

DISCUSSION PAPER

1. TITLE

Reopenings Over Three Years

2. ISSUES

When a worker's claim is reopened more than three years after the original injury, WorkSafeBC ("WCB") may calculate compensation using either the original earnings or current earnings. This determination is based on whichever earnings more accurately reflect the worker's loss. Current policy provides detailed guidance on making this determination in the context of specific situations.

A number of challenges with the current policy have been identified. These challenges fall into three main areas:

- Whether the policy on reopenings after three years is more directive than the language of the *Workers Compensation Act* ("Act");
- Whether policy should address more situations that could arise when determining a worker's compensation; and
- Whether policy should clarify how the WCB determines whether three years have passed since the original injury occurred.

3. BACKGROUND

3.1 Law

Wage-loss payments are terminated when a worker's temporary disability ceases. This may happen either because the disability resolves or because it stabilizes and becomes a permanent impairment. In the latter event, the WCB may provide a permanent disability award.

In some cases, the original disability may return, either temporarily or as a permanent condition. In other cases, an existing permanent condition may increase in severity. If any of these events occur, the original claim may be reopened.

If a claim is reopened within three years of the original injury, the worker's benefits are based on the earnings at the time of the original injury. However, if a claim is reopened more than three years after the date of the original injury, the following provisions in the *Act* apply:

- When a temporary disability recurs, the WCB has the discretion to base compensation on either the worker's original earnings or the current earnings, whichever would more accurately represent the worker's loss;¹
- When a permanent disability occurs or increases in degree, the WCB has the discretion to base compensation on either the worker's earnings at the time of the original injury or the worker's current earnings.²

3.2 Current Policy

When a claim is reopened more than three years after the original injury, current policy provides a detailed set of guidelines to assist in determining whether benefits should be based on the worker's earnings at the time of the original injury or the worker's current earnings.³ The policy sets out a number of situations that could arise when a claim is reopened. The approach taken in each situation is to base a worker's compensation on the higher of the worker's original or current earnings, unless doing so misrepresents the worker's loss.

3.2.1 *Temporary Disabilities Recurring More Than Three Years After the Original Injury*

Policy first directs the WCB to ascertain whether the worker is employed at the time of the recurrence. If so, the next step is to compare the worker's current earnings with the earnings at the time of the original injury.

Policy then specifies that when the worker's current earnings exceed the original wage rate or are lower than the original wage rate due to the worker's personal choice or employment difficulties, current earnings will be used to calculate benefits.

If the worker is unemployed, policy directs the WCB to determine the reason for the worker's unemployment. If the worker's unemployed status is due to the effects of the original injury or disease, the original wage rate is used to calculate benefits.

If the worker's unemployed status is not due to the effects of the injury or disease, no wage-loss benefits are payable unless the disability produces a potential for loss of income by removing the worker as a participant in the labour force. The policy sets out a non-exhaustive list of questions to help decision-makers determine whether there is a potential for loss of income.

¹ Section 32(1) of the Act.

² Section 32(3) of the Act.

³ Policy item #70.20 *Reopenings Over Three Years, Rehabilitation Services & Claims Manual*, Volume II ("RS&CM") – attached as Appendix A.

3.2.2 Permanent Disabilities Occurring or Increasing in Degree More Than Three Years After the Original Injury

In the event a permanent disability occurs or increases in degree more than three years after the original injury, the detailed guidelines set out in section 3.2.1 above assist the WCB in determining whether to use the worker's original or current earnings to calculate benefits. As with temporary disabilities, compensation for permanent disabilities is based on the higher of the worker's original or current earnings, unless doing so leads to an unfair result.

Policy also provides additional guidance when a worker is unemployed, otherwise than through the effects of the injury, and there is no potential loss of earnings. In such cases, a worker may still receive a permanent disability award on a loss of function basis.

3.2.3 Prior Occasion When Section 32 Was Applied

Policy states that when a claim was previously reopened after three years and benefits were based on the worker's current earnings, any rate resulting from the earlier reopening is ignored for the purposes of the later reopening.

3.2.4 Personal Optional Protection

Current policy provides guidance in three specific situations regarding persons with Personal Optional Protection ("POP"):

- When a person has maintained POP coverage at the time of the reopening, the current rate of coverage is used to calculate benefits;
- When a person no longer has POP, the rate of coverage at the time of the original injury is used to calculate benefits; and
- If the person is a worker at the time of the reopening, the worker's current earnings are used to calculate benefits as long as the disability did not cause a reduction in earnings.

3.3 Practice

The Worker and Employer Services Division advises that in 2007, the number of claims reopened within three years of the original injury was 1,428. The figures for 2008 have not yet been finalized; however, the estimated number of claims is 1,453.

In 2007, the number of claims reopened more than three years after the original injury was 894 and the estimated number of claims for 2008 is 909.

The Review Division advises that in 2007 there were 7 requests for review regarding claims reopened within three years. In 2008, the Review Division received the same number of requests as in 2007.

