

DISCUSSION PAPER

1. TITLE

Average Earnings – Casual Pattern of Employment

2. ISSUE(S)

Workers' compensation benefits are based on a worker's average earnings. The *Workers Compensation Act* ("Act") sets out two general rules for calculating average earnings as well as a number of exceptions to the general rules. One exception pertains to workers with a pattern of employment at the time of injury that is casual in nature.

At issue is a review of policy and practice to consider whether the application of the *Act* and policy are unfair to workers who have a pattern of employment at the time of the injury that is casual in nature. Given the financial consequences arising out of the determination of a worker's average earnings, it is crucial that policy guide the proper categorization of workers.

3. BACKGROUND

The B.C. Federation of Labour has expressed concerns that the application of law and policy pertaining to workers with a casual pattern of employment at the time of injury are unfair to workers.¹ It was suggested that WCB officers are applying the policy with unfair results to workers such that any worker injured on a job of less than three months' duration or who was working on-call for more than one employer is considered to be a casual worker, even though they may have a history of regular employment.

While all the average earnings policies are scheduled for review in 2006, the PRD was directed to review this issue as part of its 2005 work plan.

¹ These concerns were raised during the consultations on 2005 policy priorities between the Workers' Compensation Board ("WCB") and the BC Federation of Labour on November 22, 2004 and reiterated by subsequent letter from the BC Federation of Labour to the WCB, dated November 29, 2004.

4. LAW, POLICY & PRACTICE

4.1 Historical Background to Current Law & Policy

Prior to June 30, 2002, the *Act* provided WCB officers with very broad discretion to deduct periods of absence and use the worker's earnings for more or less than one year to appropriately reflect the worker's loss of earnings. The former Casual Workers' policy contained in policy item #66.13 of *Rehabilitation Services & Claims Manual* ("RS&CM"), Volume I, noted that:

Because of the sporadic employment history of such workers, the Board considers that there is a need to look at the worker's earnings over a longer period of time. It has been the Board's practice to use the casual worker's earnings for the one year period prior to the injury but a shorter or longer time could be used if this best represented loss of earnings.

The policy provided examples of types of workers who might be treated as casual workers, such as stevedores, fishers and tradespersons dispatched to construction jobs from union hiring halls.

Further, policy items #66.14 and #66.15 pertained to "Seasonal Workers" and "Part-Time and Temporary Workers" respectively, describing the characteristics of such employment and providing guidance as to the basis on which wage-loss payments would be made to such workers.

4.2 Current Law, Policy & Practice

Legislative amendments contained in Bill 49, *Workers Compensation Amendment Act*, 2002, took effect on June 30, 2002. The amendments provided specific guidance about the manner in which a worker's average earnings must be calculated. By providing certain rules, with a number of exceptions, for determining a worker's average earnings, the WCB's discretion was significantly narrowed. The rules and exceptions are based on employment circumstances.

Section 33.1 of the *Act* sets out two general rules for determining a worker's short-term and long-term average earnings.² The short-term average earnings of a worker who falls within the general rules are based on time of injury earnings. At the 10-week rate review, the worker's long-term average earnings are generally based on the worker's gross earnings for the 12-month period immediately preceding the date of injury.

By policy, the general rules apply to workers who receive regular remuneration on a standard five-day work week. It also applies to workers who receive

² See Appendix "A" for a copy of WCB policy on the general rule for determining short-term and long-term average earnings, policy items #65.00 and #66.00 of the *RS&CM*.

remuneration not based on a five-day work week such as variable shift workers, workers employed in two jobs and fishers.

The *Act* also provides a number of exceptions to the general rules for determining average earnings. The exceptions apply to the following:

- a worker at the time of injury is an apprentice in a trade, an occupation or a profession or is a learner (section 33.2);
- a worker employed, on other than a casual or temporary basis, by the employer for less than 12 months immediately preceding the date of injury (section 33.3);
- if exceptional circumstances exist such that the Board considers that the application of the general rule of long-term rate setting would be inequitable (section 33.4);
- casual workers (section 33.5);
- independent operators or an employer who has purchased coverage (section 33.6); and
- a worker with no earnings at the time of injury (section 33.7).

As noted in the above list, one exception to the general rules is contained in section 33.5 of the *Act* and relates to calculation of average earnings where the worker's pattern of employment at the time of the injury is casual in nature.

