respect of social assistance payments made to the worker by the Province or by city or municipal Social Welfare Departments.

At one time, social assistance was provided by individual municipalities, but it is now provided exclusively by the Province. The practice is that when a person who may be entitled to compensation is awarded social assistance, the Province may require the person to execute an assignment to it of any benefits received from the Board. The assignment is then passed on to the Board to notify it to deduct from the worker's compensation benefits the amount owed to the Province.

The rules set out below are followed in respect of assignments of compensation made by a worker to the Province.

1. No overpayment of compensation is declared and sought to be recovered in respect of payments of compensation made prior to the receipt of an assignment of benefits made by a worker to the Province.
2. In respect of payments of compensation made after receipt of the assignment:

(a) Wage Loss

Refunds will only be made to the Province for wage-loss periods which are concurrent with periods where assistance has been paid and only up to the amount of the assistance paid for that period.

(b) Monthly Permanent Disability Award Payments

The Province will be refunded up to the monthly value of the permanent disability award payment for concurrent periods. This will usually apply only to retroactive payments. Ongoing assistance, if being paid, will be adjusted by the Province beyond the implementation date of the award.

(c) Permanent Disability Awards: Cash Awards or Commutations

Where a cash award or commutation is granted, the Province will be reimbursed the equivalent amount of the monthly permanent disability award value of the commutation or lump sum payment that would otherwise have been payable to the worker. This will be for the same period of time covered by the assistance payment. This will only apply up to the amount of assistance paid by the Province for that period. This will generally only occur where the cash award or commutation is being paid on a retroactive basis.

(d) Rehabilitation Allowances

The Province has agreed not to request an Assignment of Benefits from rehabilitation allowances paid under section 16 of the *Act*.

3. Where no payments of compensation on the claim are due after receipt of the assignment or the payments cease before the full amount owed to the Province is paid off, the Province is advised that it will have to collect the amount outstanding through other means.

The worker is advised when social assistance payments are being deducted from workers' compensation benefits.

**EFFECTIVE DATE:** February 1, 2006 (minor editorial amendments)

**APPLICATION:** Minor editorial amendments made on February 1, 2006 do not affect the application of this policy.

### *#48.23 Requirements to Pay*

The Board may receive written notice requiring that benefits owing to a worker be redirected, in whole or in part, to the Federal Receiver General on account of the worker's debt under the *Income Tax Act* or the *Excise Tax Act*. Such a notice is referred to as a "Requirement to Pay". The Board will comply with Requirements to Pay.

**EFFECTIVE DATE:** July 13, 2005

**APPLICATION:** Benefits, including retroactive awards of benefits, payable under the *Workers Compensation Act* on or after July 13, 2005.

## **#48.30 Worker Not Supporting Dependants**

Where a worker is not supporting the worker's wife or husband and the worker's children and they are likely to be a charge upon the municipality where they reside, or where an order has been made against the worker by a court of competent jurisdiction for the support or maintenance of the worker's wife, husband or family, the Board may divert the compensation in whole or in part from the worker for the benefit of the worker's wife, husband or children. (1)

As the administration and payment of social assistance allowances is now a responsibility of the Provincial Government, a spouse or children not being supported by a worker are unlikely to become a charge on the municipality where they reside. Where, however, a request is received to divert compensation payments under the authority of section 98(4), it must be supported by a Court Order. An exception might occur where, due to some unusual, unforeseen circumstances, the worker's spouse or children are in fact likely to become a charge on a municipality where they reside.

Where compensation is being diverted under this provision, any cost of living adjustments are apportioned between the payment made to the worker and the diverted payment.

The Board will comply with Notices of Attachment issued under the *Family Maintenance Enforcement Act*.

**EFFECTIVE DATE:** February 1, 2006 (minor editorial amendments)

**APPLICATION:** Minor editorial amendments made on February 1, 2006 do not affect the application of this policy.

## **#48.40 Overpayments/Money Owed to the Board**

Section 15 provides an exception to its general prohibition of assignments, charges or attachments of compensation benefits in respect of "money owing to the accident fund". The Board may therefore deduct from compensation benefits the amount of money owed to it by the person entitled to receive them.