In 2007, there were 57 requests for review regarding reopenings after three years and in 2008 there were 46.

4. DISCUSSION

The following section discusses the three main challenges that arise when claims are reopened after three years and that are not addressed by current policy. Possible approaches to these challenges are also discussed.

4.1 Directive Policy Language

The *Act* uses language that is discretionary. It states that the WCB *may* calculate a worker's compensation as if the recurrence were the happening of the injury. Current policy uses language that is more directive. For example, if a worker has reduced earnings due to personal choice, the policy states that current earnings *will* be used to calculate compensation benefits. This type of language may be seen as restricting the discretion provided to decision-makers by the *Act*. Revising policy to reflect the language of the *Act* would address this issue.

4.2 Circumstances Not Addressed in Policy

Although policy sets out a list of situations that may arise upon reopening a claim after three years, it does not set out all of the situations that may arise. This leads to gaps in policy that create uncertainty. There are circumstances that could arise at the time of reopening that are not presently addressed in policy, such as the following:

- Policy does not address workers who are employed but have no earnings at the time of the reopening. This situation could arise if a worker is receiving, or was recently receiving, compensation benefits or some other form of disability payments due to a different injury or illness. Policy is silent on how to calculate benefits for such workers who have recovered from an illness but have not yet returned to work at the time the original disability recurs and that disability produces a potential for loss of earnings.
- Policy does not address how benefits are calculated for a person who was a worker at the time of the original injury, is an independent operator or business owner at the time of the recurrence but has failed to purchase POP.
- Policy does not explain how a potential for loss of income created by a recurring disability should be addressed for persons with POP coverage.
- If a worker's current earnings are less than the original POP coverage, policy directs the WCB to evaluate the impact of the original injury on the

worker's current earnings. However, there is no guidance on what the evaluation should involve or the potential implications.

Due to the approach taken in the current policy of setting out specific situations, if situations arise which are not contemplated in policy, it is difficult to know how to calculate a worker's benefits. In considering alternative approaches to address this issue, the policies of other jurisdictions were reviewed. A number of other jurisdictions provide a general principle in policy, such as using whichever of the worker's earnings is greater, rather than setting out specific situations.⁴

A similar approach to the other jurisdictions could be taken by replacing the current detailed list of situations with a general principle. The general principle could set out that the worker's original earnings are compared with the current earnings and then whichever of these amounts is highest is used to calculate compensation, as long as doing so accurately represents the worker's loss. This is the approach taken in current policy, except that it appears in the context of specific situations rather than being set out as a general principle.

Given the discretionary nature of the *Act*, policy needs to be flexible to address potential situations that might arise where application of the general principle is unfair. Therefore, exceptions to the general principle could be set out in policy. These exceptions could state that the general principle would not be used if doing so would not accurately reflect the worker's loss. The list of exceptions would not be exhaustive. Decision-makers would have the discretion to depart from the general principle in other appropriate situations.

Another approach could be to expand the list of circumstances that may arise upon reopening. Circumstances that are not currently addressed in policy could be enumerated and expressly discussed. This would mean, in each situation, decision-makers would be guided by policy as to which earnings are used to calculate benefits.

The challenge with this approach is the difficulty in identifying every potential situation that is likely to arise. In addition, this more directive approach may be interpreted as limiting the discretion provided to decision-makers by the *Act*. It may also be possible that multiple situations could apply to one worker, leaving decision-makers unclear which to apply.

4.3 Determining Whether Three Years Have Passed Since the Original Injury

Policy does not currently explain how the WCB determines whether three years have passed since the original injury. In the case of temporary disabilities, the date of recurrence of the disability is determined by the date that the worker first experiences a loss of earnings, or potential loss of earnings. In the case of

⁴ See section 5 of this paper for a discussion of the approach taken by the other twelve Canadian jurisdictions.

permanent disabilities it is the date that the permanent disability occurs or increases in degree. This issue is important when a claim is reopened close to the three year anniversary of the original injury.

For example, if a temporary disability arises two days before the three year anniversary of the original injury and the worker stops working the same day, the policy on reopenings *within* three years applies and the worker's earnings at the time of the original injury will be used to calculate benefits.

However, if the worker continues to work through the three year anniversary date and does not lose income until a few days later, then the claim is considered to be reopened after three years. In this case, wage-loss benefits may be based on the worker's current earnings.

Policy could set out how the WCB determines whether three years have passed since the original injury. Doing so may reduce confusion and requests for review and appeals.

5. OTHER JURISDICTIONS

Of the twelve other Canadian jurisdictions, two have similar language to the British Columbia legislation.⁵ Like British Columbia, these two jurisdictions base compensation payments on whichever of the worker's earnings best represent the worker's actual loss. However, neither of the policies in the other two jurisdictions provide guidance on how to make this determination.

