

PRACTICE DIRECTIVE #33A

INITIAL AND LONG-TERM AVERAGE EARNINGS

Effective Date: October 31, 2003

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1. 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. Practice Directive #33 was first issued, effective June 30, 2002.

Effective July 16, 2002, changes to the "Exceptional Circumstances" policy (RSCM Vol. II, Policy item #67.60) necessitated an amendment to this directive.

On October 31, 2003, further practice changes were made, which necessitated changes to Practice Directive #33. Some of these changes related to section 33.4, "Exceptional Circumstances". To facilitate use and on the recommendation of staff representatives, instead of amending Practice Directive #33 to incorporate these changes, all references to s.33.4 were removed from Practice Directive #33 and incorporated into new Practice Directive **#33C**, *Long-Term Average Earnings: Section 33.4, Exceptional Circumstances*. Practice Directive #33C contains the information regarding exceptional circumstances that was formerly in Practice Directive #33, as well as the practice changes of October 31, 2003.

The remainder of Practice Directive #33, including the practice changes of October 31, 2003 unrelated to s.33.4, was reissued as Practice Directive **#33A**. Along with some minor housekeeping changes, the reissued Practice Directive #33A incorporates the following practice changes:

- In clearly appropriate cases, Board officers may consider consulting a similar employer in the same region if a similar status worker is not available.
- If a 10-week rate is missed, s.33.1(2) requires that one be undertaken, even if more than 75 days have passed since the date on which the rate review was due.

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Also on October 31, 2003, in an effort to group all average earnings-related practice directives under a common heading, the following practice directives were renumbered:

- Practice Directive #55, *Casual Workers*, was renumbered to **#33B**;
- Practice Directive #56, *Secondary Employment*, was renumbered to **#33D**.

No changes were made to the substance or effective dates of either the *Casual Worker* or *Secondary Employment* practice directives.

2. PURPOSE

This practice directive provides guidance for calculating initial and long-term average earnings in relation to the new categories set out in the new law and policy. **It rescinds and replaces Practice Directive #33, which was effective July 16, 2002.**

This practice directive does not provide guidance for converting gross average earnings into average net earnings. See Practice Directive #32, *Net System of Compensation*.

3. EFFECTIVE DATES AND TRANSITION RULES

This amended directive applies to all decisions made on or after October 31, 2003, on all claims to which Bill 49 applies. (See Practice Directive #38A, *Effective Dates and Transition Rules*.)

4. LAW

The following are highlights of the new sections relating to the calculation of gross average earnings:

4.1 General Rule for Regular Workers

- Section 33.1(1) – Initial Average Earnings: 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.
- Section 33.1(2) – Long-Term Average Earnings: based on the earnings in the 12-month period immediately preceding the date of injury.

4.2 Exceptions to the General Rule

The following are the exceptions to the above general rules:

- Sections 33.2 – Apprentices/Learners: the long-term average earnings are based on “... *the 12 month period immediately preceding the date of injury, of a qualified person employed at the starting rate in the same trade, occupation or profession.*”

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- Section 33.3 – Regular Workers Employed by their Employer Less Than 12 months: the long-term average earnings “...*must be based on the gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury, of a person of similar status employed in the same type and classification of employment...*”
- Section 33.4(1) provides:

“If exceptional circumstances exist such that the Board considers that the application of section 33.1(2) would be inequitable, the Board’s determination of the amount of average earnings of a worker may be based on an amount that the Board considers best reflects the worker’s loss of earnings.”

However, section 33.4(2) specifically precludes the use of the “exceptional circumstances” section to set the long-term average earnings of a worker who is an apprentice or learner, employed less than 12 months, a casual worker, and a person who has POP.

- Section 33.5 – Casual Workers: both the initial and long-term average earnings “...*must be based on the worker’s gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury.*”
- Section 33.6 – Self-Employed Persons who have Purchased Personal Optional Protection (“POP”): both the initial and long-term average earnings are “... *based on the gross earnings for which the coverage is purchased.*”
- Section 33.7 – Non-Earners [volunteers admitted to the scope of the Act under section 3(5)]: provides the Board with discretion to determine the initial and long-term average earnings.

Section 33.1(3) states that:

“If 2 or more sections of section 33.2 to 33.7 apply to the same worker for the same injury, the Board must determine the section that best reflects the worker’s circumstances and apply that section.”

5. POLICY

Chapters 5 and 9 of the *Rehabilitation Services and Claims Manual* (“RSCM”) Volume II provide guidance with respect to the calculation and compositions of average earnings.

6. INITIAL AVERAGE EARNINGS

6.1 General Rule – Initial Average Earnings – Regular Workers

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The general rule in section 33.1(1) of the *Act* is that, for regular workers, the earnings at the time of injury, up to the maximum allowed under the *Act*, must be used to establish a worker's initial average earnings. This provision applies to regular workers who are:

- Permanent part-time;
- Permanent full-time;
- Labour contractors without POP coverage under section 2(2);
- Fishers who operate their own business (own the vessel); or
- Principals of limited corporations.

