

## COVERAGE AND COMPENSATION FOR SELF-EMPLOYED PERSONS

### BACKGROUND

On June 30, 2002, section 33 of the *Workers Compensation Act* (the “Act”), relating to the calculation of average earnings, was amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. As a result, the Panel of Administrators approved amendments to the Board’s policies concerning average earnings.

### PURPOSE

The main purpose of this directive is to assist Compensation Services staff in adjudicating workers’ compensation claims relating to self-employed persons. In particular, this directive addresses these main topics:

- identifying the nature of the self-employed person’s employment; and
- identifying the registration and coverage requirements for each type of employment.

This directive also provides a very general overview of average earnings as they relate to the new legislation and policy provisions. It does not provide detailed guidance with respect to establishing initial and long-term wage rates. The Board’s prior policy and practices relating to establishing average earnings for self-employed persons have generally remained unchanged. Practice Directive #33, *Average Earnings – Initial and Long-term Wage Rates* should be read in conjunction with this practice directive.

Attached to this directive is a flow chart that provides a general overview of the information contained in this directive.

### 1.0. LAW AND POLICY

Section 1 of the *Workers Compensation Act* (the “Act”) defines a worker and an employer. Section 2 of the *Act* provides the Board with discretion to provide coverage for independent operators.

Chapters 2 of the *Rehabilitation Services and Claims Manual* (“the RSCM”) Vol. I and Vol. II state that the Board considers that a contract to provide labour, in an industry covered by the *Act*, may create one of three types of relationships: **workers; independent firms; or labour contractors**. Policy items #20:10:30 and #20:30:20 of the *Assessment Policy Manual* (the “APM”) provide definitions for these three categories, as well as their respective registration requirements.

Due to the new legislation provisions, the policies in the RSCM, relating to average net earnings, have been amended.

## **EFFECTIVE DATE**

The Board's policies relating to the determination of a person's employment status, for Assessment purposes, has not changed. However, due to the new legislation provisions, the policies relating to average net earnings have been amended. See Practice Directive #38, *Effective Dates, Recurrences and Transition Rules*.

## **2.0. WORKERS**

### **2.1 Definition of Worker**

The term "worker" is defined in Section 1 of the *Act*. APM Policy item #20:30:20(1) states, in part, that workers include individuals who do not employ others and who are:

- (a) paid on an hourly, salaried or commissioned basis; or*
- (b) paid on commission or piecework, etc., where work is performed working in the employer's shop, plant or premises; or*
- (c) paid commission, piecework or profit sharing where they are using equipment supplied by the employer; or*
- (d) operating under circumstances where the "lease" or "rental" of equipment or "purchase" of material from their employer, is merely a device to arrive at a wage or commission amount."*

Persons, who are not regularly employed with a designated employer - e.g. only work a few hours per week, may be covered as workers under the *Act*, in certain circumstances. To assist in these determinations, Board officers should contact the Assessment Department for further guidance.

### **2.2 Coverage for Workers**

Workers are automatically covered for compensation by the employer for whom they work.

### **2.3 Wage Rates for Workers**

Initial and long-term wage rates for workers are established in accordance with Section 33 of the *Act* and Chapters 9 of the RSCM Vol. I and Vol. II.

## **3.0. OWNERS OF INDEPENDENT FIRMS**

### **3.1 Definition of Independent Firms**

Independent Firms include incorporated companies, as well as proprietorships and partnerships. APM Policy item #20:30:20(2) states, in part, that independent firms include the following:

- "(a) Any firm supplying labour and materials (nails, drywall tape, etc. are not considered materials.) Supplying materials does not include a subcontractor purchasing materials and turning the invoices over to the prime contractor*