Section 33.5 provides that,

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 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.

Section 33.5 does not provide for an initial wage rate to be set based on date of injury earnings for the first 10 weeks of the claim.

As part of the consideration of the Casual Workers policy, it is relevant to note that section 33.4 of the *Act* provides an exception to the application of section 33.1(2), the general rule, for determining a worker's long-term average earnings. This provision provides that, if exceptional circumstances exist such that the application of section 33.1(2) would be inequitable, the WCB's determination of the amount of long-term average earnings may be based on an amount that the WCB considers best reflects the worker's loss of earnings. An example of an exceptional circumstance might be if a worker experienced an atypical absence from work in the prior year due to illness, education or maternity leave.

Section 33.4 of the *Act* specifically excludes application of the exceptional circumstances provision to workers who had a pattern of employment at the time

of the injury that was casual in nature. Therefore, once it is determined that a worker had a casual pattern of employment, even if the categorization results in a level of compensation which does not accurately reflect the worker's loss of earnings, the WCB does not have any authority to consider the worker's actual loss of earnings or earning capacity.

In order to ensure that WCB policy reflected the Bill 49 legislative amendments, the Panel of Administrators passed a resolution which removed the portion of the policy set out in section 5.1 above and inserted the following language into the Casual Workers policy in *RS&CM*, Volume II:³

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.

The Casual Workers policy is intended to assist in interpreting section 33.5 and provides that a casual worker is a worker with a short-term/sporadic attachment to employment. Generally, the employment lasts less than three consecutive months or the worker is "on call" for one or more employers.

As part of the policy updates in connection with the enactment of Bill 49, policies pertaining to "Seasonal Workers" and "Part-Time and Temporary Workers" were deleted. The reference to employment of "short duration" and "less than 3 months" being indicative of "casual employment", which was originally contained in the "Seasonal Workers" policy, was incorporated into the new Casual Workers policy. In addition, the reference to a person who works on call for one or more employers as being a casual worker in the new Casual Workers policy was originally contained in the "Part-Time and Temporary Workers" policy.

It appears that, in practice, seasonal and part-time workers are typically categorized under the general rule for determination of average earnings while temporary workers are typically categorized under the section 33.5 exception.

By BOD resolution #2003/03/18-02, effective March 18, 2003, the Casual Workers policy was amended to delete any reference to longshore workers (also known as stevedores) being treated as having a casual pattern of employment. This amendment was intended to ensure that the calculation of benefit entitlement for stevedores took into account the individual employment circumstances of such workers.⁴

While the Casual Workers policy provides general guidance as to the characteristics of a casual pattern of employment, WCB officers requested further guidance in determining whether or not a worker should be classified as

³ See Appendix "A" for a copy of policy item #67.10.

⁴ The policy continues to provide that fishers are to be treated as workers engaged in casual employment, but notes that this rule cannot be rigidly applied.

having a pattern of employment at the time of injury that is casual in nature. In response to the request, Practice Directive #33B was first issued on November 20, 2002 by the former Compensation Services Division. Practice Directive #33B also provides some guidance with respect to categorization of seasonal and part-time/temporary workers.

Practice Directive #33B sets out the following presumptions with respect to categorization of workers with a casual pattern of employment:⁵

...it is the Division's position that, in the absence of clear evidence to the contrary, there is a presumption that any employment which lasts less than three consecutive months is casual employment.

It is the Division's position that, in the absence of clear evidence to the contrary, any workers hired "on call" for a multitude of employers should be categorized as casual.

5. DISCUSSION

5.1 General

The fundamental issue raised by a review of policy item #67.10 is whether the policy adequately defines a "pattern of employment at the time of the injury [that] is casual in nature" and guides the proper categorization of workers under this exception in the *Act*.

Proper categorization of workers according to their employment circumstances is crucial given that improper categorization of workers may have significant financial consequences. If a worker with a history of regular full-time employment is mis-categorized as a worker with a casual pattern of employment at the time of the injury, the benefits the worker receives for the initial 10 weeks may be lower than had the worker's average earnings been calculated based on the general rule. Conversely, if a worker with a casual pattern of employment at the time of the injury is mis-categorized to fall within the general rule, the worker may be overcompensated for the first 10 weeks and the employer would experience higher claim costs which would affect its experience rating.

