

DISCUSSION PAPER

1. TITLE

Variable Earnings

2. ISSUES

At issue is whether the policy for calculating a variable shift worker's short-term average earnings should be expanded to include on call workers who are employed with one or more employers on a regular basis at variable rates of pay.

In addition, the following issues also require attention:

- What time period should be used to determine short-term average earnings for workers covered under this policy?
- What kind of absences from work should be excluded from the short-term average earnings calculations?
- Is policy clarification required to ensure consistent use of the terms "date of injury earnings" and "time of injury earnings"?

3. BACKGROUND

On August 13, 2008 WorkSafeBC ("WCB") published a discussion paper concerning the variable shift workers policy. A number of stakeholders made submissions that questioned the intent of the proposed policy amendments. This paper has been developed to address the stakeholders' concerns and to clarify the intent of the policy changes.

3.1 Law and Policy

The *Workers Compensation Act* ("Act") sets out a general rule for determining an injured worker's short-term wage loss benefits. The rule requires the WCB to base the short-term rate on the worker's average earnings at the time of injury.¹

The *Act* also sets out exceptions to the general rule for calculating short-term average earnings for some workers. These exceptions include casual workers,² persons with Personal Optional Protection,³ and persons with no earnings on the date of injury.⁴ There are specific statutory directions on calculating the rate of pay for these workers.

¹ Section 33.1(1) of the *Act*.

² Section 33.5 of the *Act*.

³ Section 33.6 of the *Act*.

⁴ Section 33.7 of the *Act*.

The term “time of injury” is not defined in the *Act*. Therefore, it is open to the WCB to set policy on what time period should be used to best reflect the worker’s short-term loss. The legislation and policy set out the following rules and exceptions for calculating short-term average earnings:

- For regularly employed workers who are remunerated on a standard five-day work week, average earnings are based on the worker’s rate of pay at the date of injury.⁵ For example, a construction worker who is regularly employed in a series of short-term contracts with different employers at the same rate on each job would fall into this category.
- For workers who are regularly employed on a varying shift cycle basis, average earnings are based on the three month period immediately preceding the injury.⁶ For example, a maintenance worker who is regularly employed but works shifts with no repeating pattern would fall into this category.
- For casual workers, average earnings are based on the earnings in the twelve month period immediately preceding the injury.⁷ For example, an on call nurse who does not have regular, predictable earnings or working hours may fall into this category.
- The casual workers policy expressly states that it does not apply to certain workers. For example, it does not apply to those who work on call for one or more employers with predictable, consistent working hours that reflect a regular pattern of employment. An example is an on call film worker who is employed by different employers on a regular basis at differing rates of pay.

4. DISCUSSION

The following section discusses the issues with the current policy and the key themes raised by stakeholders during the first round of consultation. A detailed overview of stakeholder submissions is contained in Appendix A.

4.1 On call workers with variable rates of pay

Policy is currently silent as to the appropriate treatment for regularly employed on call workers with variable earnings, for example, on call film workers who work for different employers at different rates of pay. For these workers it may not be appropriate to base average earnings on the rate of pay on the day of injury. Doing so could result in a short-term wage rate that is either too high or too low, resulting in significant over or under compensation for the first ten weeks of benefits.

⁵ Policy item #65.00 *General Rule for Determining Short-Term Average Earnings*.

⁶ Policy item #65.01 *Variable Shift Workers*.

⁷ Section 33.5 of the *Act* and policy item #67.10 *Casual Pattern of Employment*.

The WCB's current practice is to treat these types of workers in the same manner as variable shift workers, namely, by averaging their earnings over a three month period. Expanding the variable shift workers policy to expressly include on call workers who are regularly employed at different rates of pay would:

- better reflect the on call worker's short-term loss of earnings;
- limit situations where the short-term wage rates are either too high or too low;
- limit situations where there is a big difference between the short-term and long-term wage rate; and
- set out for decision-makers and stakeholders how the WCB will establish the short-term wage rate for these workers.

Long-term average earnings at the ten week point of the claim would continue to be calculated based on the prior 12 months of earnings, as required by the *Act*. Date of injury earnings would continue to be used to set the short-term wage rate for on call workers who work for different employers but who are regularly employed at the same rate of pay on each job.

