

## DISCUSSION PAPER

### 1. TITLE AND DATE

Variable Earners

### 2. ISSUES

Workers compensation benefits are based on a worker's average earnings. The *Workers Compensation Act* ("Act") sets out two general rules for calculating average earnings as well as a number of exceptions to the general rules.

The general rule for determining short-term average earnings for regularly employed workers, who are remunerated on a standard five-day work week, is to base their time of injury earnings on their rate of pay at the date of injury. WorkSafeBC ("WCB") recognizes that not all workers receive remuneration on a five-day work week. Accordingly, basing time of injury earnings on a worker's rate of pay at the date of injury is not always appropriate. This is the case for workers employed with variable earnings.

At issue is whether policy provides appropriate guidance for determining average earnings for regularly employed workers with variable earnings. A review of the variable shift worker policy has raised the following issues:

- Should the policy be revised to reference day call workers?
- Should the policy be revised to introduce a more flexible approach to determine short-term average earnings for workers with variable earnings?
- Should policy expressly exclude prior periods of wage loss compensation from the 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

#### 3.1 Law and Policy

The *Act* sets out a general rule for determining a worker's wage loss benefits based on the worker's average earnings and earning capacity at the time of the worker's injury.<sup>1</sup> The *Act* also provides a number of exceptions to the general rule when setting a worker's short-term and long-term average earnings.

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<sup>1</sup> Section 33 of the *Act*.

Once the WCB accepts a worker's claim, he or she will generally begin receiving wage loss benefits based on their average earnings and earning capacity at the time of injury. This amount will be used for the first ten weeks of their claim. After ten weeks, their average earnings will normally be based on the worker's earnings in the twelve month period prior to the injury.<sup>2</sup>

The *Act* provides that the WCB will use the "time of injury" for determining a worker's average earnings and earning capacity. "Time of injury" is not defined in the *Act* and it is open for the WCB to set policy on how to calculate this time period. Under the general rule, for workers who receive regular remuneration under a five-day work week, the WCB will use the worker's rate of pay on the date of the injury subject to the maximum wage rate permitted by the *Act* to determine time of injury earnings.<sup>3</sup>

The *Act* also provides exceptions to the general rule which use a set time period before the "date of injury" to determine a worker's average earnings.

The variable shift worker policy directs that for workers employed on a rotating shift cycle, the WCB will use the worker's shift cycle to determine time of injury earnings. Where the worker is employed as a variable shift worker, the WCB will use the three month period immediately preceding the worker's date of injury to set the worker's short-term average earnings. In the instance where a worker has been with his or her employer for less than three months, their short-term average earnings are based on the worker's earnings from the worker's date of hire to the date of injury.

#### **4. DISCUSSION**

All four issues identified in this discussion paper concern the WCB's approach to determining short-term average earnings. As each issue addresses a different aspect of the WCB's policies on short-term average earnings, the four issues will be addressed separately.

##### **4.1 Applying the Variable Shift Workers Policy to Day Call Workers**

The Worker and Employer Services Division has raised concerns with respect to the determination of initial wage rates for workers who are on "day call". Day or on call workers are those who work under a series of very short successive contracts of service. This issue arises because these workers may work only one, two or a few days and make a significant amount of money in those few days. As well, they may not work every day, or their wage may vary from one job to the other. These workers are often employed under a series of short-term employment contracts punctuated by breaks in employment.

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<sup>2</sup> Section 33.1 of the *Act*.

<sup>3</sup> Policy item #65.00 *General Rule for Determining Short-Term Average Earnings* of the *Rehabilitation Services & Claims Manual ("RS&CM")* Volume II.

Prior to the January 1, 2006 amendments to the casual worker policy, workers who undertook a succession of very short employment contracts were generally considered to be casual workers. Under the casual worker policy, short-term average earnings are based on one-year earnings, which acts to average out any inconsistencies in earnings.<sup>4</sup> Since the amendments, many day or on call workers are now categorized under the general rule, if they have a regular pattern of employment.