5.2 Review Division Decisions and WCAT Appeals

In order to determine whether there are any issues with respect to the application of the law and policy pertaining to the categorization of workers with a pattern of employment at the time of injury that was casual in nature, a review of decisions

⁵ In addition to the presumptions set out above, Practice Directive #33B provides other direction as to the interpretation and application of section 33.5 of the *Act* and the Casual Workers policy. Appendix "B" reproduces Practice Directive #33B in its entirety.

by the WCB's Review Division and the Workers' Compensation Appeal Tribunal ("WCAT") was undertaken.

Statistics provided by the Review Division indicate that, in 2004 they decided a total of 63 issues relating to policy item #67.10.⁶ Of those, 44 appeals were denied, 6 were allowed, 4 were allowed in part and 9 were returned to the WCB.

The WCAT decided 35 appeals on this issue from November 29, 2003 until April 4, 2005. Of the 35 relevant cases reviewed, 13 decisions were overturned.⁷ Eleven of the decisions overturned by the WCAT varied the WCB's decision that the worker's pattern of employment was casual in nature in favour of finding that the worker had a regular pattern of employment.

Considering average earnings determinations are a fundamental threshold issue to be decided by WCB decision-makers, the above statistics indicate that reviews and appeals of this issue do not comprise a significant percentage of the total number of issues taken to review and subsequent appeal.

In WCAT Decision No. 2004-06437, the WCAT panel considered a decision of the WCB with respect to the categorization of a worker within the section 33.5 (casual worker) exception to the general rule. The WCAT panel recognized that if the worker had completed the job at which he was injured, the worker would have worked for the accident employer for less than one month. In that sense the worker could, without other evidence and based on Practice Directive #33B, be considered a casual worker. However, the panel, in varying the WCB's decision, reviewed the worker's pattern of employment and accepted that the worker was a regular, seasonal worker with the odd occasional, casual job in the off-season.⁸

WCAT decision No. 2004-04998 referred to a Federal Court of Appeal decision of Mr. Justice Linden which summarized the jurisprudence regarding employment of a casual nature.⁹ The case emphasized the importance of the worker's *pattern of employment* rather than the worker's *job* at the date of injury and stated that, more important than the duration of the work is whether the employment is "ephemeral", "transitory", "unpredictable" and "unreliable".

Based on a review of relevant decisions and discussions with staff, it appears that, when determining whether the section 33.5 exception is applicable, decision-makers are focusing primarily on the specific job the worker was

⁶ The 63 decisions represent 0.5% of the 13,799 total issues decided by the Review Division in 2004.

⁷ Of the 22 decisions upheld by the WCAT, two claims had the original decision on the categorization of the worker changed by the Review Officer: WCAT Decision Nos. 2004-06384 and 2005-01628.

⁸ It is noted that Practice Directive #33B states that, "Despite the fact that the availability of work is seasonal, these workers are not, for that reason alone, categorized as casual."

⁹ *Roussy v. Canada (Minister of National Revenue – M.N.R.)* [1992] F.C.J. No. 913.

engaged in at the time of the injury. It may be that this is too narrow a focus given the reference in the *Act* to a “pattern of employment at the time of the injury”.

While policy item #67.10 also refers to “sporadic attachment to employment”, it appears that decision-makers place greater emphasis on the reference to “short-term” and focus on the length of the particular job at the time of the injury than on the worker’s attachment to employment generally at the time of the injury. This may be attributable to the emphasis on the three-month guideline in Practice Directive #33B. This may also be attributed to the fact that, despite the significant legislative changes brought by Bill 49, policy continues to reflect to a great extent the old policy, which only required consideration of the duration of employment rather than consideration of the worker’s pattern of employment at the time of injury.

5.3 Issues To Be Addressed

A review of WCB practice, appellate decisions and relevant provisions of the *Act* and WCB policy suggest that additional clarification and guidance may be of assistance with respect to determination of average earnings for workers with a pattern of employment at the time of the injury that is casual in nature.

The following points may support the notion that current policy does not adequately guide the categorization of workers with a pattern of employment at the time of the injury that is casual in nature:

- WCB officers requested further guidance in determining whether a worker’s pattern of employment at the time of the injury is casual in nature, resulting in Practice Directive #33B.
- There are considerable references to Practice Directive #33B in appellate decisions, possibly suggesting that guidance in policy is insufficient.
- Some decision-makers may be placing greater significance on the duration of the worker’s job at the time of the injury than on the nature of the worker’s attachment to employment at the time of injury, as presumably intended by the reference to a “pattern of employment” in the *Act*.
- Some decision-makers appear to be elevating the three-month guideline contained in policy to the status of a binding legal rule.