4.2 “Date of Injury Earnings” and “Time of Injury Earnings”

The *Act* directs the WCB to calculate a worker's short-term average earnings at the time of injury.⁸ A number of policies on short-term average earnings, including the variable shift workers policy, refer to “date of injury earnings”.⁹

For regularly employed workers with regular earnings, the rate of pay on the date of injury is an appropriate reflection of the workers' average earnings and the short-term loss. However, for other workers, including variable shift workers and on call workers who have variable rates of pay, a longer period may be required to calculate average earnings and to give a more accurate reflection of the short-term loss.

It may therefore be more appropriate to change the term “date of injury earnings” to “time of injury earnings” in the short-term average earnings policies. As the latter term follows the language in the *Act*, it would be more accurate and consistent use of terminology.

The policy on the general rule for determining short-term average earnings contains another challenge with wording. The policy refers to “actual earnings on the day of injury”.¹⁰ This has raised issues because it is a narrow term which could mean the amount of money the employer paid the worker on the day of

⁸ Section 33.1(1) of the *Act*.

⁹ Policy items #65.00 *General Rule for Determining Short-Term Average Earnings*, #65.01 *Variable Shift Workers*, #65.02 *Worker with Two Jobs* and #65.03 *Fishers*.

¹⁰ Policy item #65.00 *General Rule for Determining Short-Term Average Earnings*.

injury. Changing to a broader term such as “rate of pay on the day of injury” ensures the worker’s rate of pay is used to calculate the short-term wage rate, rather than the actual wages paid.

4.3 Absences from work

The WCB has discretion under the *Act* to determine how a worker’s average earnings in the short-term are calculated. The WCB may consider a number of variables to ensure that workers are compensated at the rate that reflects their rate of pay at the time they were injured.

The original consultation paper discussed removing from the average earnings calculation periods of time when the worker received workers compensation benefits. Stakeholders suggested that other types of absences should also be excluded from the average earnings calculations. For example, if during the three months before the date of injury a worker was absent for one month due to an atypical sick leave then this period should be excluded. The average earnings would be calculated over two months instead.

Another stakeholder suggestion is to follow the language in the Exceptional Circumstances policy which is used in setting the long-term wage rate.¹¹ Some of the circumstances relevant when setting the long-term wage rate do not apply in the short-term, such as diminished future career options. Other circumstances would not apply to on call or shift workers, such as deductions from gross income to derive the labour component of average earnings.

The question arises whether all the variables should be expressly set out in policy or be determined on a case by case basis.

4.4 Time period for calculating the short-term average earnings

Policy currently provides that a variable shift worker’s short-term average earnings are based on the three month period immediately preceding the date of injury.

The earlier discussion paper and draft policy presented the option of using a shorter or longer time period than three months. Stakeholders suggested that too much flexibility in the time period would create uncertainty and complexity.

Other stakeholders proposed using a 12 month earnings history for these types of workers. The *Act*, however, clearly sets out when 12 month prior earnings can be used at the start of a claim. This project is concerned with those workers who would not fall under one of those exceptions.

In most cases a period shorter than three months is sufficient to give an accurate reflection of a worker’s short-term loss. As a result it may be more appropriate to add more flexibility to the policy by allowing the WCB to use a period of up to three months to calculate the short-term average earnings.

¹¹ Policy item #67.60 *Exceptional Circumstances*.

5. OTHER JURISDICTIONS

There is no consistent approach across the provinces to the method for calculating short-term wage loss for variable earners.

Most provinces calculate the average short-term earnings of variable earners using the same method as regular workers, however, they calculate the average earnings over varying periods of time. New Brunswick, Nova Scotia and Yukon use a four week period. Northwest Territories and Nunavut, Saskatchewan and Prince Edward Island use a 12 month period. In Newfoundland and Labrador a practice has developed of using a 12 to 24 month average for workers with irregular earnings. Manitoba uses a flexible approach, applying whichever of the three methods set out in policy best represents the worker's loss of earnings.

Ontario and Quebec are the only provinces with a specific policy for on call workers. Ontario's policy states that short-term earnings for on call workers, casual workers and part-time workers are calculated by averaging earnings over the four weeks prior to the injury. In Quebec the earnings of on call workers may be determined by reviewing workers who occupy a similar job category in the same region.

Alberta treats variable earners such as on call workers as seasonal or casual workers and uses the worker's rate of pay on the date of injury to set the short term wage rate. The initial rate lasts for as long as the worker's job would have continued.