In accordance with section 33.1(1), the initial wage rate is payable for the shorter of:

- (a) *the initial payment period; or*
- (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.*

The "initial payment period" is defined in section 1 of the *Act* as:

"...the period starting on the date of a worker's injury and ending on the last day of the 10th week for which compensation is payable under this Act to the worker for a temporary disability resulting from the injury."

Earnings at the Time of Injury

To calculate a worker's earnings at the time of injury, hourly, daily, weekly, monthly or yearly rates may be considered. For most regular workers, the time of injury earnings are readily apparent and should be used.

- (a) Where a worker works "regular" overtime, it is included in time of injury earnings.
- (b) The Board's policies respecting workers who work variable shifts remain the same. In most cases, a worker's 3-month earnings immediately preceding the injury will be used to establish initial average earnings. In some cases, the employer's payroll will be based on a weekly or bi-weekly system. In these situations, a 12-week average may be used. As well, where the payroll cut-off is a few days prior to the date of injury, the earnings may be used up to and including the end of the payroll period. However, this is only the case where the payroll end date is reflective of time of injury earnings.

Where a worker is not casual, but has not yet been employed by the employer for 3 months, the Board officer will use the worker's gross earnings from the date of hire to the date of injury to establish initial average earnings.

- (c) For the purposes of section 33, labour contractors without POP are generally

considered to be permanent regular workers who are self-employed. As such, earnings at the time of injury should be used to establish the initial wage average earnings.

The Board's policies and practice with respect to labour contractors' average earnings have not substantively changed. RSCM Vol. II simply clarifies the previous policy with respect to initial and long-term average earnings.

Initial average earnings are based on the gross amount that the prime contractor paid to the labour contractor for performing the job. However, any amount that represents payment for equipment should be deducted from the gross amount. As well, a deduction should be made if the gross payment includes monies for the provision of helpers (other workers).

Labour contractors' average earnings are also subject to the 90% net compensation rules. See Practice Directive #32.

(d) Fishers may be self-employed or employed by others.

Where the Board officer determines that the fisher is self-employed, the fisher is categorized as a regular worker (e.g. a full-time fisher). Initial average earnings may be calculated in accordance with RSCM Vol. II, Policy items #65.03 and #68.63.

However, where the fisher is not self-employed, they are normally treated as casual workers (see RSCM Vol. II, Policy item #67.10).

(e) Principals' initial average earnings should be established in accordance with Practice Directive #22, *Principals' Earnings Information*.

6.2 Exceptions to the General Rule – Initial Average Earnings

For casual workers, persons who have purchased POP, and workers with no earnings at the time of injury, gross average earnings for the purpose of both the initial and long-term average earnings are set at the outset of the claim by the Long-Term Rate Setting Unit. There is no review of the gross average earnings for these workers at 10 weeks. However, an average "net" earnings review must still be undertaken at this time using the Individual Net Calculator.

Exception #1 – Section 33.5 Casual Workers

(a) Defining Casual Employment

The determination of whether *"a worker's pattern of employment at the time of the injury is casual in nature"* depends upon the circumstances of each case. As noted in RSCM Vol. II, Policy item #67.10: *"A casual worker is a worker who has a short-term/sporadic attachment to employment. Generally the employment lasts less than*

three consecutive months. A worker who works 'on call' for one or more employers may also be a casual worker."

Please refer to Practice Directive #33B, *Casual Workers*, for further guidance.

(b) Average Earnings for Casual Workers

As per s.33.5, average earnings for a casual worker should be based on earnings in the 12-month period immediately preceding the date of injury. The gross average earnings of a casual worker are not reviewed after 10 weeks of short-term disability. However, the average net earnings may vary due to re-calculating net after 10 weeks (see Practice Directive #32).

Exception #2 – Section 33.6 – Personal Optional Protection (“POP”)

Section 33.6 provides that the average earnings for persons who have purchased POP coverage in accordance with section 2(2) of the *Act*, is the amount of POP purchased.¹ While the average earnings equal the amount of POP purchased, this amount is subject to the short-term and long-term 90% net compensation rules.

In the event of a permanent impairment, the amount of POP purchased will be used to calculate any permanent disability award. (Prior to June 30, 2002, Board policy stated that, when assessing a permanent disability award, the actual pre-injury earnings would be used up to the maximum amount of POP purchased).

For a person who has POP coverage as well as other employment, the earnings in the non-POP employment are combined with the amount of POP coverage actually purchased, up to the statutory maximum, in order to determine the person's average earnings. Please see Practice Directive #33D, *Secondary Employment*.