It may be that the issues raised by the B.C. Federation of Labour regarding the policy would be more appropriately addressed in practice, given the limitless variety of employment circumstances that workers may present. As such, it may be appropriate for policy to maintain the present definition of a “casual worker”, but expand on the definition to provide additional guidance as to what constitutes a “sporadic attachment to employment”. This may serve to reduce reliance on the three-month guideline. Such revision to policy would necessitate revision to

Practice Directive #33B to remove the presumptive language associated with a job of less than three months' duration and add discussion pertaining to the need to consider attachment to employment.

It may be appropriate for policy to provide guidance as to the period of time the decision-maker should consider when determining whether a worker's pattern of employment at the time of the injury was casual in nature.

A review of the use of the phrase "casual worker" or "casual pattern of employment" by other government agencies was undertaken. It appears that, rather than provide a strict definition of the phrase, such agencies tend to provide a list of indicators that may suggest that a worker is a casual worker or engaged in a casual pattern of employment. The indicators used by other government agencies include: limited entitlement to benefits generally associated with continuity of employment, whether the worker has a consistent starting time and set finishing time and whether the worker is able to refuse work prior to each incidence of work.

A list of indicators may best be incorporated into a practice document, rather than policy to allow for many examples to contemplate the infinite number of employment circumstances that may fall under the section 33.5 exception for workers with a pattern of employment at the time of the injury that is casual in nature.

6. OTHER JURISDICTIONS

Most other Canadian jurisdictions categorize workers according to employment circumstances for the purpose of setting wage rates. Although terminology varies, the most common categories are long-term/permanent employment or non-permanent/irregular employment.

The latter category includes casual workers. While each jurisdiction follows a different approach to categorization, wage rates are usually based on a worker's average annual earnings using earnings information from between one and five years before the injury.

In Ontario, long-term average earnings for workers in non-permanent employment are generally based on employment in the 24 months before the injury.¹⁰ The applicable policy in Alberta provides that they usually consider the 12-month period prior to the accident, but will consider a different period if the 12-month period is not a fair representation of the worker's earnings.¹¹

¹⁰ Ontario's Workplace Safety and Insurance Board Policy 18-02-04.

¹¹ Workers' Compensation Board of Alberta, Policy 04-01, Part II, Application 2: Special Circumstances.

Given the considerable discretion in the legislation in other jurisdictions to use the worker's earnings for more or less than one year to appropriately reflect the worker's loss of earnings, the importance of properly defining a casual worker is lessened. As such, most other jurisdictions do not provide guidance as to the definition of a casual worker either in policy or practice.

The Saskatchewan Workers' Compensation Board, however, does provide some guidance on what is a casual worker. Policy provides that a casual worker is, "a person who works full or part-time normally for a period of less than three months usually to meet peak or periodic demands. Those who work at holiday periods, during stocktaking or on call would qualify as casual workers." This policy is intended to assist with the application and interpretation of section 70(4) of the Saskatchewan's *Worker's Compensation Act*, which is an exception to their general rule regarding computation of average earnings for those situations where the general rule would produce inequitable results. The initial wage rate, for the first 26 weeks of the claim, is based on date of injury earnings, whereas the long term wage rate is to be based on earnings of a person regularly employed in the same grade of employment.

7. OPTIONS AND IMPLICATIONS

Option 1: Status quo

Under this option, no amendment would be made to policy item #67.10, *Casual Workers*.

Implications

- The B.C. Federation of Labour's concerns regarding clarity, consistency, predictability and fairness in decision-making would not be addressed.
- Some decision-makers would continue to strictly apply the three-month guideline due to the lack of other guidance with respect to categorization of casual workers.
- This option will maintain the current number of review and appeal requests from workers, employers and stakeholders, due to differing applications of policy.
- Decisions under policy item #67.10 would remain open to contrary interpretation by review/appellate authorities.

Option 2: Amend policy item #67.10 to remove the reference to three consecutive months

Under this option, the statement contained in policy item #67.10 which states, "Generally the employment lasts less than three consecutive months", would be removed.