6. OPTIONS AND IMPLICATIONS

Option 1: Status quo

Under this option, no changes would be made to policy.

Implications

- Policy would not reflect current practice in setting short-term average earnings for on call workers with variable rates of pay.
- Policy would preclude the WCB from using a more flexible approach to set short-term average earnings for workers with variable earnings.
- As a result of prior periods of wage-loss compensation, some workers may continue to have their short-term average earnings reduced.
- There would continue to be an inconsistent use of the term "date of injury" in policy.

Option 2: Amend policy to include regularly employed on call workers with variable rates of pay

Under this option:

- Policy would allow the WCB to use a time period of three months or less to determine short-term average earnings for workers with variable rates of pay.
- Policy would expressly exclude prior periods of wage-loss compensation from the short-term average earnings calculations. Other significant atypical and/or irregular disruptions to the pattern of employment would also be excluded.
- Policy would be revised to replace the term “date of injury earnings” with “time of injury earnings” where appropriate.

Draft policy reflecting this option is set out in Appendix B.

Implications

- An earnings review of up to three month would average out inconsistencies in earnings for on call workers.
- A more flexible approach to setting short-term average earnings would allow policy to more accurately reflect a worker’s average earnings.
- The introduction of a more flexible approach to setting short-term average earnings may lead to an increase in the number of reviews and appeals.
- Injured workers with prior periods of wage-loss compensation and other atypical absences from work would have their average earnings set at a rate that better reflects their actual loss of earnings.
- Consistent terminology would reduce confusion.

Option 3: Treat on call workers with variable rates of pay as regular workers

Under this option average earnings for on call workers with variable rates of pay would be calculated in the same way as earnings for regular workers. The rate of pay on the day of injury would be used to set the on call worker’s short-term wage rate.

Implications

- There would be no need to obtain up to three months of wage records for on call workers.
- On call workers with varying rates of pay may be over or under compensated for the first ten weeks of their claims.

- For these workers, there may be big variations between the short-term wage rate and the long-term wage rate.
- The wage rate set for such workers may not be an accurate reflection of their short-term loss.

7. CONSULTATION

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

Stakeholder comments will be accepted until **February 23, 2009**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

By mail: Rachel Fisher, Policy Analyst
Policy and Research Division
WorkSafeBC
P.O. Box 5350, Stn. Terminal
Vancouver, B.C. V6B 5L5

By fax: 604 279-7599

By e-mail: policy@worksafebc.com

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*.

APPENDIX A

Variable Shift Worker Policy

Consultation Results Table

The PRD has reproduced, as received, the comments below

No.	Organization	Feedback from a worker or employer perspective?	Preferred Option [Answers in square brackets are inferred from Explanation]	Explanation
1	University of Victoria	Employer	Option 2	With a number of on call workers with varying work patterns, flexibility is necessary to ensure fairness.
2	Central Interior Logging Association	Employer	Option 2	The CILA supports WorkSafeBC in the proposed policy amendment to allow WorkSafeBC increased flexibility to more accurately determine earnings for workers that have variable earnings as outlined in Appendix A (#65.01). The CILA also supports the proposed policy amendment (#65.02) to determine time of injury earnings for workers with two jobs. We support the concept of determining the time of injury earnings based on the combined earnings of both jobs. We have no comments on proposed policy amendment #65.03 pertaining to Fishers.
3	BC Construction Association	Employer	None	<p>The BC Construction Association represents approximately 2000 construction companies from across British Columbia active in all areas of the sector. We are in complete agreement with the concerns expressed by COCA, particularly around the complexity and uncertainty that the current proposals create. We also echo the concern that the "more flexible approach" may result in unjustified, higher short-term wage loss payments.</p> <p>We urge you to consider COCA's potential solution which provides a more fair and balanced approach. We agree with their recommendation that WorkSafeBC use the worker's earnings for the previous year. WorkSafeBC could develop criteria to identify these exceptional cases. The average earnings for these very exceptional cases could then be determined by your senior adjudicative staff.</p>