Under the general rule, short-term average earnings are based on the worker's rate of pay at the date of injury, regardless that the worker's job may have lasted for only a few days. This could potentially result in highly inflated short-term average earnings. The inflated earnings do not accurately reflect the worker's short-term loss and may be reduced significantly when the long-term rate is set. Employers that employ day call workers often tend to cease operations within very short periods of time and have no incentive to appeal wage rate decisions. These inflated wage rates may go unchecked in the system.

As day call workers do not work a standard five-day work week, the WCB's practice has been to use a broadened approach to "time of injury" and base short-term average earnings on a three month review similar to the approach set out in the variable shift worker policy.

Concern has been raised that this approach is not set out in policy, as the variable shift worker policy specifically addresses shift workers but does not reference workers with variable earnings. This matter could be resolved by revising policy to address variable earnings generally as opposed to shift work specifically.

#### **4.2 Introducing a More Flexible Approach to Setting Short-Term Average Earnings for Variable Shift Workers**

Policy provides that the WCB will use the three month period preceding a worker's date of injury to determine short-term average earnings when the worker has variable earnings and is not on a rotating shift cycle.<sup>5</sup> Where the worker has been with the employer for less than three months, the WCB will use the worker's earnings from the date of hire to the date of injury.

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 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

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<sup>4</sup> Policy item #67.10 *Casual Pattern of Employment* of the *RS&CM*.

<sup>5</sup> Policy item #65.01 *Variable Shift Workers* of the *RS&CM* sets out that the WCB will base short-term average earnings on the three month period preceding the date of injury where the worker has irregular earnings; shifts with no repeating patterns; a shift cycle involving more than five cycles; differing shift hours per cycle; or the worker is scheduled for a shift change.

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.

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. The benefits of introducing a more flexible approach would have to be balanced against the WCB's desire for consistent application of policy.

### **4.3 Exclusion of Prior Periods of Compensable Wage Loss from Average Earnings Calculations**

The Board of Directors ("BOD") recently approved changes to the policy on calculating long-term wage rates when exceptional circumstances exist.<sup>6</sup> That policy now provides that when the long-term wage rate is set, prior periods of compensable wage loss will be excluded from the average earnings calculations. The revisions took place to ensure that workers who had experienced compensable injuries in the past do not have their long-term wage rates reduced by including periods of compensable wage loss in their average earnings calculations. The reduction of a worker's compensation benefits due to work-related injuries and illnesses was seen as being contrary to the purposes and intent of the *Act*. The exclusion of such periods better reflects a worker's actual loss of earnings.

The same approach could be adopted when setting a worker's short-term wage rate. Policy could be revised to provide that if a worker has suffered prior periods of wage loss compensation in the three month period used to calculate the worker's average earnings, then the periods of compensable wage loss would be excluded. This would ensure the worker's short-term wage rate better reflects their actual loss of earnings. This would also bring the short-term wage rate for such workers in line with other workers who have not suffered recent compensable workplace injuries and illnesses.

### **4.4 Consistent Terminology**

The *Act* provides that the WCB will base short-term average earnings and earning capacity on the remuneration a worker was receiving at the time of injury unless the worker meets one of the exceptions set out in the *Act*.<sup>7</sup> The term "date of injury" earnings is used in the listed exceptions, where the *Act* directs the WCB to use a set period of time before the date of injury to determine short-term average earnings.

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<sup>6</sup> Policy item #67.60 *Exceptional Circumstances of the RS&CM*.

<sup>7</sup> The exceptions to section 33.1 of the *Act* are sections 33.5 to 33.7.

Policy provides direction in determining time of injury earnings when the *Act* does not set out a specific timeframe to use. In some instances, policy guides the WCB to use a worker's wage rate at the date of the injury to set their time of injury earnings. In other instances, policy guides that a set period of time before the date of injury is to be used to set time of injury earnings. The term "time of injury" is not synonymous with "date of injury" in determining short-term average earnings. The date of injury is a marker that the WCB uses to assist in setting time of injury earnings.