Implications

- The three-month guideline would no longer be treated as the primary decisional criteria for determination of whether a worker had a casual pattern of employment at the time of the injury.
- Decisions-makers would have less guidance with respect to categorization of casual workers, with the only remaining guidance being that, "a casual worker is a worker who has a short-term/sporadic attachment to employment" and that, "a worker who works 'on call' for one or more employers may also be a casual worker".
- The policy would continue to lack sufficient guidance as to the categorization of workers.
- Given a lack of alternative guidance, the three month guideline would likely continue to be followed in practice.
- Decisions under policy item #67.10 would remain open to contrary interpretation by review/appellate authorities.
- This option may increase the number of review and appeal requests from workers, employers and stakeholders, due to differing applications of policy.

Option 3: Amend policy item #67.10 to make it clear that, when determining whether a worker's pattern of employment was casual in nature, the decision-maker should consider both the job at the time of the injury and the worker's pattern of employment. Further guidance would be provided as to the type of factors decision-makers should consider when determining whether a worker's pattern of employment at the time of injury was casual in nature

Under this option, policy item #67.10 would be amended to provide an overview of a two-step investigation of whether the worker's pattern of employment at the time of the injury was casual in nature. The initial stage of the investigation would focus on the worker's particular job at the time of the injury, including a consideration of the duration of the particular job. The second stage of the investigation would focus on the worker's pattern of employment over a longer

period of time, including consideration of a list of factors which may favour a worker's pattern of employment reflecting a casual pattern versus a regular pattern of employment.

The policy would be further amended to recognize that, even if the employer considers the work to be casual, this may not be conclusive of the issue.

A draft policy reflecting this option is attached as Appendix "C".

Implications

- Decision-makers would have more guidance with respect to categorization of casual workers.
- The three-month guideline would no longer be treated as the primary criteria for categorization of casual workers.
- Decision-makers would not only consider the worker's employment at the time of the injury but, where necessary, also consider a sufficiently long period for a pattern to be identifiable, which reflects the intention of the *Act*. This approach would require WCB officers to undertake additional investigation prior to determining a worker's categorization as casual.
- This option may result in fewer workers being categorized as a casual worker.
- This option would result in revision to practice, requiring additional training for decision-makers.

8. CONSULTATION

Stakeholders are invited to provide feedback on the discussion paper, options, draft policy, and any additional comments that may be relevant to the issue.

Stakeholder comments will be accepted until **September 14, 2005**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

By mail: Deborah Viccars
Policy Analyst
Policy and Research Division
Workers' Compensation Board
P.O. Box 5350, Stn. Terminal
Vancouver, B.C. V6B 5L5

By fax: 604 279-7599

By e-mail: policy@worksafebc.com

The WCB's governing body, the Board of Directors, will consider the options expressed by stakeholders before it adopts any amendments to the current policies.

Please note that all comments become part of the Policy and Research Division's database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.

APPENDIX "A"

REHABILITATION SERVICES & CLAIMS MANUAL VOLUME II

#65.00 GENERAL RULE FOR DETERMINING SHORT-TERM AVERAGE EARNINGS

Section 33.1(1) of the *Act* provides as follows:

Subject to sections 33.5 to 33.7, the Board must determine, for the shorter of the following periods, the amount of average earnings of a worker based on the rate at which the worker was remunerated by each of the employers for whom he or she was employed at the time of injury:

- (a) the initial payment period;
- (b) the period starting on the date of the worker's injury and ending on the date the worker's injury results in a permanent disability, as determined by the Board.

Except for a casual worker, a person who purchased coverage under section 2(2) of the *Act* and a worker with no earnings at the time of injury, the general rule for determining short-term average earnings is to use the worker's rate of pay at the date of injury up to the maximum wage rate permitted by the *Act*.

For workers who receive regular remuneration on a standard five-day work week, the determination of date of injury earnings will be based on the worker's actual earnings on the day of injury.

The Board recognizes that not all workers receive remuneration based on a five-day work week. Policy items #65.01, #65.02, and #65.03 detail how the Board will determine the earnings at the time of injury for workers in other circumstances.