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4	BC Nurses' Union	Worker	Option 2	<p>Members of the BC Nurses' Union may be affected by the Board's policy regarding variable earners. A large part of the BCND membership works non-standard shifts. There are also members that may work on successive contracts of service. It is our view that there should be a sufficient amount of flexibility in policy in order to ensure that the average earnings calculated for the worker will best reflect the actual loss of income due to the injury. The proposed Option 2 to increase the flexibility under policy to address certain circumstances moves in the right direction but needs to go further in order to fairly reflect the earning capacity at the time of the injury. We will address the four specific items in the Discussion paper in the order they appear in the paper.</p> <p>4.1 Day Call Workers</p> <p>There should be flexibility to set the rate on what best reflects the actual loss. If there is evidence the worker is a regular earner in a day call circumstance the rate should be set based on the date of injury earnings. The worker would have had the opportunity to have regular earnings after the injury and would not be able to do so due to the injury. Their short term wage rate should be set the same way it would be for any other regular worker. If the worker is disabled they lose the opportunity to take employment. In order to ensure fairness the short term wage rate should be set based on the wage rate on the date of injury (DOI).</p> <p>If there is evidence the worker would not work in day call employment on a regular basis then it would be appropriate to use a period longer than the rate on the date of injury. Relevant evidence would include the period the day call worker was expected to be offered such work and the earning of other workers in the same or similar positions.</p> <p>There should not be a presumption against a worker having or seeking day call work. The practices as set out in policy item #34.32 regarding potential loss should be applied to day call workers. There should be a presumption that the worker would take or seek work after the date of injury unless there is evidence to rebut that presumption. In circumstances where there is evidence to rebut the presumption a longer period could be used to establish the initial wage rate. There should be flexibility to use 3 month or one year prior earnings where those earnings would best reflect the actual loss.</p>

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				<p>4.2 More flexible approach to setting short term average earnings for Variable Shift Workers.</p> <p>The example provided in the discussion paper of going from part time to full time is a good example of where a flexible approach should be used. If there has been a change in employment status and there is good evidence that the 3 month rate will not accurately represent the actual loss there should be the flexibility to use the period from the time the employment status changed. As an example a worker may have been in a 0.5 FTE variable shift position until one month before her injury. She changes to a 1.0 FTE Variable shift position one month prior to DOI. It would be most accurate to use the earning as of the date of the beginning of the actual change to the 1.0 FTE position. Where there is a change in circumstance within the period of the three months that is now used to use the earnings in the period immediately after there was a change in the employment status.</p> <p>Periods of compensable or non compensable illness should be deducted from the short term wage rate unless they are less than 5%, which could be considered an average absenteeism rate. Deducting larger periods of absenteeism should take place because the rate would not reflect the actual loss if the reason for the prior absence(s) were no longer present.</p> <p><i>Exclusion of Periods of Compensable Wage Loss</i></p> <p>We agree with the recent change to policy made by the Board of Directors that prior periods of compensation should be excluded from average earnings for long term wage rates. This exclusion should be made for short tem wage rate. There is no logic to accepting the exclusion for long term but not short term.</p> <p>The exclusion should be expanded to include non compensable absences where the evidence would lead to a conclusion the absence does not reflect the actual loss. As an example a worker may have been on maternity/parental leave prior to their injury. They returned to work one month prior to the injury. They would have continued to work on a regular basis but for the injury but due to the use of the month or other period to calculate average earnings for short term wage loss due to their employment status the</p>

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				<p>average earnings is set at only one third of what the actual rate this worker would have earned for the entire period of short term wage loss. In order to ensure that the average earnings most accurately reflect the actual loss resulting from the injury any period of absence that can not be shown to likely continue into the future should be excluded from average earnings. This would apply to other circumstances such as education leaves, or illnesses that were not likely to result in significant future absences. Only where it can be shown that it is likely the absence is greater than an average absenteeism rate of 5% and the absenteeism would likely continue into the future should the period not be excluded. For example a worker may have a chronic medical condition that has resulted in fairly consistent absences from work. Those periods of absences should not be excluded. Another worker may have suffered a broken limb in a non-work related sporting incident. That disabled them from working for two of the three months prior to the date of injury. The limb has healed and it is not likely to result in ongoing disability. That period should be excluded from the calculation of the average earnings.</p> <p>As in item 4.2 above any period of absence greater than 5% representing an average absenteeism should be removed from the calculation of the wage rate where doing so would best reflect the actual loss.</p> <p>4.3 Consistent terminology</p> <p>The discussion paper states that the terms "date of injury" and "time of injury" are not synonymous. The paper does not describe the differences between the two terms. A telephone inquiry to the Policy and Research Division did not result in much more clarity of the difference between the two terms or the need for changing this in policy. As best as we can understand the difference between the terms the date of the injury would mean the actual day that the injury occurred. The time of the injury would be a looser term that could encompass the day, the month prior, three months prior, etc. It is our view that this more ill-defined term of the time if the injury is not necessary. The policy makes it fairly clear that for calculating short term average earnings at the date of injury in most circumstances is based on the earnings on that date but in other specific circumstances may be calculated using longer periods. In our view this change in language is unnecessary and may actually lead to more confusion in regards to the terms.</p>