In practice, Nova Scotia uses a worker's original earnings unless there has been a substantive change in earnings since the original injury. Prince Edward Island almost always uses a worker's higher earnings, unless they are unusual for the worker and not representative of his or her actual loss.

Five jurisdictions use whichever of the worker's earnings is greater.⁶ Four jurisdictions use a worker's earnings at the time of the recurrence of disability.⁷ Of these, Newfoundland and Labrador, Northwest Territories and Nunavut have made provisions for workers with no earnings at the time of a recurrence. Newfoundland and Labrador can base compensation payments on the worker's previous twelve months of earnings, while Northwest Territories and Nunavut will use the worker's earnings at the time of the original occurrence of injury.

Aside from British Columbia, only four jurisdictions have a threshold time limit for a recurrence of disability.⁸ All four jurisdictions have a twelve month threshold that either starts from the date of the original occurrence of injury or from the end of the initial loss of earnings period.

⁵ Nova Scotia and Prince Edward Island.

⁶ Alberta, Ontario, Quebec, Saskatchewan and Yukon.

⁷ Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories and Nunavut.

⁸ Alberta, Newfoundland and Labrador, Nova Scotia and Prince Edward Island.

Apart from the four jurisdictions that always use a worker's higher earnings rate to set compensation payments and don't have a time threshold, Prince Edward Island is the only jurisdiction that will use the date a worker becomes entitled to healthcare benefits as the triggering date of the recurrence policy. The remaining jurisdictions all treat the claim file as being reopened on the date that a worker ceases working and suffers a loss of earnings from the recurrence of disability.

6. OPTIONS AND IMPLICATIONS

Option 1: Status Quo

Under this option, the policy on reopenings after three years would remain unchanged.

Implications

- The mandatory language in some sections of the policy may not reflect the discretionary language in the *Act*.
- Some circumstances that may arise upon the reopening of a claim more than three years after the original injury may not be addressed by policy. As a result, it could be unclear how the WCB would calculate compensation benefits in such cases.
- Guidance in determining whether three years have passed since the original injury would not be set out in policy.

Option 2: Set Out a General Principle in Policy

Under this option, policy would:

- Set out the current policy's general principle of basing a worker's compensation on the higher of the worker's original earnings or current earnings.
- Provide guidance on how to determine whether a worker is experiencing a potential loss of earnings.
- Provide a non-exhaustive list of exceptions to the general principle, which would include situations when a worker has reduced or no earnings for reasons other than the disability.
- Clarify how the WCB determines whether three years have passed since the date of the original injury.

Implications

- Policy would no longer identify specific situations that arise when a claim is reopened.
- The general principle would guide decision-makers on how to calculate a worker's benefits in many different situations, without enumerating each situation that could arise.
- The exceptions to the general principle would allow flexibility in situations when application of the general principle might have an unfair result. This ensures that whichever earnings most accurately reflect the worker's loss are used to calculate compensation.
- The language of the policy would reflect the discretionary language of the *Act*.
- Due to the increased flexibility of the policy, there may be more requests for reviews and appeals.

Option 3: Amend Policy to Include More Situations

Under this option, policy would not expressly state a general principle, but would instead be expanded to address an increased number of circumstances that may arise upon reopening a claim after three years, including situations when:

- A worker is employed but has no earnings;
- An independent operator or business owner has failed to purchase POP at the time of the recurrence, but was a worker at the time of the original injury; and
- A person had POP at the time of the original injury, but has no coverage at the time of the recurrence and has a potential loss of income.

Implications

- Policy would set out how the WCB addresses an increased number of circumstances that could arise upon reopening a claim.
- Policy cannot address every circumstance that could arise. Therefore, when circumstances arise that are not contemplated in policy, it may be unclear on how benefits should be calculated.
- If more than one situation described in policy applies to a worker, stakeholders and decision-makers may be unclear how to apply the policy.
- This more directive approach may lead to a decrease in the number of requests for reviews and appeals.

7. 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 **October 2, 2009**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

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WorkSafeBC'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*.

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#70.20 Reopenings Over Three Years

Section 32 of the *Act* provides:

- (1) For the purpose of determining the amount of compensation payable where there is a recurrence of temporary total disability or temporary partial disability after a lapse of 3 years following the occurrence of the injury, the Board may calculate the compensation as if the recurrence were the happening of the injury if it considers that by doing so the compensation payable would more nearly represent the percentage of actual loss of earnings suffered by the worker by reason of the recurrence of the injury.
- (2) Where a worker has been awarded compensation for permanent partial disability for the original injury and compensation for recurrence of temporary total disability under subsection (1) is calculated by reference to the average earnings of the worker at the date of the recurrence, the compensation must be without deduction of the compensation payable for the permanent partial disability; but the total compensation payable must not exceed the maximum payable under this Part at the date of the recurrence.
- (3) Where more than three years after an injury a permanent disability or an increased degree of permanent disability occurs, the compensation payable for the permanent disability or increased degree of permanent disability may be calculated by reference to the average earnings of the worker at the date of the occurrence of the permanent disability or increased degree of permanent disability.