APPENDIX "A"

REHABILITATION SERVICES & CLAIMS MANUAL VOLUME II

#66.00 GENERAL RULE FOR DETERMINING LONG-TERM AVERAGE EARNINGS

Section 33.1(2) of the *Act* provides:

Subject to sections 33.2 to 33.7, if a worker's disability continues after the end of the period referred to in subsection (1) (a) and (b) that is shorter for the worker, the Board must, for the period starting after the end of that shorter period, determine the amount of average earnings of the worker based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of the injury.

After a claim has lasted five weeks, the Board officer considers whether it is likely to last for ten weeks and, if the Board officer has not done so already, sets in motion any enquiries necessary for a possible 10-week average earnings review.

As part of the Board officer's enquiries, information will be obtained as to the worker's earnings for the 12-month period immediately preceding the date of injury. Information will also be obtained about the worker's tax status for the previous year.

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.

APPENDIX "A"

REHABILITATION SERVICES & CLAIMS MANUAL VOLUME II

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.

APPENDIX "A"

REHABILITATION SERVICES & CLAIMS MANUAL VOLUME II

#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.

APPENDIX "B"

PRACTICE DIRECTIVE #33B

CASUAL WORKERS

Effective Date: March 18, 2003

A. BACKGROUND

On June 30, 2002, the *Workers Compensation Act* (the "Act"), was amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. As a result, the Panel of Administrators approved amendments to the Board's policies.

This practice directive was first issued on November 20, 2002, in response to a request from Board officers for guidance in determining whether or not a worker should be categorized as a casual worker, for the purposes of determining average earnings under sections 33.1 to 33.7 of the *Act*.

On March 18, 2003, *Rehabilitation Services and Claims Manual* ("RSCM") Vol. II, Policy item #67.10, *Casual Workers*, was further amended, which necessitated a change to this practice directive. In particular, the reference to longshore workers in Policy item #67.10 was removed. Therefore, longshore workers were no longer automatically treated as casual workers for the purpose of establishing average earnings. These workers may now be categorized as regular, casual, or otherwise, depending upon the circumstances of the employment.

On October 31, 2003, in an effort to group all average earnings-related practice directives under a common heading, this practice directive was renumbered Practice Directive **#33B**. This renumbering coincided with amendments to Practice Directive #33, *Average Earnings* (please see "Background" section of Practice Directives #33A and #33C for more details).

Also on October 31, 2003, Practice Directive #56, *Secondary Employment*, was renumbered Practice Directive **#33D**. No substantive changes were made to either the *Casual Worker* or *Secondary Employment* practice directives.

B. PURPOSE

This practice directive assists Board officers in determining whether a worker should be categorized as casual (s.33.5) or regular (s.33.1(2)).

APPENDIX "B"

PRACTICE DIRECTIVE #33B

C. EFFECTIVE DATE

Since no substantive changes were made as a result of renumbering this practice directive, this directive continues to apply to all decisions made on or after March 18, 2003, on all claims to which the *Act*, as amended by Bill 49, applies. It continues to replace Practice Directive #55, *Casual Workers*, which was effective November 20, 2002.

Please see Practice Directive #38A, *Effective Dates and Transition Rules*, and Practice Directive #38B, *Reopenings and Recurrences*, for the appropriate transition rules.

D. LAW

The *Act* has two general rules: one for initial and another for long-term average earnings. For the purposes of this practice directive there are two notable exceptions to those rules.

Section 33.3 – Exception to section 33.1(2) – employed less than 12 months, states that:

In the case of a worker employed, on other than a casual or temporary basis, by the employer for less than 12 months immediately preceding the date of the injury, 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 person of similar status employed in the same type and classification of employment

(a) by the same employer, or

(b) If no person is so employed, by an employer in the same region.

Section 33.5, Exception to section 33.1 – casual worker, states:

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 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 the injury.

APPENDIX "B"

PRACTICE DIRECTIVE #33B

E. POLICY

RSCM Vol. II, Policy item #67.10, *Casual Workers*, states:

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...

F. DISCUSSION

The legislative intent of the Bill 49 changes, as evidenced by the general rule, is to compensate most workers based on their time of injury earnings for the first ten weeks, rather than on an average of the previous year's earnings. One exception to the general rule relates to those workers whose "*pattern of employment at the time of the injury is casual in nature*". In those cases, average earnings are set at the outset of the claim on the worker's 12-month prior earnings.

The Board does not wish to create an administrative burden by requesting long-term earnings information at the outset of most claims, nor was that the intent of the legislation. Therefore, the general initial average earnings rule prevails unless the worker meets the section 33.5 casual exception (or has purchased POP or is a Non-earner).