A worker or employer may owe money to the Board in several ways. They may be paid more compensation benefits than they are entitled to as a result of an administrative error, a decision outside the statutory authority of the Board, or fraud or misrepresentation. (See policy item #48.41.) They may incur liability for the repair or replacement of Board property which they damage. An employer or independent operator may fail to pay assessments owed to the Board.

Assessments owing by a limited company may be deducted from compensation payments made to the sole principal of that company or, where there is more

than one principal, from payments made to a principal who is personally responsible for the non-payment of assessments. (2) This also applies to situations involving personal optional protection premiums owing.

#### *#48.41 When Does an Overpayment of Compensation Occur?*

An overpayment is any money paid out by the Board to a payee as a result of an administrative error, fraud or misrepresentation by the worker, or where the decision was not one within the statutory authority of the Board. Administrative errors are computer, mechanical, mathematical, or an error in implementing a decision on a claim, and similar types of errors. They do not include decisions made regarding entitlement. An overpayment may also be incurred by a doctor, qualified practitioner, or an institution following the incorrect payment of a health care benefit account by the Board.

A decision regarding entitlement which is modified or reversed by a later decision does not result in an overpayment. These are referred to as "Decisional Errors" and include errors of policy. They include situations where new information is later received which initiates a judgment change in the original decision. They can also include situations where information was available but overlooked.

Decisional errors involving actions outside the statutory authority of the Board or due to fraud or misrepresentation are corrected retroactively to the date of the original decision, and result in an overpayment.

Board policy also does not require the initiation of recovery procedures for overpayments under \$50.00 as long as there is no evidence of fraud or misrepresentation. All overpayments, irrespective of the amount, are referred to the Board's Legal Services Division where fraud or misrepresentation is indicated.

**EFFECTIVE DATE:** March 3, 2003 (as to deletion of cross-references to payments to children on fatal claims, interim adjudications and appeals)

**APPLICATION:** Not applicable.

#### *#48.42 Recovery Procedures for Overpayments*

If, at the time of the discovery of the overpayment, payments are still being made on the claim, the amount of any overpayment will be recovered from those payments. The Board officer will as far as possible do this in a manner which causes the least hardship to the worker. Normally, the Board officer will recover the amount owing by instalments. If payments of the claim are terminated by the time the overpayment is discovered or before full recovery can be obtained, the procedures outlined below are followed. However, if a request for a review by the Review Division or an appeal to the Workers' Compensation Appeal Tribunal

against the overpayment is lodged, re-collection procedures are as outlined in policy item #48.46.

1. The Vocational Rehabilitation Services and Compensation Services Departments will conduct the initial collection procedure which will include the Board officer making personal contact with the worker in addition to sending two letters, one immediately and one 30 days later. For overpayments in excess of \$500, the second letter advises that unpaid accounts will be turned over to the Board's Collections Section.
2. When the overpayment is 70 days overdue it will be sent to the Board's Collections Section. Unless there is evidence of fraud or misrepresentation, claims for overpayments under \$500 are not sent to Collections.
3. A letter will be sent to the worker by a Collections Officer at the 70-day overdue date indicating that the overpayment has been transferred to the Board's Collections Section and suggesting that payment be made within a month in order to avoid possible legal action. This letter will make it clear that the Board is serious about collecting the overpayment.
4. If payment is not received within 30 days, or a reasonable payment plan arranged, the Collections Officer will attempt to make telephone contact with the worker or pay a personal visit.
5. If this does not result in positive arrangements for payment, a final, more strongly worded letter will be sent. An asset search will be conducted and if there is a reasonable expectation that money is collectible, the account will be turned over to the Board's Legal Services Division for attention and action. The result of this action could be the seizing of assets or garnisheeing wages.

Policy item #50.00 sets out the procedures regarding the crediting of interest to retroactive wage-loss and permanent disability lump-sum payments. In the case of claims overpayments, interest charges only apply to amounts due where the overpayment is the result of fraud, misrepresentation or the withholding of information by the worker. Interest is not charged on overpayments that result from the correction of an error. The charging of interest on an overpayment must be approved by a Manager or a Director.