Section 32 of the *Act* gives the Board discretion to determine compensation benefits on a reopening of a claim more than three years after an injury by reference to the worker's current earnings.

The guidelines set out below apply in situations where there is a recurrence of temporary disability or an occurrence of or increase in a permanent disability over three years after an injury or disablement from occupational disease.

In applying this policy, where the original wage rate was set before June 30, 2002, the wage rate must be reset in order to convert it from a rate based on 75% of gross average earnings to a rate based on 90% of average net earnings. This conversion will involve using information from the time of the original injury plus applicable cost of living adjustments, and the relevant tax provisions at the time of recurrence. A second wage rate calculation based on

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the worker's earnings at the time of the recurrence must be done in accordance with the *Act*. This enables the Board to determine which average earnings calculation best represents the worker's loss of earnings.

Where a worker does not fall within any of the exceptions provided for in sections 33.5 to 33.7 of the *Act* and it is determined that compensation is payable as if the recurrence were the happening of the injury such that a new wage rate is established based on the earnings at the time of recurrence, the initial payment period provided in section 33.1(1) of the *Act* will recommence.

1. **Temporary Disability Recurring After Three Years Where the Worker Is Employed**

(a) **Worker's Current Earnings Exceed the Rate Originally Set On the Claim**

Where the worker's earnings at the time of the recurrence of disability exceed the earnings rate originally set on the claim (or the review rate, if applicable) plus cost of living adjustments, section 32(1) is normally applied so as to treat the recurrence of disability as the happening of the injury. Wage-loss compensation is based on the worker's earnings immediately prior to the recurrence and, where there is an existing permanent partial disability award granted in respect of the original injury, section 32(2) applies. Therefore, the permanent disability periodic payment is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. (14) Where required under the *Act*, a 10-week rate review will be carried out. Any cost of living adjustments following the recurrence will be applied in accordance with section 25 of the *Act*.

(b) **Worker Is Employed at the Same Rate as Originally Set On the Claim**

Where the worker is employed at the same rate as originally set on the claim (or review rate, if applicable), the previous rate will be used plus applicable cost of living adjustments. The discretion contained in section 32(1) will not be exercised.

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(c) **Worker Is Employed at a Lower Rate than Originally Set On the Claim**

Where the worker is employed at a lower rate than the rate originally set on the claim (or review rate, if applicable) plus applicable cost of living adjustments, a determination will be made as to the reason for the lower figure.

(i) **Reduced Earnings Due to Effects of the Injury or Disease Accepted On the Claim**

If it is determined that the reduced earnings level is due to the effects of the injury or disease accepted on the claim, the rate originally set on the claim (or review rate, if applicable) plus applicable cost of living adjustments will be used on the reopening. Care must be exercised in making this determination to ensure that consistency is maintained with prior decisions reached on the claim. If, for example, a prior decision has been reached that a permanent disability award or higher award which the worker asked for should not be awarded because the worker was capable of undertaking certain occupations, it will not now be possible to conclude that the worker's not being employed in those occupations is due to the effects of the injury.

(ii) **Reduced Earnings Due to Personal Choice**

If it is determined that the lower earnings level is due to a matter of personal choice on the part of the worker, such as, for example, a voluntary change in lifestyle, the reduced earnings figure will be used on reopening to calculate the worker's wage rate. Section 32 will be applied and the rules set out in (a) above will apply in relation to the reduced figure.

(iii) **Reduced Earnings Due to Employment Situation**

If it is determined that the reduced earnings at the time of the reopening are due to employment difficulties occasioned by economic circumstances, section 32 applies and the recurrence of disability is treated as the happening of the injury. Where there is an existing permanent partial disability award granted

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in respect of the original injury, section 32(2) applies and the award is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. The current rate of earnings will be used. When required by the *Act*, a 10-week rate review is carried out. Since the 10-week review generally permits a consideration of the 12 months immediately preceding the date of injury, it will have the effect of adjusting for the long term any temporary aberrations in earnings capacity caused by economic fluctuations.

Any cost of living adjustments occurring in the twelve months following the recurrence will, by virtue of section 25(3), not be applicable to the wage-loss payments being made.

2. **Temporary Disability Recurring After Three Years Where the Worker Is Unemployed**

Where the worker is unemployed at the time of the reopening, a determination will be made of the reasons for this.

(a) **Where Unemployed Status Is Due to the Effects of the Injury or Disease**

If it is determined that the unemployed status prior to the recurrence is due to the effects of the injury or disease accepted on the claim, the wage rate originally set on the claim (or the review rate, if applicable) plus applicable cost of living adjustments will be used. The discretion in section 32 will not be exercised. As in 1(c)(i) above, care must be exercised to ensure that the determination is consistent with prior decisions on the claim.