Section 33.3 relates to the determination of long-term average earnings for regular, permanent workers who have not yet been employed with their employer for 12 months. **Board officers should note that, when determining long-**

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term average earnings, section 33.3 specifically excludes those workers who work "on a casual or temporary basis".

As the legislative direction is clear, it is important that Board officers correctly categorize a worker at the onset of the claim, not after 5 or 10 weeks of benefits have been paid. This will be even more important in light of the provisions of Bill 63 which significantly restrict the Board's ability to reconsider its decisions.

G. ADJUDICATIVE GUIDELINES

Average earnings are arrived at by determining the appropriate category in the context of the worker's employment situation. As noted above, Policy item #67.10 discusses the following situations:

- 1. "A casual worker is a worker who has a short-term/sporadic attachment to employment. Generally the employment lasts less than three consecutive months."**

This policy is directive, in that workers with short-term/sporadic attachment to employment are casual. Given the policy's direction, and in order to ensure consistent and equitable treatment of workers in similar situations, it is the Division's position that, in the absence of clear evidence to the contrary, there is a presumption that any employment which lasts less than three consecutive months is casual employment. Clear evidence to the contrary might be evidence from the employer that although the one job will end within three months, the worker was expected to continue working for that employer in a different capacity. Other evidence might be that, although the time of injury position would have lasted less than three months, the worker had at the time of injury been employed by that employer on a continuous basis for more than three months.

- 2. "A worker who works "on call" for one or more employers may also be a casual worker."**

On Call with Single Employer

- a) Where a worker works varying shifts for the same employer on a continuous basis, he or she would normally be categorized as a regular worker. In such cases, although the work is unscheduled, the worker has an ongoing attachment to the employer i.e. – the worker is regularly called in to work and makes himself/herself available to that employer.

An example is a nurse who only works for one employer but reports to one of four hospital sites, all of which are managed by the same employer. Another example is a teacher who works for one school

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district but is assigned to different schools. These workers would be categorized as regular. Therefore, initial average earnings would be based on the earnings at the time of injury.¹ The long-term average earnings would be based on the general rule – i.e. the 12-month period immediately preceding the date of injury.

If the worker had not been employed with that employer for 12 months, section 33.3 [less than 12-month rule] would be applicable, as the nurse or teacher is neither casual nor temporary. Caution, however, should be exercised so that the average earnings of an appropriate similar status co-worker are comparable to that of an on-call worker.

- b) Where the on-call employment with the single employer is so sporadic, occasional and unpredictable that attachment to the employer cannot be demonstrated, a worker would be categorized as casual. An example is a worker who works on-call for only a few days a month, for the same employer, on an unscheduled basis.

On Call with Multiple Employers

Generally, these workers have no attachment to any one employer and have the ability to voluntarily decline work. It is the Division’s position that, in the absence of clear evidence to the contrary, any workers hired “on call” for a multitude of employers should be categorized as casual. This would include workers hired by temporary agencies and/or union hiring halls. These workers have a casual relationship with the agency or hiring hall – i.e. they are not regular workers of that agency/hiring hall, regardless of the number of assignments the agency/hiring hall refers the worker to.

However, clear evidence to the contrary might be evidence that, although the worker was hired “on call”, that particular assignment/job was expected to last longer than three consecutive months.

3. “Fishers”

The policy also notes that fishers (who do not own their own vessel) are generally treated as casual workers.

In addition to the foregoing, the following are other situations for which clarification has been requested:

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4. Workers with Temporary Assignments/Contracts

- Where the job with the employer is three or more months in duration, but has a known termination date, the worker will be categorized as regular, except where there is clear evidence to the contrary, in which case, they should be categorized as casual. Regular workers are entitled to an initial payment period based on their earnings at the time of injury.
- When determining long-term average earnings, where a worker on a temporary assignment does not meet the casual exception, the general rule prevails – i.e. the long-term average earnings would be based on the worker’s 12-month prior earnings. Board officers should note that the exception in section 33.3 [less than 12-month rule] is not applicable, as it specifically excludes “temporary basis” workers.
- For example: a worker is hired to work on a construction project for a six-month period and is injured on the third day of employment. This worker will be categorized as a regular worker who has a long-term temporary assignment. Initial and long-term average earnings would be calculated in accordance with the above.