In the case of doctors and other health care benefit payees, overpayments are handled by the Board by making a deletion from future payments. There is no attempt by the Board to obtain the recovery of such an overpayment from a worker who received the health care benefits unless the costs of the health care benefits were paid directly to the worker.

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

**#48.43**      *Recovery of Overpayments on Reopenings or New Claims*

If there is an outstanding overpayment made to a worker on a claim and that claim is reopened or a new claim for the same worker is established, the overpayment will be recovered from that worker. Normally, this will take place following contact with the worker to determine the manner in which the overpayment is to be recovered, either in full from the first payment of wage loss, or where the overpayment is a considerable sum of money, at a reasonable amount every two weeks during the period of disability. Every attempt will be made to recover the full amount of the overpayment.

Where there is an outstanding overpayment to either the worker or the employer and the claim is reopened or a new claim established, and if the worker is still employed by the same employer and they continue full salary, the overpayment will be recovered in full from that employer before subsequent wage loss is paid to them. The employer will be notified that this process is taking place. No recoveries are made from workers for overpayments made to employers.

Subject to the exception referred to in the preceding paragraph, the recovery of overpayments will be made only from those to whom the overpayment is made.

The general law of bankruptcy releases a bankrupt from all claims provable in bankruptcy upon discharge from bankruptcy. Therefore, where an overpayment has been incurred prior to the bankruptcy date, the Board does not take legal proceedings against the discharged bankrupt to recover the overpayment. Should a subsequent claim be submitted or the claim reopened, no attempt to recover such an overpayment is made.

**#48.44**      *Deduction of Overpayments from Permanent Disability Awards*

Where a worker is entitled to a permanent partial disability award, attempts are made to recover the overpayment prior to establishing the award. Whenever possible, the full amount will be recovered direct from the worker. Where recovery is not made prior to the payment of the award, the recovery may be made from the award itself either from the initial payment or on the basis of a permanent disability award adjustment as follows:

- (a) non-payment of the full permanent disability award for a fixed term;
- (b) a partial reduction of the permanent disability award for a fixed term;
- (c) a partial reduction of the permanent disability award for the duration of a worker's entitlement to a permanent disability award.

In the case of a large overpayment and/or a small award, it is also possible that the capitalization of the full award may be required to offset the overpayment.

Where a previous permanent disability award has been made and the overpayment is on a subsequent claim, the Board does not usually elect to recover the overpayment from the prior award. This is an option that is only used as a last resort. The choice is first given to the worker as to how she or he wishes to repay the overpayment on the understanding that the Board would prefer not to interfere with the ongoing permanent disability award.

Where an award has been suspended for the purpose of paying off an amount owing to the Board, the worker will, every six months, be sent a statement showing the results of any changes in the permanent disability award amount because of cost of living adjustments, the amounts credited to the worker's account as a result of the suspension, and the amount still owing.

Permanent disability awards are made to workers and pensions are paid to dependants at the end of each calendar month. Should a worker or dependant die during the month for which a full month's payment has been made, no deduction is made nor is any overpayment declared.

#### *#48.45 Deduction of Overpayments from Vocational Rehabilitation Payments*

An overpayment may be recovered from a vocational rehabilitation assistance payment at the discretion of the Board officer in Vocational Rehabilitation Services Department in consultation with the Board officer in Compensation Services Department. Every attempt is, however, made by the Board to have the worker make arrangements to repay the overpayment in some other method rather than reduce a vocational rehabilitation payment. Recovery from a vocational rehabilitation payment would only occur under exceptional circumstances.

#### *#48.46 Reviews and Appeals on Overpayments*

A request for a review by the Review Division may be made on the question of whether the worker owes money to the Board and, if so, the amount owing.

However, no such request may be made on the question of whether the Board should recover the overpayment or not, and on the manner of any recovery. Board policy requires that if an overpayment is being reviewed or appealed, procedures to recover the overpayment from the worker will be suspended pending the decision by the Review Division or the Workers' Compensation Appeal Tribunal. However, if a new claim is submitted, or a claim other than the one on which the request for review by the Review Division or the appeal to the Workers' Compensation Appeal Tribunal is recorded is reopened, recoveries of the overpayment may be made from any benefit entitlements that accrue. The Board officer will of course still be permitted to exercise discretion as to the amount and the periodic nature of the recovery.