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				<p>Conclusion</p> <p>Option 2 is preferred as a flexible approach is needed to set a wage rate that best reflects the actual loss due to the injury.</p> <p>In addition to the changes currently proposed in the discussion paper period of absence for other than compensable injuries should be deducted from the calculation of the wage rate whenever that absence would result in a rate that does not best reflecting the actual loss under section 33 of the Act.</p>
5	<p>COCA (two identical submissions – one from COCA’s Chairman and one from COCA’s President)</p>	Employer	None	<p>I am responding on behalf of COCA, which represents 17 construction associations, with members from all parts of British Columbia, from every sector and from every size of company.</p> <p>This Discussion Paper deals with "Day or on call workers" who are defined as "those who "Work under a series of very short successive contracts of service." The Paper further explains: "These workers are often employed under a series of short-term employment contracts punctuated by breaks in employment." This description encompasses a substantial number of workers within the Construction Industry as well as many other industries.</p> <p>The Paper deals with the establishment of short-term average earnings. The vast majority of workers' compensation claims are short term, so the Paper is widespread in its impact. We have serious concerns about the proposals made within this Paper. We believe that the proposals are overly complex and provide too much uncertainty as to how wage rates will be established. We also believe that there is a significant risk that the "more flexible approach" will result in unjustified, higher short-term wage loss payments.</p> <p>The problem occurs because the Paper proposes more "flexibility" in setting short-term average earnings." The Paper states:</p> <p>"Generally, the three month period is an appropriate amount of time to use to determine short-term average earnings. However, there are instances when a shorter time period would be a</p>

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				<p>better reflection of the worker's loss. For example, in the instance of a worker who made a permanent switch from part time to full-time hours one month prior to the date of injury, using their earnings in the one month preceding their injury date would provide a more accurate picture of the worker's loss at the time of injury. Conversely, there are instances when a longer time period would be a better reflection of the worker's loss. For example, in the instance of a worker who was unable to work the majority of the three month period due to a non-compensable illness, a longer period of time may better reflect the worker's loss at the time of injury.</p> <p>Policy does not currently contemplate using a shorter or longer amount of time regardless that it might better reflect the worker's actual loss. To accommodate such an approach, policy would have to be revised to introduce some flexibility in determining an appropriate period of time to use to set time of injury earnings.</p> <p>The benefits of introducing a more flexible approach would have to be balanced against the WCB's desire for consistent application of policy." (pages 3-4)</p> <p>Our concern is that this approach will lead to the choice of the highest average earnings, not the most representative. We believe that there is a better and simpler solution that provides a more fair and balanced approach. The three month period that is described in the above paragraph requires the Claim Manager to research and determine the worker's earnings for that three month period.</p> <p>Instead, we recommend that WorkSafeBC use the worker's earnings for the previous year. In all but very exceptional cases this would produce the most representative average earnings. WorkSafeBC could develop criteria to identify these exceptional cases. The average earnings for these very exceptional cases could then be determined by your senior adjudicative staff.</p> <p>Our proposal would result in the use of a longer-term history of wages and this would give the fairest representation of what workers' compensation is designed to do - replace 90% of the net loss of earnings when a worker suffers an occupational injury or disease.</p> <p>As an adjunct to this proposal, we recommend that you link your database with Revenue Canada's so that you can readily obtain the worker's earnings for the previous year. (Similar to the links that you now have with respect to employer information.)</p>