*for reimbursement.*

- (b) Any firm which requires 2 or more pieces of revenue producing equipment to fulfill a contract...*
- (c) Service industry firms contracting to two or more clients simultaneously and employing workers.*
- (d) Incorporated companies, unless:
  - (i) it is a personal services corporation ...[Please see item 3.3.1 below], or*
  - (ii) its sole function is to provide a labour only phase of another firm's operation and there is a degree of common ownership between the two...**
- (e) Societies, cooperative associations.*
- (f) Manpower supply firms.*
- (g) Persons who are normally labour contractors who employ a worker(s) and are not contracting to an employer under the Act are considered independent for that period of time..."*

### **3.2 Registration for Independent Firms**

Registration with the Assessment Department is mandatory for all independent firms where the firm is an employer. This requirement applies to both unincorporated firms and firms which contract to a prime employer who may be already registered with the Board. Individual coverage for owners of independent firms is detailed below, under item 3.4 "Unincorporated Independent Firms".

### **3.3 Definition of Principals of Incorporated Independent Firms**

Principals are officers of incorporated companies who also own shares in the corporation. Incorporated companies can be identified by names such as: *Co., Company, Ltd., Limited, Inc. and Incorporated.* Companies are separate legal entities from their principals or shareholders.

#### **3.3.1 Coverage for Principals of Incorporated Independent Firms**

APM Policy item # 40:10:30 states, in part that:

*"Shareholders, directors, or officers of a corporation who have any degree of activity in the operation are considered to be workers of the corporation..."*

As principals are considered workers of their companies, they cannot purchase POP. Principals of corporations must register their companies with the Assessment Department and declare the number of principals/active shareholders and their total earnings. Failure to register will result in the rejection of the claim, unless they can demonstrate that they were not personally responsible for registering the firm – (see *Governors' Decision #335, 5 WCR Page 101*). Failure of a firm to register does not, however, bar a claim from other workers of the corporation.

The only exception to mandatory registration for an incorporated company, is where the corporation is deemed a "personal service corporation". This is where no other help is

employed and, but for the incorporation, the principal would clearly fall into the worker category. The exception also applies to situations where there is a degree of common ownership between two companies and the sole function of the principal's firm is to provide the labour-only phase of another firm's operations. See APM policy item #20:30:20(d) or contact the Assessment Department for further guidance.

### **3.3.2 Wage Rates for Principals of Incorporated Independent Firms**

Principals' wage rates are established in accordance with Practice Directive #22, *Principals' Earnings Information*. As the company is a separate entity, principals' remuneration is generally verified through a T4, *Statement of Remuneration Paid*. Income and expenses declared on the company's tax return are not transferred to a principal's individual tax return. With respect to dividends paid by the company to a principal, RSCM Vol. I, Policy item #35.24, *Workers Engaged in Own Business*, states, in part, that:

*'...The general position of the Board is that, in determining earnings on a claim, dividends from investments in corporations [e.g. T5's, Statement of Investment Income,] are not considered. ... However, where the principal receives nominal or no wages for the work done the Board will estimate what it considers to be a reasonable wage for that work...'*

In some cases, both the principal's personal tax return and the company's corporate tax return may be required in order to determine the principal's average earnings.

## **3.4 Unincorporated Independent Firms – (Proprietorships and Partnerships)**

### **3.4.1 Definition of Proprietors of Independent Firms**

Proprietorships are unincorporated business organizations with one owner. Income and expenses of an unincorporated firm are declared on the owner's individual tax return, as there is no legal distinction between the proprietorship and its owner.

### **3.4.2 Coverage for Proprietors of Independent Firms**

Proprietors of unincorporated independent firms, who wish coverage for compensation, must purchase POP from the Assessment Department. Spouses of proprietors of independent firms are not automatically covered for compensation. Spouses of proprietors of independent firms may apply for "voluntary coverage" provided there is an employment relationship and they are paid by the business. While the spouse does not have to purchase POP, the proprietor must make a declaration to the Assessment Department at the time when POP is purchased for the proprietor.