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

#### *#48.47 Waiver of Overpayment Recoveries*

Other than the exceptions listed in policy item #48.41, it is the Board's position that recoveries should be made when an overpayment occurs. As such, it is expected that requests to waive recovery should be rare and must clearly meet policy criteria.

Board policy regarding the waiver of recovery procedures for overpayments provides for the following:

The President, Vice-President, Rehabilitation and Compensation Services Division (or Directors for overpayments under \$1,000) will have discretionary authority to waive recovery procedures for overpayments where:

1. in their judgment, severe financial hardship would result (it is not considered that amounts under \$1,000 should be deemed as meeting this requirement); or
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, 2005	—	December 31, 2005	\$194.94
January 1, 2006	—	December 31, 2006	\$200.08

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

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

## #49.11 *Meaning of Custodial Care in Hospital or Elsewhere in Section 35(5)*

Section 35(5) applies where a worker is receiving “custodial care in a hospital or elsewhere”.

“Custodial care” requires that the worker be undergoing a voluntary or involuntary stay in, and be receiving care from, a hospital or other similar institution. Only long-term or permanent residence in a hospital or similar institution could amount to “custodial care”. It does not cover periodic stays in hospital which a worker might have to undergo for the purpose of surgery or other treatment.

A worker is not considered to be receiving “custodial care” when confined to prison or other corrective institution. While the worker might be said to be in involuntary custody, it is not felt that the worker is undergoing “care” for the

purpose of the section. The case would be different if the prison or corrective institution were also a hospital. The Board has authority under section 98(3) of the *Act* to discontinue the compensation of workers confined to prison. (5)

#### *#49.12 Nature of the Board's Authority under Section 35(5)*

Section 35(5) clearly confers a discretionary power on the Board. In exercising this discretion, the Board is free to choose any of the applicable alternatives listed in section 35(5) without regard to the order in which they are set out. There is no obligation on the Board to give any priority to any of the alternative choices set out in the section.

This does not mean that, in exercising its discretion under section 35(5), the Board cannot set its own priorities for the application of the various alternatives. The necessity to set guidelines for Board staff in their administration of this section, as a matter of practice, may require that the Board lay down some order of priority. This will appear from the guidelines set out below in relation to the sub-paragraphs of section 35(5).

#### *#49.13 Application of Section 35(5) in Cases of Temporary Disability*

In the case of a worker entitled to temporary disability payments who is receiving custodial care in a hospital or elsewhere, the Board may take any of the alternative courses of action set out in paragraphs (a) to (d) of section 35(5). Guidelines for applying these alternatives are set out below in paragraphs 1. to 4.

1. Worker able to use money for personal needs or to manage personal affairs.

The Board may pay the compensation to 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.” Priority should normally be given to this alternative. To the extent able, the worker should make a personal choice as to how much of the compensation payment to spend on personal needs, how much to contribute to the home and family, and how much to save.

This provision requires that a judgment be made on an individual basis as to the amount which the worker is able to use or manage for personal needs. This may be none, all, or part only of the worker’s compensation payment, since payment is to be made to the worker only to the “extent” that the worker is capable of using or managing it.

A distinction is drawn between the amount which the worker can use for personal needs and the amount that he or she can manage. A worker may be capable of managing an amount which is greater than what can be used for personal needs. On the other hand, there may be the capacity to handle small amounts of money to purchase personal comforts without the worker having any capacity to further manage personal affairs. Where there is an entitlement to temporary disability payments, these are to be paid in an amount the worker is capable of using for personal needs or in an amount the worker is capable of managing, whichever is greater. Any balance remaining after payment is made to the worker will be applied under alternatives 2. to 4. below.

2. Person dependent on the worker for support.

The Board may pay the compensation to “any person who is dependent on the worker for support”. Any balance remaining after payment has been made to the worker under alternative 1. will normally be paid to any dependants living with, and being maintained by, the worker.