(b) **Where Unemployed Status Is Not Due to Effects of the Injury or Disease**

If it is determined that the worker's unemployed status prior to the recurrence is not due to the effects of the injury or disease accepted on the claim, no wage-loss benefits are payable unless the disability following reopening will produce a potential for loss of income by removing the worker as a

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viable entity in the labour force. In the latter case, benefits will be paid on the basis of the wage rate originally set on the claim (or the review rate, if applicable) plus applicable cost of living adjustments. In determining whether there is a “potential loss”, the following are among the questions that might be considered.

- (i) Was the worker’s unemployment a matter of personal choice?
- (ii) Does the worker’s lifestyle render it unlikely that he or she will, in practice, obtain employment? For example, if the worker has moved to a remote area where there are virtually no employment opportunities, this would indicate that there was no potential loss.
- (iii) Are there any other health conditions or personal problems that limit the possibility of employment?
- (iv) Was the worker being paid Employment Insurance benefits? Since the payment of such benefits requires a confirmation that the worker is fit for work, this would be an indicator that there was a potential loss.
- (v) Has the worker been making an active, ongoing, job search? Has the worker registered with the Human Resources and Development Commission?
- (vi) Has the worker maintained union status, remained available for dispatch to jobs, been dispatched to jobs or declined offers of dispatch?
- (vii) Was the worker listed as seeking employment by the Ministry of Human Resources?

3. **Permanent Disability Occurring or Increasing More Than Three Years After Injury**

The rules set out above in relation to wage-loss benefits are, in general, equally applicable to permanent disability awards. These rules have the effect that in one situation no wage-loss benefits are paid, notably when the worker is unemployed otherwise than through the effects of the injury and it is determined that there is no

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potential loss of earnings. A permanent disability award assessed on a loss of function basis under section 23(1) of the *Act* should, however, be paid in that situation and (subject to any appropriate wage rate review being carried out) calculated on the basis of the wage rate originally set on the claim plus applicable cost of living adjustments. Permanent disability awards are distinguishable from wage-loss benefits since the awards concern the long term situation as opposed to the current situation. Refer to Chapter 6, Permanent Disability Awards, for a discussion regarding the methods of assessing permanent disability awards. A permanent disability award is payable under section 23(1) for significant impairments even though the worker has returned to work with no loss of earnings and may not have a loss of earnings in the future. Even though a person is unemployed at the time of a section 23(1) assessment, and does not now foreseeably have an actual loss of earnings, it does not mean that the person should not receive an award under section 23(1). However, the situation is different for projected loss of earnings awards under section 23(3). Since that assessment aims to predict the worker's actual loss of earnings over the future, no award can be made when the worker is unemployed for reasons unrelated to the injury and it is determined that there will not be a potential loss of earnings.

4. **Prior Occasion When Section 32 Was Applied**

Where, on a previous reopening of the claim, section 32 or its predecessor has been used to base compensation on the current earnings, any rate resulting from the application of that section is ignored for the purposes of a later reopening.

Where, according to the guidelines set out above, compensation would normally be based on the worker's pre-injury earnings, but it is found impossible or impractical to obtain those earnings, section 32(1) or (3) may be applied, unless this will result in a rate of compensation significantly less than that to which the pre-injury earnings would probably have entitled the worker.

5. **Re-openings for Persons with Personal Optional Protection**

In the case of a reopening over three years from the date of injury:

- Where the person has maintained personal optional protection coverage at the time of reopening, the Board will determine the person's average earnings based on the current rate of coverage.

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- Where the person no longer has personal optional protection, the Board will determine average earnings based on the initial personal optional protection rate plus the appropriate cost of living adjustments.
- Where the person is now employed in circumstances where there is compulsory coverage for worker so that the person is considered to be a worker under the *Act*, the rate on reopening will be based on the worker's current average earnings. An evaluation is required as to the impact of the original injury on the worker's current average earnings where the worker's average earnings are lower than the amount of personal optional protection the worker had at the time of the injury.

EFFECTIVE DATE: March 3, 2003 (as to deletion of references to recurrence and new injury)

APPLICATION: Not applicable.

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ADDITIONS IN BOLD AND DELETIONS STRUCKTHROUGH

#70.20 Reopenings Over Three Years

Section 32 of the *Act* provides:

- (1) For the purpose of determining the amount of compensation payable where there is a recurrence of temporary total disability or temporary partial disability after a lapse of 3 years following the occurrence of the injury, the Board may calculate the compensation as if the recurrence were the happening of the injury if it considers that by doing so the compensation payable would more nearly represent the percentage of actual loss of earnings suffered by the worker by reason of the recurrence of the injury.
- (2) Where a worker has been awarded compensation for permanent partial disability for the original injury and compensation for recurrence of temporary total disability under subsection (1) is calculated by reference to the average earnings of the worker at the date of the recurrence, the compensation must be without deduction of the compensation payable for the permanent partial disability; but the total compensation payable must not exceed the maximum payable under this Part at the date of the recurrence.
- (3) Where more than three years after an injury a permanent disability or an increased degree of permanent disability occurs, the compensation payable for the permanent disability or increased degree of permanent disability may be calculated by reference to the average earnings of the worker at the date of the occurrence of the permanent disability or increased degree of permanent disability.