### **3.4.3 Wage Rates for Proprietors of Independent Firms**

Section 33.6 provides that average earnings of a person entitled to POP are the earnings for which coverage has been purchased.

Spouses with voluntary coverage and children of proprietors, paid by the firm and who have an employment relationship, are considered to be workers of the firm. Average earnings are therefore set in accordance with Chapters 9 of RSCM Vol. I and Vol. II.

### **3.5 Definition of Partners of Independent Firms**

A partnership is similar to a proprietorship except that two or more individuals own the business. For accounting purposes, it is recognized as a business entity separate from the financial dealings of its individual owners. Partners can distribute the business' profits or losses in any way they wish.

#### **3.5.1 Coverage for Partners of Independent Firms**

Partners of unincorporated independent firms who wish coverage must also purchase POP. Failure to do so results in the rejection of the claim, but is not a bar to compensation for other workers of the firm.

Spouses and children of a partner, who are paid by and work for the partnership, are covered as workers and do not have to purchase POP or request "voluntary coverage". See APM Policy item #20:50:10.

#### **3.5.2 Wage Rates for Partners of Independent Firms**

The average earnings for a partner of an independent firm are based on the amount of POP purchased.

## **4.0 LABOUR CONTRACTORS**

### **4.1 Definition of Labour Contractors**

As outlined in APM Policy item #20:30:20(3), labour contractors include unincorporated individuals or partners:

- “(a) who have workers and supply labour only to one firm at a time (e.g. a framer with one or more workers in the Construction Industry).*
- (b) who are not defined as workers, do not have workers, do not supply major materials or major revenue-producing equipment but who contract to two or more firms on a simultaneous basis (e.g. a janitorial contractor having simultaneous contracts with two or more unaffiliated firms).*
- (c) who may or may not have workers but contract a service including one piece of major revenue-producing equipment to a firm or individual (e.g. backhoe contractor supplying a backhoe).”*

### **4.2 Coverage for Labour Contractors with POP**

Labour contractors have the OPTION to either register as an employer or purchase POP. APM Policy item #20:30:20(3) provides that where a labour contractor chooses to register his or her business, the business is then treated as an independent firm by the Assessment Department. In these situations, the labour contractor is not covered unless he or she has

purchased POP. The same principles concerning coverage and wage rates relating to proprietors of independent firms would then apply. (See APM Policy item #20:50:10).

#### **4.2.1 Wage Rates for Labour Contractors with POP**

The average earnings for a labour contractor with POP are based on the amount of POP purchased.

#### **4.3 Coverage for Labour Contractors without POP**

A labour contractor who has not registered and has not purchased POP, as well as any other help employed by the labour contractor (including paid family members), are covered by the prime contractor or firm with whom the labour contractor contracts. See APM Policy item #20:30:20(3).

##### **4.3.1 Initial Wage Rates for Labour Contractors without POP**

Chapters 9 of RSCM Vol. I and Vol. II, as well as Practice Directive #33, provide guidance in determining average earnings for both the initial and long-term wage rates. (Board officers should also note Appendix "A" to Practice Directive #33.)

### **6.0. ADJUDICATIVE PROCEDURES**

APM Policy item #20:30:20 states, in part that: *"...the determination of an "independent firm/labour contractor/worker" relationship and the adjudication of claims are based on the facts that are available at the time an assessment is made or a claim adjudicated"*.

Therefore, where there is an indication that a claimant may be self-employed, the Board officer must:

1. determine what type of employment the self-employed person was working in at the time of the injury;
2. determine whether registration was mandatory for that particular type of employment;
3. determine whether POP was mandatory;
4. if necessary, obtain an opinion from the Assessment Department with respect to registration and POP;
5. determine whether the claimant has coverage under the *Act*;
6. proceed to adjudicate the merits of the claim; and
7. establish an appropriate wage rate in accordance with section 33 and Chapters 9 of RSCM Vol. I and Vol. II.