Where a person who is dependent on the worker for support lives separate from the worker, payments will be made to the dependant only to the extent that he or she was maintained by the worker. Therefore, if the worker was making a regular payment to the dependant, whether voluntarily or by virtue of a separation agreement or court order, the amount of that payment will be paid to the dependant by the Board. Where the worker was making no regular payments or not complying with a separation agreement or court order, judgment must be made as to the amount that would have paid to the dependant had the worker been capable of managing personal affairs.

Where compensation is payable to the worker’s children under this provision, it may be paid to a foster-parent or home or other person or institution looking after them.

Where compensation is paid under alternative 1. on the basis that the worker is capable of managing his or her affairs but does not support the worker’s wife or husband and the worker’s children, the Board may be able to divert all or part of the worker’s compensation to the worker’s wife, husband or children under section 8(4) of the Act. (6)

3. Maintenance of a home.

The Board may apply the worker's compensation payment to the "maintenance of a home to which the worker is likely to return on his recovery". Where payments are made to the worker under alternative 1. above on the basis that the worker can manage personal affairs or are made to the dependants living with the worker under alternative 2., it is expected that the worker or dependants will use the money to maintain their home. Alternative 3. should only be of relevance when the worker is incapable of managing the property alone and there are no dependants living under the same roof.

Payments for the maintenance of the worker's home should normally be made to the person who is managing the property on the worker's behalf. The Board should not normally undertake the management of a worker's property.

4. Accumulation of balance.

Temporary disability payments may be "accumulated by the board for payment to the worker on his recovery". Any balance remaining after payments have been made under alternatives 1. to 3. set out above should be accumulated until the worker has recovered the capacity to manage personal affairs. The accumulations should then be paid to the worker either as a lump sum or, if this is in the worker's best interests, by instalments over a period of time.

#### *#49.14 Application of Section 35(5) in Cases of Permanent Disability*

In the case of a worker entitled to permanent disability payments who is receiving custodial care in a hospital or elsewhere, the Board may take any of the alternative courses of action set out in paragraphs (a) and (b) and the final paragraph of section 35(5).

The guidelines for dealing with these cases are set out below.

1. Worker able to use money for personal needs.

Under paragraph (a) of section 35(5), permanent disability payments will in the first place be paid to the worker to the extent that the worker is capable of using them for personal needs. Where a worker is capable of handling greater sums than required for personal needs, paragraph (a) of section 35(5) authorizes the Board to pay these greater sums to the worker and this is the practice of the Board in the case of temporary disability. However, in the case of permanent disability, the exercise of this authority

would conflict with the object of the section to prevent the accumulation of estates. It is not therefore the Board's practice to pay more to the permanently disabled worker than required for personal needs.

2. Person dependent upon the worker for support.

Any balance remaining after the application of alternative 1. above will be applied for the benefit of any dependants of the worker according to the same principles as for temporary disability.

3. Maintenance costs.

Any balance remaining after the application of alternatives 1. and 2. above will be applied toward the cost of the worker's maintenance. This applies to the full cost of custodial care, not just the value of the worker's room and board. It only applies when the Board is paying the cost of maintenance as part of the costs of a compensation claim.

Where a worker is conscious and compensation is being applied toward the cost of maintenance, the worker must receive a comfort allowance of a minimum amount which is subject to cost of living adjustments as described in policy item #51.20. The amount of this minimum is set out in policy item #49.10. Comfort allowance is interpreted to mean the monies payable to the worker under alternative 1. above which the worker is able to use for personal needs. The result is that where the worker is conscious, the minimum amount payable for personal needs is the amount set out in policy item #49.10.

Any balance remaining after payment of the cost of maintenance will be paid to the worker to the extent the worker is able to manage personal affairs. To the extent the worker is not able, it will be paid to the person who is best qualified to administer it under the terms of section 35(1) of the *Act*.

**#49.15      *Application of Section 35(5) on a Change of Circumstances***

A situation may arise where the compensation of a worker receiving custodial care is being applied to the cost of maintenance, but the worker becomes able to leave the hospital and live at home. Section 35(5) would then cease to have any application so that it would be necessary to resume payment of the worker's permanent disability award. However, the worker would not be entitled to receive the payments previously applied to the cost of maintenance. If, following departure from custodial care, the worker remains incapable of handling personal affairs, consideration should be given to the application of section 35(1).