Exception #3 – Section 33.7 – Non-earners

Volunteers are not “workers”. However, under s.3(5), they may be covered under the *Act* by Order-in-Council. Where a volunteer is granted coverage, s.33.7 provides the Board with discretion to determine the amount of average earnings. The Board's existing policies concerning the calculation of average earnings for volunteers remain unchanged. The amounts provided for in RSCM Vol. II, Policy item #67.31 are less than the statutory minimum. As section 29(2) of the *Act* provides that a worker will receive 100% of his or her gross earnings if he or she falls under the statutory minimum, these earnings are therefore not subject to the 90% average net earnings rule. Where

¹ Section 2(2) of the *Act* allows for the admittance of “independent operators”. Once registered with the Board, owners of independent firms may purchase POP for themselves. However, labour contractors may choose to register and purchase POP or they may choose to be covered by the prime contractor for whom they work. Given the unique registration requirements for these two categories, Board officers must determine whether POP coverage was mandatory for the person, prior to establishing a wage rate on a claim. See Practice Directive #25, *Coverage and Compensation for Self-Employed Persons*, which outlines the criteria in making this determination.

the non-earner has secondary employment, please see Practice Directive #33D. Secondary employment earnings may be subject to “gross” and “net” average earnings review.

7. LONG-TERM AVERAGE EARNINGS

7.1 Overview of Long-Term Average Earnings

With the exception of casual workers, persons who have purchased POP, and workers with no earnings at the time of injury, a rate review is conducted for all workers after 10 cumulative weeks of temporary disability benefits or on the effective date of a permanent disability award.

7.2 Long-Term Average Earnings – General Rule – All Workers

For all regular workers employed for 12 months or more, long-term average earnings should be established on the earnings in the 12-month period immediately prior to the date of injury.

- (a) Long-term average earnings for labour contractors who are regularly self-employed should be based on the prior 12-month earnings.²

There has been no significant departure in the method for determining long-term average earnings for a labour contractor who has not purchased POP. As noted in policy, the prior 12-month earnings declared on the labour contractor’s individual tax return will include the business’ gross and net income. To assist in determining what component of the business income represents the worker’s average earnings, the prior year’s tax return filed with Canada Customs and Revenue Agency (“CCRA”) should be obtained. Certain deductions relating to the business are deducted from the business’ gross income, as listed in Appendix “A”. Also, see Practice Directive #25, *Coverage and Compensation for Self-Employed Persons*.

Once the figure that represents the labour contractor’s individual average earnings is obtained, the 90% net compensation rules would apply, subject to minimum and maximum.

- (b) Fishers may be self-employed or employed by others. Where they are self-employed, RSCM Vol. II, Policy item #68.63 applies. In these cases, the fisher is a regular worker and the general rule for long-term average earnings applies. However, where fishers are not self-employed, they are normally treated as casual workers and therefore, RSCM Vol. II, Policy item #67.10 applies.

² Labour contractors who have not yet been self-employed 12 months do not meet the exceptional circumstances. Therefore, they should be classified in accordance with section 33.3 (workers not employed with employer for 12 months).

- (c) Principals' long-term average earnings should be established in accordance with Practice Directive #22, *Principals' Earnings Information*.

7.3 Exceptions to the General Rule for Long-Term Average Earnings

Exception #1 – Section 33.2 – Apprentice/Learner

As noted in RSCM Vol. II, Policy item #67.40, an “apprentice in a trade” is one who is defined under the *Industry Training and Apprenticeship Act* or an equivalent statute. The *Industry Training and Apprenticeship Regulation* (or equivalent) provides a list of trades that require compulsory certification.

The policy further states that “an apprentice in an occupation or profession” is one who must complete an apprenticeship in order to obtain the license or professional designation required to work in the occupation.

A “learner” is included in the definition of a worker in section 1 of the *Act*, and includes a worker who is “...undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment”.

The long-term average earnings for an apprentice/learner is based on the earnings in the 12-month period immediately prior to the date of injury of “a qualified person employed at the starting rate in the same trade, occupation or profession with the same employer”. The method for obtaining this information is detailed below under heading 9.

Exception #2 – Section 33.3 – Workers Not Employed With Employer for 12 Months

In order for this exception to apply, the worker must be a regular worker AND permanently employed at the time of injury. This exception does not apply to workers employed on a casual or temporary basis (see Practice Directive #33B, *Casual Workers*). Nor does s.33.3 apply to non-earners and persons with POP.

The long-term average earnings for a worker in this category are based on the earnings in the 12-month period immediately prior to the date of injury, of “a person of similar status employed in the same type and classification of employment by the same employer”. The method for obtaining this information is detailed below under heading 9.

Exception #3 – Where 12-Month Earnings Produce an Inequitable Result

Section 33.4(1) of the *Act* provides that:

“If exceptional circumstances exist such that the Board considers that the application of section 33.1(2) would be inequitable, the Board’s determination of the amount of average earnings of a worker may be based on an amount that the Board considers best reflects the worker’s loss of earnings.”