This policy sets out how the Board determines compensation benefits if a worker's temporary disability recurs, or a permanent disability occurs or increases, more than three years after the date of the original compensable injury.

When a temporary disability recurs more than three years after the original injury, section 32(1) of the *Act* gives the Board the discretion to calculate a worker's compensation as if the recurrence were the happening of the injury. This means the Board may use the worker's earnings at the time of the recurrence to calculate compensation benefits. The date used by the Board to determine whether more than three years have passed since the original injury, is the date the worker first experiences a loss of earnings, or potential loss of earnings, due to the recurrence of temporary disability.

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When a permanent disability occurs or increases in degree more than three years after the original injury, section 32(3) of the *Act* applies. This means the Board may use the worker's earnings at the time that the permanent disability occurs or increases in degree to calculate benefits. The date used by the Board to determine whether more than three years have passed since the original injury is the date the permanent disability occurs or increases in degree.

1. GENERAL PRINCIPLE

The following general principle applies when a temporary disability recurs, or a permanent disability occurs or increases in degree, and causes either a loss of earnings or a potential loss of earnings.

The Board generally bases compensation benefits on the higher of:

- (a) the worker's earnings at the time of the original injury, plus the applicable cost of living adjustments; and
- (b) the worker's current earnings, at the time of the recurrence of temporary disability, or the occurrence or increase in degree of permanent disability.

If these two amounts are equal, compensation benefits are based on the worker's current earnings.

~~Where a worker does not fall within any of the exceptions provided for in sections 33.5 to 33.7 of the *Act* and it is determined that compensation is payable as if the recurrence were the happening of the injury such that a new wage rate is established based on the earnings at the time of recurrence, If the current earnings are used to calculate compensation benefits for a recurring temporary disability, the initial payment period provided in section 33.1(1) of the *Act* will recommence.~~

When comparing a worker's earnings, the Board looks at the wage rate originally set on the claim. If a long-term wage rate was previously set, the Board compares it to the worker's current earnings, which are determined in accordance with sections 33.1 to 33.7 of the *Act*. If no long-term wage rate was previously set, then the short-term wage rate is used to make the comparison.

~~In applying this policy, where~~ If the original wage rate on the claim was set before June 30, 2002, **it may be necessary to recalculate that wage rate must be reset in order to convert it from a rate based on 75% of gross average earnings to a rate based on 90% of average net earnings.** This conversion ~~will involve~~ using information from **the worker's earnings at the time of the original injury plus applicable cost of living**

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adjustments, and the relevant tax provisions at the time of **the recurrence of the temporary disability or at the time the permanent disability occurs or increases in degree**. ~~A second wage rate calculation based on the worker's earnings at the time of the recurrence must be done in accordance with the Act. This enables the Board to determine which average earnings calculation best represents the worker's loss of earnings.~~

~~Any~~ **Cost of living adjustments that occurring pursuant to section 25(3) of the Act in the first twelve months following the recurrence of the temporary disability, or increase or occurrence of the permanent disability, are** ~~will, by virtue of section 25(3), not be applicable to the wage loss payments being made.~~ **compensation benefits calculated in accordance with this policy.**

1.1 Potential Loss of Earnings

The general principle may still apply when, at the time of the recurrence of temporary disability, or occurrence or increase in degree of permanent disability, a worker has reduced or no earnings for reasons unrelated to the disability, but the disability produces a potential for loss of earnings. In these cases, the Board may use the worker's earnings at the time of the original injury, plus the applicable cost of living adjustments, to calculate compensation benefits.

In determining if there is a potential loss of earnings, the factors the Board may consider include the following:

- (a) If the worker is unemployed or has reduced earnings, is it likely that he or she would have found work or earned a higher income if not for the disability? If yes, this may indicate that there is a potential loss. However, if an economic downturn or other employment difficulties caused the worker's earnings to decrease, this may indicate there is no potential loss.
- (b) If the worker is unemployed, does the worker's lifestyle render it unlikely that he or she will obtain employment? For example, if the worker moved to a remote area where there are limited employment opportunities, this may indicate that there is no potential loss.
- (c) If the worker is unemployed, is the worker actively searching for a job? Has the worker registered with any provincial or federal government agencies to assist in the job search? If so, this may indicate there is a potential loss.