It may also happen that what was initially thought to be a temporary disability might turn out to be permanent. As soon as this is definitely known, consideration should be given to using any part of the periodical payments not required for the worker's personal needs or dependants' needs, for the cost of maintenance. This would only apply to future compensation payments.

#### **#49.16 Administration of Section 35(5)**

Decisions on the application of section 35(5) are to be made by the Board officer in Compensation Services Department in the case of temporary disability and by the Board officer in Disability Awards Department in the case of permanent disability. The information required to make the decision, where not already on file, will be obtained by a Board officer in Disability Awards Department, or, where appropriate, by a Board officer in Vocational Rehabilitation Services Department or a Board Medical Advisor.

#### **#49.20 Imprisonment of Worker**

This policy deals with the application of section 98(3). In considering the payment of compensation under this policy, regard must be given the individual circumstances of the case.

Section 98(3) of the *Act* provides:

Despite sections 22(1), 23(1) or (3), 29(1) and 30(1), where it is found that a worker is confined to jail or prison, the Board may cancel, withhold or suspend the payment of compensation for the period it considers advisable. Where compensation is withheld or suspended, the Board may pay the compensation or any portion of it to the worker's wife, husband or children, or to a trustee appointed by the Board, who must expend it for the benefit of the worker, the worker's wife, husband or children.

Section 98(3) applies where it is determined that a worker who is receiving benefits is subsequently incarcerated in any place used to confine persons in the course of the administration of the criminal justice system. The section does not apply to situations where a worker is injured while incarcerated.

In applying section 98(3), the following definitions apply:

**Cancel:** to terminate compensation payments for the period considered advisable - the payments otherwise payable during the period of cancellation are permanently lost to the worker - the payments cannot be redirected.

Suspend: to temporarily terminate compensation payments - the payments are not accumulated by the Board for the worker but may be redirected during the temporary stop in accordance with section 98(3).

Withhold: to temporarily hold back compensation payments - the payments may be accumulated by the Board and paid to the worker upon release from prison, or may be redirected during the temporary hold back in accordance with section 98(3).

The general rule is that vocational rehabilitation benefits will be cancelled during the period of incarceration while the worker is unable to participate in the rehabilitation program. One exception, however, applies to a worker who is entitled to a permanent total disability award under section 22(1) who requires rehabilitation services and supports due to the nature of the disability.

Health care benefits will generally continue to be paid during incarceration.

Wage loss benefits (sections 29 and 30) will be suspended during the period of incarceration as there is considered to be no loss of earnings during incarceration. These benefits may be paid, in whole or in part, to the worker's wife, husband or children, or to a trustee appointed by the Board to expend for the benefit of the worker, the worker's wife, husband, or children. If not redirected, these benefits are permanently lost during the period of incarceration.

Permanent disability periodic payments based on the loss of function method of assessment (sections 22 and 23(1)) will either continue to be paid or be withheld during the period of incarceration. If withheld, these payments may be paid, in whole or in part, to the worker's wife, husband or children, or to a trustee appointed by the Board to expend for the payments of the worker, the worker's wife, husband, or children. Payments neither paid to the worker nor redirected will be paid to the worker on release.

Permanent disability periodic payments based on the projected loss of earnings method of assessment (section 23(3)) will be suspended during the period of incarceration. These payments may be paid, in whole or in part, to the worker's wife, husband or children, or to a trustee appointed by the Board to expend for the payment of the worker, the worker's wife, husband or children. If not redirected, these payments are permanently lost during the period of incarceration; however, the worker will be entitled, during the period of confinement, to the section 23(1) award the worker would have been granted had there been no section 23(3) consideration.

Confinement under section 98(3) only includes those circumstances where the worker is prevented from seeking or obtaining employment for regular wages under an employee/employer relationship. Thus, ongoing entitlement to benefits

will be determined once the worker is released on day parole and is no longer considered to be "confined" to jail or prison.