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				We believe that our proposal would be simpler to administer and would result in the payment of the appropriate level of wage loss compensation.
6	Employers' Advisers Office	Employer	None	<p>While our office takes no position regarding the acceptability/appropriateness of the above noted document on behalf of the employer community, we provide the following comment outlining the impact we see the proposed amendments having on the system as a whole.</p> <p>There are four distinct proposals related to setting short term average earnings, as follows:</p> <ul style="list-style-type: none"> • to expand the variable earners policy to include on-call workers who have an ongoing employment relationship with one or more employers; • to provide more flexibility in determining an appropriate period upon which to base a worker's average earnings; • to exclude periods when the worker is on wage loss compensation benefits; and • to provide consistent terminology throughout the policy documents whenever possible. <p>We will begin with the last issue. We have no concern with the proposed changes to "time of injury" throughout the documents.</p> <p>With respect to other changes in policy item #65.00, the change from "actual earnings on the day of injury" to "rate of pay on the day of injury" is a substantive change which was not addressed in the discussion paper. "Actual earnings" could refer to the amount of money the employer paid the worker on the day of injury, while "rate of pay" more specifically refers to the hourly, daily or monthly rate agreed upon by the parties. We take no issue with this change and believe it provides clarification, but recommend you provide some discussion of this change in your discussion paper.</p> <p>With respect to the proposed changes to policy item #65.01, we have no concerns with changing the name of policy.</p> <p>However, we have concerns both with adding on-call workers to the list of variable earners and with the creation of "exceptional circumstances" for determining short-term</p>

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				<p>average earnings. We do not believe that section 33.1(1) of the Act does allows the Board the flexibility to create these exceptions.</p> <p>Section 33.1 states that when setting the initial rate, the average earnings of a worker are 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 the injury. The only exceptions to this general method of determining initial average earnings are set out in sections 33.5 <i>casual workers</i>, 33.6 <i>persons with coverage under section 2(2)</i> and 33.7 <i>persons without earnings</i>. For each exception, a different method of calculating initial average earnings is specified. Initial average earnings for casual workers are based on earnings in the 12 months prior to the date of injury; for those with coverage under section 2(2) initial average earnings are based on the amount of coverage purchased; and for those without earnings, average earnings are determined in a manner the Board considers appropriate.</p> <p>Regarding "on call" workers, under the current legislation it is the pattern of employment that determines how a worker's average earnings will be determined. If a worker has a regular pattern of employment, section 31.1(1) determined their average earnings. If they have a casual pattern of employment, section 33.5 applies. Since "pattern of employment" is not a defined term under the Act, the Board can and has established a definition by policy.</p> <p>The examples used in the discussion paper to argue in favour of adding on-call workers to the list of variable earners addresses issues such as working under a series of very short successive contracts of service, making a significant amount of money in a few days, not working every day, earning wages that vary from one job to another and having breaks in employment. The paper then states that these workers are categorized as "regular" workers and their average earnings are determined pursuant to section 31.1, yet these same factors are listed in policy item #67.10 as indicia of a casual pattern of employment.</p> <p>It is our submission that the Board does not need to amend the variable shift workers policy in order to average the wages of on-call workers over a greater period of time. The Board can simply apply policy #67.10 in a more considered manner and achieve the</p>

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				<p>same result. There will certainly be on-call workers who, after careful consideration, meet the requirements of a regular worker (for example, nurses who work on call for the same employer for extended periods of time), and those whose employment reflects a casual connection to the workplace. If adjudication staff apply the casual pattern of employment policy in a considered manner, the concern regarding inflated short term average earnings would be addressed at the outset of a claim.</p> <p>Regarding the proposal to exclude periods of time when a variable earner is in receipt of compensable wage replacement benefits, we submit this is, in effect, creating an exceptional circumstance. With respect, the only exceptions to section 33.1(1) are sections 33.5, 33.6 and 33.7. The "exceptional circumstances" provisions set out in section 33.4 are specifically excluded from consideration for initial average earnings.</p> <p>We appreciate that the proposed revision is an attempt to treat workers who work other than a 5 day work week in a fair and equitable manner, however, we believe that Board is attempting to do indirectly that which is prohibited directly. The legislature has specifically provided "exceptional circumstances" for long term average earnings only. We submit that the Board cannot now create a policy to establish exceptional circumstances for initial average earnings.</p>

APPENDIX B

#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 ~~time~~**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 ~~time~~**date** of injury earnings will be based on the worker's **rate of pay**~~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.

EFFECTIVE DATE:

CROSS REFERENCE: Policy item #65.00 *General Rule for Determining Short-Term Average Earnings* and policy item #67.01 *Casual Pattern of Employment of the Rehabilitation Services & Claims Manual Volume II*.

APPLICATION: To all decisions on or after the effective date.