5. Workers Recently Hired on Temporary Assignment with Unknown End Date

Where a worker is recently hired on a temporary assignment with an unknown end date, in the absence of clear evidence that the temporary assignment would have lasted three or more months, the worker will be categorized as a casual worker.

6. Workers Recently Hired on a Permanent Basis

Where there is clear evidence that a new employee is hired on a permanent basis, the worker would be categorized as a regular worker. Therefore, the initial average earnings would be based on the earnings at the time of injury. The long-term average earnings would be based on the section 33.3 exception [less than 12-month rule].

7. Workers with Seasonal Component to their Employment

The former policy relating to “seasonal workers” has been deleted. As well, there is no reference in the new legislation to these types of workers. There are a number of occupations that operate during a given season such as tree planters, berry pickers, harvesters, fishers and certain ski industry workers. Their jobs usually terminate at the end of a season. Despite the

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fact that the availability of work is seasonal, these workers are not, for that reason alone, categorized as casual. Claims for these types of workers should be handled in accordance with the preceding guidelines relating to sporadic/short-term attachment to the employer.

8. Workers Recently Hired on Probationary Basis

Probationary employment, (as opposed to a worker hired on a temporary basis with a possibility of extension) generally relates to the suitability of a worker in continuing a particular position, not the expected length of the employment or attachment to that employer at the time of injury. These workers would be categorized as regular workers. Therefore, the initial average earnings would be based on the earnings at the time of injury. The long-term average earnings would be based on the section 33.3 exception [less than 12-month rule].

9. Collective Agreements/Contracts

Collective agreements or other contracts might deem a worker as casual. However, for the purposes of determining average earnings, section 33, RSCM Vol. II Policy Item #67.10, and the practice directives prevail.

¹ See RSCM Vol. II, Policy item #65.01 *Variable Shift Workers*.

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#67.10 Casual Workers Pattern of Employment

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~~ 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.

This provision is applied in those situations where, due to the unpredictable, sporadic and/or transitory pattern of the worker's employment, the initial rate general rule would not provide an appropriate representation of a worker's loss of earnings. In these situations, it is considered that earnings over the 12-month period immediately before the date of injury more appropriately reflect the worker's loss of earnings.

~~A casual worker is a worker who has a short-term/sporadic attachment to the 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.~~

Determination of whether a worker's pattern of employment is casual in nature involves a two-step investigation.

- 1. The first step involves a consideration of the nature of the worker's job at the time of the injury. This will identify:**
 - (a) those workers to whom the section 33.1 general rule should apply;**
 - (b) those workers who are an apprentice or learner, to whom the section 33.2 exception applies;**
 - (c) those workers who are employed, on other than a casual or temporary basis, by the employer for less than 12 months**

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immediately preceding the date of the injury, to whom the section 33.3 exception applies; and

- (d) those workers who have purchased coverage under section 2(2) of the Act, to whom the section 33.6 exception applies.

Certain workers will not clearly fall within the above categories. An indicator that a worker may fall within the section 33.5 exception is that their job at the time of injury was not permanent and/or was scheduled to last less than three months. However, this is not conclusive of the issue and the second step of the investigation must then be undertaken.

2. Where a worker does not clearly fall within the above categories, the second step involves consideration of the worker's pattern of employment over a longer period of time. In order to determine whether the worker's pattern of employment is casual, it may be necessary to consider the worker's employment activities in the period prior to the injury. Normally, one year would be the maximum period of inquiry.

The following are factors or characteristics that may favour categorization of a worker's pattern of employment as casual in nature:

- The worker has uncertain or unpredictable working hours.
- The worker has a significant variation in weekly earnings.
- The worker has the option to accept or reject requests to work without penalty.
- The worker works "on call" for one or more employers. In certain cases, however, a worker who works on call for one or more employers may have predictable, consistent working hours which may reflect a regular pattern of employment for which the section 33.1 general rule might apply.

An employer's reference to a worker as a "casual worker" is not conclusive of the worker's categorization. All relevant factors must be considered and no single factor is determinative. Relevant factors not listed in policy may also be considered.

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After a decision-maker has considered the worker's attachment to employment, he or she must weigh the evidence to determine whether the worker's pattern of employment at the time of the injury was casual in nature.

~~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 Regulation* addresses the calculation of earnings for compensation benefits.~~