When an incarcerated worker whose benefits have been cancelled, suspended or withheld becomes eligible to participate in a work release program, but is unable to do so because of the effects of a work caused disability accepted under the claim, compensation benefits may be reinstated from that point.

The power to redirect payments to dependants is exercised if the worker was supporting the worker's wife, husband or children prior to the imprisonment. All, or a portion of the compensation, is paid to them or a trustee, the amount depending on the number of dependants and their needs. If the worker was not supporting them, the power is not exercised unless there is a court order against the worker, in which case the amount provided for in the order will be paid. The power to pay the compensation to a trustee for the benefit of the worker depends on the reasonable needs of the worker while incarcerated.

### **#49.30 Payment of Public Trustee and Committee Fees**

The Board pays the fees charged to a worker by the Public Trustee or Committee for managing the worker's entire estate when the following conditions are met:

1. The worker is incapable of managing his or her own affairs and the Public Trustee or Committee administers the worker's estate;
2. The worker's incapacity to manage his or her own affairs results from a compensable injury or disease; and
3. The Public Trustee or Committee is appointed to manage the worker's affairs under the *Patients Property Act* or the *Public Trustee Act*, or equivalent statute.

The Board will pay the Public Trustee and Committee fees in accordance with the fee schedule established by the Public Trustee. Fees may include the account review fee paid to the Public Trustee by Committees and the accountant's fees for preparing the account summaries.

The Board will pay the Committee fees after the Public Trustee has approved the accounts.

### **#50.00 INTEREST**

With respect to compensation matters, the *Act* provides express entitlement to interest only in the situations covered by sections 19(2)(c) and 258. In these situations, the Board will pay interest as provided for in the *Act* (see Item C8-61.10 and policy item #100.83).

The Board has discretion to pay interest in situations other than those expressly provided for in the *Act*. In these situations, interest may be paid subject to the following conditions:

- The retroactive payment is to a worker or employer in respect of a wage-loss payment (provided under sections 29 and 30 of the *Act*) or a permanent disability lump-sum payment (provided under sections 22 and 23 of the *Act*).
- It has been determined that there was a blatant Board error that necessitated the retroactive payment. For an error to be “blatant” it must be an obvious and overriding error. For example, the error must be one that had the Board officer known that he or she was making the error at the time, it would have caused the officer to change the course of reasoning and the outcome. A “blatant” error cannot be characterized as an understandable error based on misjudgment. Rather, it describes a glaring error that no reasonable person should make.
- Interest will be calculated from the first day of the month following the commencement date of the retroactive benefit and up to the end of the month preceding the decision date. Notwithstanding, in no case will interest accrue for a period greater than twenty years.

In all cases where a decision to award interest is made, the Board will pay simple interest at a rate equal to the prime lending rate of the banker to the government (i.e., the CIBC). During the first 6 months of a year interest must be calculated at the interest rate as at January 1. During the last 6 months of a year interest must be calculated at the interest rate as at July 1.

For practical reasons, certain mathematical approximations may be used in the calculations.

The rate of interest provided in this policy will also be used in the calculation of overpayments as outlined in policy item #48.42.

**EFFECTIVE DATE:** March 3, 2003 (as to reference to section 258)  
**APPLICATION:** Not applicable.

## **#51.00 COST OF LIVING ADJUSTMENTS TO PERIODIC PAYMENTS**

Sections 25(1) and (2) of the *Act* provide the method for indexing periodic payments of compensation to a worker. The sections provide:

- (1) For the purposes of this section, the Board must, as of January 1 of each year,

- (a) determine the percentage change in the consumer price index for Canada, for all items, for the 12 month period ending on October 31 of the previous year, as published by Statistics Canada, and
  - (b) subtract 1% from the percentage change determined under paragraph (a).
- (2) The percentage resulting from calculations made under subsection (1) must not be greater than 4% or less than 0%.

The Board determines the indexing factor to be applied to periodic payments of compensation to a worker or a dependant in the following manner:

- The Board compares the consumer price index for October of the previous year with the consumer price index for October of the year prior to the previous year.
- One percentage point is subtracted from the percentage change between these two consumer price indexes.
- If the percentage that results from this subtraction is greater than 4%, it is reduced to 4%. If the percentage that results from this subtraction is less than 0%, no adjustment to periodic payments of compensation is made.