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- (d) **Are there any other non-compensable health conditions or personal problems that limit the possibility for the worker to earn an increased income, or gain employment? If so, this may indicate that there is no potential loss.**
- (e) **Has the worker maintained union status? If the worker has remained available for dispatch to jobs, or been dispatched to jobs, then this may indicate a potential loss. If the worker has declined offers of dispatch, this may indicate no potential loss.**
- (f) **Was the worker recently on some form of worker's compensation benefits or other disability benefits due to a different disability? Has the worker since recovered but not yet returned to work? If so, this may indicate a potential loss.**

2. EXCEPTIONS

Exceptions to the general principle may occur if a worker has reduced or no earnings at the time of the recurrence of the temporary disability, or at the time the permanent disability occurs or increases in degree, for reasons unrelated to the disability. Examples include, but are not limited to the following:

- **If the worker has no current earnings for reasons unrelated to the disability and there is no potential loss of earnings, then no wage-loss benefits are payable. In cases when a permanent disability occurs or increases in degree, the worker may be eligible for benefits under section 23(1) of the Act. If eligibility is established, the award under section 23(1) of the Act is calculated on the basis of the worker's earnings at the time of the original injury, plus applicable cost of living adjustments.**
- **If the worker has reduced earnings for reasons unrelated to the disability and the disability does not prevent the worker from earning an increased income, then compensation benefits are based on the worker's earnings at the time of the recurrence, or the occurrence or increase of degree of permanent disability.**

3. WORKER RECEIVING PERMANENT PARTIAL DISABILITY AWARD FOR THE SAME DISABILITY

When ~~W~~wage-loss compensation for a recurrence of a temporary total disability is based on the worker's **current earnings immediately prior to the recurrence and, ~~where~~ **when** there is an existing permanent partial disability award granted in respect of the**

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original injury, section 32(2) applies. Therefore, the permanent disability periodic payment is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence.

4. PERSONS WITH PERSONAL OPTIONAL PROTECTION

This policy applies to persons who purchased Personal Optional Protection at the time of the original injury and/or at the time of the recurrence of the temporary disability, or occurrence or increase in degree of the permanent disability.

Compensation benefits for such persons are calculated in accordance with this policy, except that the Board will use the amount of Personal Optional Protection coverage purchased in determining the person's earnings.

5. PRIOR OCCASION WHEN SECTION 32 WAS APPLIED

Where ~~if~~, on a previous reopening of the claim, section 32 ~~of the Act~~ or its predecessor ~~has been~~**was** used to base compensation on the **worker's** current earnings, any rate resulting from the **previous** application of that section **32** is ignored for the purposes of ~~a~~ **at the time of the** later reopening.

~~1. Temporary Disability Recurring After Three Years Where the Worker Is Employed~~

~~(a) Worker's Current Earnings Exceed the Rate Originally Set On the Claim~~

~~Where the worker's earnings at the time of the recurrence of disability exceed the earnings rate originally set on the claim (or the review rate, if applicable) plus cost of living adjustments, section 32(1) is normally applied so as to treat the recurrence of disability as the happening of the injury. (14) Where required under the Act, a 10-week rate review will be carried out. Any cost of living adjustments following the recurrence will be applied in accordance with section 25 of the Act.~~

~~(b) Worker Is Employed at the Same Rate as Originally Set On the Claim~~

~~Where the worker is employed at the same rate as originally set on the claim (or review rate, if applicable), the previous rate will be used plus applicable cost of living adjustments. The discretion contained in section 32(1) will not be exercised.~~

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~~(c)~~ **Worker Is Employed at a Lower Rate than Originally Set On the Claim**

~~Where the worker is employed at a lower rate than the rate originally set on the claim (or review rate, if applicable) plus applicable cost of living adjustments, a determination will be made as to the reason for the lower figure.~~

~~(i)~~ **Reduced Earnings Due to Effects of the Injury or Disease Accepted On the Claim**

~~If it is determined that the reduced earnings level is due to the effects of the injury or disease accepted on the claim, the rate originally set on the claim (or review rate, if applicable) plus applicable cost of living adjustments will be used on the reopening. Care must be exercised in making this determination to ensure that consistency is maintained with prior decisions reached on the claim. If, for example, a prior decision has been reached that a permanent disability award or higher award which the worker asked for should not be awarded because the worker was capable of undertaking certain occupations, it will not now be possible to conclude that the worker's not being employed in those occupations is due to the effects of the injury.~~

~~(ii)~~ **Reduced Earnings Due to Personal Choice**

~~If it is determined that the lower earnings level is due to a matter of personal choice on the part of the worker, such as, for example, a voluntary change in lifestyle, the reduced earnings figure will be used on reopening to calculate the worker's wage rate. Section 32 will be applied and the rules set out in (a) above will apply in relation to the reduced figure.~~

~~(iii)~~ **Reduced Earnings Due to Employment Situation**

~~If it is determined that the reduced earnings at the time of the reopening are due to employment difficulties occasioned by economic circumstances, section 32 applies and the recurrence of disability is treated as the happening of the injury. Where there is an existing permanent partial disability award granted in respect of the original injury, section 32(2)~~

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~~applies and the award is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. The current rate of earnings will be used. When required by the Act, a 10-week rate review is carried out. Since the 10-week review generally permits a consideration of the 12 months immediately preceding the date of injury, it will have the effect of adjusting for the long term any temporary aberrations in earnings capacity caused by economic fluctuations.~~