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#65.01 Variable **Earnings**~~Shift Workers~~

The Board recognizes that not all workers receive remuneration based on a regular five-day work week. Accordingly, calculating time of injury earnings based on a worker's rate of pay on the day of injury is not always appropriate. ~~Where a worker is employed on a rotating shift cycle basis, the Board will determine the worker's date of injury earnings based on the worker's shift cycle.~~ The guidelines set out below apply in determining short-term average earnings where a worker is regularly employed with variable earnings.

The Board considers~~In those cases where a variable shift worker to have~~ variable earnings if the worker:

- works on call for one or more employers at differing rates of pay and does not have a casual pattern of employment;
- has irregular shifts;
- has shifts with no repeating patterns;
- works a shift cycle involving more than five cycles;
- works differing shift hours per cycle;
- is paid shift differentials; or
- is scheduled for a shift cycle change,.

For such workers with variable earnings, the Board will usually calculate ~~the worker's short-term average earnings are based on~~ **with reference to the worker's earnings in the three month period immediately preceding up to and including the worker's date of injury.** However, the Board may use a shorter time period if it determines that the three month time period is not an accurate reflection of the worker's time of injury earnings.

Situations where a shorter time period may be used include:

- ~~where the variable shift~~ **regularly employed worker with variable earnings** has been with ~~an~~ the employer for less than three months, the worker's short-term average earnings are based on the worker's earnings from the worker's date of hire **up to and including** the date of injury.
- **where the worker received wage-loss compensation (or wage-loss equivalent rehabilitation allowances/benefits) during the three month period prior to the date of injury.**

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- where the worker has experienced a significant atypical and/or irregular disruption in the pattern of employment during the three month period prior to the date of injury. This circumstance may arise, for example, if the worker had a lengthy absence due to a non-compensable illness or injury, educational or maternity/paternity reasons.

In such situations, the Board may choose to exclude a portion of the time period over which earnings are averaged if doing so would provide a more accurate reflection of the worker's time of injury earnings. The Board does not generally exclude short absences from work for non-compensable reasons or minor fluctuations in hours worked or rate of pay.

EFFECTIVE DATE:

CROSS REFERENCE: Policy item #65.00 *General Rule for Determining Short-Term Average Earnings* and policy item #67.01 *Casual Pattern of Employment of the Rehabilitation Services & Claims Manual Volume II.*

APPLICATION: To all decisions on or after the effective date.

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#65.02 *Worker with Two Jobs*

If a worker holds two jobs and is disabled from both by an injury arising out of and in the course of one of them, ~~time~~**date** of injury earnings will be based on the combined earnings of both jobs up to the statutory maximum. This applies whether or not the other job is covered by Part 1 of the *Act* or is self-employment. The total days worked in both jobs are merged to obtain the days worked per week. Both employers, if covered by Part 1 of the *Act*, may be reimbursed by the Board if they continue paying the disabled worker. (1)

Where a worker is engaged in two jobs, one of which is a job for which personal optional protection has been purchased, the income earned in the non-personal optional protection job will be combined with the amount of personal optional protection purchased for the other job, up to the statutory maximum, in order to determine average earnings.

EFFECTIVE DATE:

CROSS REFERENCE: **Policy item #65.00 *General Rule for Determining Short-Term Average Earnings* and policy item #67.01 *Casual Pattern of Employment of the Rehabilitation Services & Claims Manual Volume II.***

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

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#65.03 *Fishers*

The ~~time~~**date** of injury earnings for fishers whose remuneration is based on a share of the catch, the value of which may only be determined at a future date, will be based on the earnings over the ~~3~~**-three** month period immediately preceding the date of injury. Where earnings information is not available for that three-month period, the worker's average earnings may be based on the 12-month period immediately preceding the worker's date of injury. See also policy item #68.62 for information on a fisher's composition of average earnings where the fisher deducts equipment and/or operating expenses from gross income for business or taxation purposes and owns a vessel or other equipment used to harvest fish.

EFFECTIVE DATE: ~~October 1, 2005~~

CROSS REFERENCE: **Policy item #65.00 *General Rule for Determining Short-Term Average Earnings* and policy item #67.01 *Casual Pattern of Employment of the Rehabilitation Services & Claims Manual Volume II.***

APPLICATION: **To all decisions on or after the effective date.**
~~Minor editorial amendments made on October 1, 2005 do not affect the application of this policy.~~