The resulting percentage changes determined annually are set out below:

<b>Date</b>	<b>Percentage</b>
January 1, 2006	1.635783

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

The resulting percentage change is applied on January 1 of each year to periodic payments of compensation made continuously in respect of an injury or a death occurring more than 12 months before the date of the adjustment.

If the Board starts or restarts periodic payments of compensation on a date more than 12 months after the date of the worker's injury or death, the Board adjusts all periodic payments as if payments were made continuously from the date of injury or death. This means that if payments on a claim are started or restarted more than 12 months after the injury or death, the worker or dependant receives the benefit of any cost of living adjustments occurring in the interim period as if he or she had been continuously paid since the date of injury or death.

Compensation paid to a worker on or after June 30, 2002 will be indexed according to section 25 of the *Act*, irrespective of the date the worker was injured. However, if the Board pays to a worker, who was injured before June 30, 2002, compensation as a result of a retroactive adjustment, the indexing rules in section 25 of the *Act*, as it read immediately before June 30, 2002, apply to the compensation benefits that should have been paid to the worker before June 30, 2002. Compensation due to the worker on or after June 30, 2002 will be indexed according to section 25 of the *Act*.

Effective December 31, 2003, compensation paid to a dependant of a deceased worker is indexed under section 25 of the *Act* regardless of the date that the worker died. However, if the Board retroactively adjusts compensation in respect of a death that occurred before December 31, 2003, the indexing rules in section 25.1 of the *Act*, as it read immediately before December 31, 2003, apply to the compensation that should have been paid to the dependant before that date. Compensation owing to the dependant on or after December 31, 2003 is indexed under section 25 of the *Act*.

Authority to approve adjustments under section 25 has been assigned to the President.

**Effective Date:** December 31, 2003 (as to references to benefits paid to surviving dependents).

**Application:** This policy item applies to all periodic payments made to workers and surviving dependants.

## **#51.20 Dollar Amounts in the Act**

Section 25.2 (1) of the *Act* provides:

Subject to subsection (3), the Board must adjust every dollar amount referred to in this Act on January 1 of each year by applying the percentage change in the consumer price index for Canada, for all items, for the 12 month period ending on October 31 of the previous year, as published by Statistics Canada.

The Board determines the percentage change to be applied each January 1 to dollar amounts in the *Act* by comparing the consumer price index for October of the previous year with the consumer price index for October of the year prior to the previous year.

The resulting percentage changes determined annually are set out below:

<b>Date</b>	<b>Percentage</b>
January 1, 2006	2.635783

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

When the Board makes the adjustments, those dollar amounts referred to in the *Act* are deemed to be amended.

These provisions do not apply to the figures referred to in policy item #39.61, the maximum wage rate and other figures referred to in policy item #69.00.

Authority to approve adjustments under section 25.2 has been assigned to the President.

Authority has also been assigned to the President to adjust the following amounts to reflect changes based upon the consumer price index, using the formula set out in the applicable item of the *Manual*:

Maximum and Minimum Disfigurement Amount	#43.20
Clothing Allowances	#79.00
Personal Care Allowances	#80.20
Independence and Home Maintenance Allowance	#81.00
Transportation Allowance	#82.20
Subsistence Allowances: Meals	#83.20
Transfer of Costs	#114.11
Funeral and Other Death Expenses	C8-54.00

The Board adjusts dollar amounts referred to in sections 17 and 18 of the *Act* in accordance with section 25.2 of the *Act*. In addition, effective December 31, 2003, the Board adjusts the dollar amounts referred to in sections 17 and 18 and Schedule C of the *Act*, as it read immediately before June 30, 2002, in accordance with section 25.2 of the *Act*.

**Effective Date:** December 31, 2003 (as to references to sections 17 and 18 of the *Act* as well as dollar amounts in sections 17 and 18 and Schedule C of the *Act* as it read immediately before June 30, 2002).

**Application:** This policy item applies to all dollar amounts in the *Act*.

## 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