Along with the variable shift worker policy, there are three other policies in Volume II of the *Rehabilitation Services & Claims Manual* that use the term "date of injury" when "time of injury" would be more consistent. This issue was identified by management responsible for the Claims Management Solution project ("CMS"). Accordingly, the CMS team has requested that the Policy and Research Division review the policies in this area to ensure consistency of terminology.

This issue could be resolved by revising policy and replacing the term "date of injury" with "time of injury", where warranted.

## **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 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 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 day/on call workers as seasonal or casual workers and uses the worker's rate of pay at the time of injury to set the short-term wage rate.

Nova Scotia, Prince Edward Island and Yukon report similar problems as British Columbia, namely workers with variable earnings often experience a reduction in benefits when the long-term wage rate is set. Nova Scotia and Prince Edward

Island manage a worker's expectations by advising of this possibility at the time the short-term wage rate is set. Yukon is reconsidering its policy due to this problem.

## 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 day call workers.
- 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 on variable shift workers to reference variable earners and introduce a more flexible approach to determine short-term average earnings for this group of workers. Further, policy would also be amended to replace the term "date of injury" with "time of injury" where appropriate.**

Under this option:

- Policy on variable shift workers would be revised to reference variable earnings as opposed to shift work.
- Policy would allow the WCB to use a time period other than three months to determine short-term average earnings for workers with variable earnings.
- Policy would expressly exclude prior periods of wage loss compensation from the short-term average earnings calculations.
- Policy would be revised to replace the term "date of injury" with "time of injury" where appropriate.

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

### *Implications*

- A three month review of earnings would average out inconsistencies in earnings for day call workers.
- A more flexible approach to setting short-term average earnings would allow policy to more accurately reflect a worker's actual loss of 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 would have their average earnings set at a rate better reflecting their actual loss of earnings.
- Policies on average earnings would be more consistent, as the method for calculating a worker's short-term wage rate would better reflect the current method for calculating a worker's long-term wage rate.
- Consistent terminology would reduce confusion and address CMS concerns.

## **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 10, 2008**. 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

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By e-mail: [policy@worksafebc.com](mailto: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****#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.

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

The Board recognizes that not all workers receive remuneration based on a 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. For example, some workers may have variable earnings. In these circumstances, the Board may use a different time period to determine time of injury earnings. ~~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 situations where a worker is employed with variable earnings.

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

- works "on call" for one or more employers 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 workers with variable earnings, the Board will usually base their ~~worker's~~ short-term average earnings ~~are based on the three month period immediately preceding the worker's date of injury.~~ However, if the Board determines that the three month time period is not an accurate reflection of the worker's time of injury earnings, it can use a shorter or longer time period to determine the worker's short-term average earnings.

Where ~~at the variable shift worker with variable earnings~~ has been with ~~an~~ the employer for less than three months, the worker's short-term average earnings are usually based on the worker's earnings from the worker's date of hire up to the date of injury. However, if the Board determines that time period is not an accurate reflection of the worker's time of injury earnings, it can use a shorter time period to determine the worker's short-term average earnings.

**APPENDIX A**

In both scenarios, the Board may choose to exclude a portion of the time period if doing so would provide a more accurate reflection of the worker's time of injury earnings.

The Board excludes any periods during which the worker received wage loss compensation (or wage loss equivalent rehabilitation allowances/benefits) from the total period over which earnings are averaged.

This circumstance arises when a worker has received temporary total disability benefits, temporary partial disability benefits, a vocational rehabilitation training allowance or other types of compensable wage replacement benefits in the period during which the worker's short-term average earnings are calculated.

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.

**APPENDIX A****#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.**

## ADDITIONS IN BOLD AND DELETIONS STRUCKTHROUGH

**APPENDIX A**#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-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.~~