~~2. Temporary Disability Recurring After Three Years Where the Worker Is Unemployed~~

~~Where the worker is unemployed at the time of the reopening, a determination will be made of the reasons for this.~~

~~(a) Where Unemployed Status Is Due to the Effects of the Injury or Disease~~

~~If it is determined that the unemployed status prior to the recurrence is due to the effects of the injury or disease accepted on the claim, the wage rate originally set on the claim (or the review rate, if applicable) plus applicable cost of living adjustments will be used. The discretion in section 32 will not be exercised. As in 1(c)(i) above, care must be exercised to ensure that the determination is consistent with prior decisions on the claim.~~

~~(b) Where Unemployed Status Is Not Due to Effects of the Injury or Disease~~

~~If it is determined that the worker's unemployed status prior to the recurrence is not due to the effects of the injury or disease accepted on the claim, no wage-loss benefits are payable unless the disability following reopening will produce a potential for loss of income by removing the worker as a viable entity in the labour force. In the latter case, benefits will be paid on the basis of the wage rate originally set on the claim (or the review rate, if applicable) plus applicable cost of living adjustments. In determining whether there is a "potential loss", the following are among the questions that might be considered.~~

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- (i) ~~Was the worker's unemployment a matter of personal choice?~~
- (ii) ~~Does the worker's lifestyle render it unlikely that he or she will, in practice, obtain employment? For example, if the worker has moved to a remote area where there are virtually no employment opportunities, this would indicate that there was no potential loss.~~
- (iii) ~~Are there any other health conditions or personal problems that limit the possibility of employment?~~
- (iv) ~~Was the worker being paid Employment Insurance benefits? Since the payment of such benefits requires a confirmation that the worker is fit for work, this would be an indicator that there was a potential loss.~~
- (v) ~~Has the worker been making an active, ongoing, job search? Has the worker registered with the Human Resources and Development Commission?~~
- (vi) ~~Has the worker maintained union status, remained available for dispatch to jobs, been dispatched to jobs or declined offers of dispatch?~~
- (vii) ~~Was the worker listed as seeking employment by the Ministry of Human Resources?~~

3. ~~Permanent Disability Occurring or Increasing More Than Three Years After Injury~~

~~The rules set out above in relation to wage-loss benefits are, in general, equally applicable to permanent disability awards. These rules have the effect that in one situation no wage-loss benefits are paid, notably when the worker is unemployed otherwise than through the effects of the injury and it is determined that there is no potential loss of earnings. A permanent disability award assessed on a loss of function basis under section 23(1) of the Act should, however, be paid in that situation and (subject to any appropriate wage rate review being carried out) calculated on the basis of the wage rate originally set on the claim plus applicable cost of living adjustments. Permanent disability awards are distinguishable from wage-loss benefits since the awards concern the long term situation as opposed to the current situation. Refer to Chapter 6,~~

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~~Permanent Disability Awards, for a discussion regarding the methods of assessing permanent disability awards. A permanent disability award is payable under section 23(1) for significant impairments even though the worker has returned to work with no loss of earnings and may not have a loss of earnings in the future. Even though a person is unemployed at the time of a section 23(1) assessment, and does not now foreseeably have an actual loss of earnings, it does not mean that the person should not receive an award under section 23(1). However, the situation is different for projected loss of earnings awards under section 23(3). Since that assessment aims to predict the worker's actual loss of earnings over the future, no award can be made when the worker is unemployed for reasons unrelated to the injury and it is determined that there will not be a potential loss of earnings.~~

~~4. Prior Occasion When Section 32 Was Applied~~

~~Where, according to the guidelines set out above, compensation would normally be based on the worker's pre-injury earnings, but it is found impossible or impractical to obtain those earnings, section 32(1) or (3) may be applied, unless this will result in a rate of compensation significantly less than that to which the pre-injury earnings would probably have entitled the worker.~~

~~5. Re-openings for Persons with Personal Optional Protection~~

~~In the case of a reopening over three years from the date of injury:~~

- ~~• Where the person has maintained personal optional protection coverage at the time of reopening, the Board will determine the person's average earnings based on the current rate of coverage.~~
- ~~• Where the person no longer has personal optional protection, the Board will determine average earnings based on the initial personal optional protection rate plus the appropriate cost of living adjustments.~~
- ~~• Where the person is now employed in circumstances where there is compulsory coverage for worker so that the person is considered to be a worker under the Act, the rate on reopening will be based on the worker's current average earnings. An evaluation is required as to the impact of the original injury on the worker's current average earnings where the worker's average earnings are lower than the amount of personal optional protection the worker had at the time of the injury.~~

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EFFECTIVE DATE: ~~March 3, 2003 (as to deletion of references to recurrence and new injury)~~ TBD

APPLICATION: ~~Not applicable.~~