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However, section 33.4(2) specifically precludes the use of the “exceptional circumstances” section with respect to sections:

- 33.2 (apprentice/learner);
- 33.3 (regular worker employed less than 12 months);
- 33.5 (casual); and
- 33.6 (POP).

RSCM Vol. II, Policy item #67.60, *Exceptional Circumstances*, provides three criteria for determining if a worker’s circumstances that give rise to the inequity are exceptional. Only one of these criteria needs to be met for s.33.4 to be applied. The three criteria are:

- (a) Criterion A – Significant Atypical and/or Irregular Disruption
- (b) Criterion B – Diminished Future Career Options Due to the Injury: Students & Young Workers
- (c) Criterion C – Self-employed Labour Contractors

For more information about the application of the “exceptional circumstances” provision, please refer to Practice Directive #33C, *Long-Term Average Earnings: Section 33.4, Exceptional Circumstances*.

8. ADDITIONS/EXCLUSIONS TO COMPOSITION OF AVERAGE EARNINGS

- Prior to June 30, 2002, Board policy allowed for adjustments to the 12-month period where a worker had short absences from the workforce for certain reasons (e.g. WCB claims, labour disputes or medical absences). These types of adjustments are no longer allowed, except in accordance with the exceptional circumstance policy.
- Certain items may be included or excluded in the composition of average earnings (vacation pay, room and board, and overtime). See RSCM Vol. II, Policy items #68.00-#68.90.
- Section 33(3.2) states that Employment Insurance payments may be considered when calculating average earnings in certain situations. Refer to Practice Directive #35, *Employment Insurance Payments*.
- The new legislation excludes certain employment benefits and special allowances from the calculation of average earnings. See RSCM Vol. II, Policy items #68.10 to 68.40. In short, the Board must not include:
 - Employer’s contributions to EI, CPP, pensions, health and welfare, or life insurance plans; or
 - Payments in respect of special expenses or allowances paid to the worker because of the nature of the worker’s employment.

“Special expenses” normally include items that assist the worker to perform the job and are generally paid for by the employer. The RSCM Vol. II, Policy item #68.23 provides some examples.

Board officers must ensure that earnings information provided by the worker or employer (e.g. income tax forms or T4 slips) does not include the above items.

9. PROCESS FOR OBTAINING COMPARABLE EARNINGS INFORMATION

Sections 33.2 (Apprentice/Learner) and 33.3 (Employed Less than 12 Months) of the Act, and RSCM Policy items #67.40, *Apprentice or Learner*, and #67.50, *Workers Employed with their Employer for Less than 12 Months*, provide parallel rules for obtaining long-term average earnings information. For example, Policy item # 67.50 provides the following process:

“...the Board will contact the injury employer to determine what the average earnings are or would be of a person of similar status employed in the same type and classification of employment.”³

Where this information is not available, the Board will contact an employer similar to the injury employer, in the same region as the injury employer...”

However, the policy further states that:

“The Board is not limited to obtaining wage rate information from a single employer. As such, the Board may use relevant information from employers in the region on the average earnings of a person of similar status employed in the same type and classification of employment. This information may be used to determine the average earnings of a worker who has worked less than 12 months for the injury employer where relevant information is not available from the worker’s employer.”
[Emphasis added]

9.1 Same Employer

When obtaining earnings information in these situations, it is not necessary for the “comparable” person to have been employed for 12 months. This is because Policy items #67.40 and #67.50 allow Board officers to obtain a figure that represents what a comparable person earns or “*would earn*” in 12 months. However, neither law nor policy permits estimating the worker’s earnings based on what the worker *himself/herself* would have earned working with the injury employer for 12 months.

A Board officer may also use the earnings of a “comparable” person who has been employed with the employer for *more than 12 months* **only if** that person did **not**

³ In the case of s.33.2, Apprentices/Learners: “...to determine what a qualified person employed at the starting rate in the same trade, occupation or profession earns or would earn with the injury employer.”

receive any raises or promotions upon or after reaching the 12-month point in his or her employment. If the person did receive a raise/promotion upon/after 12 months of employment, he or she is no longer considered “a person of similar status” to the worker. In that case, the person is not “comparable” since he or she received a raise that the worker would not have received within the first 12 months of employment.

Board officers must caution employers not to disclose co-workers' names (or other identifying personal information) to the Board in order to ensure compliance with the provisions of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

9.2 Similar Employer in the Same Region

While the policy accords discretion to contact a similar employer in the same region, it is the Division’s position that Board officers should exercise great caution in using this option. This is because it is very difficult to determine whether an employer in the same region is truly “similar”. For example, a large amount of information would first have to be gathered from many, if not most, of the employer’s competitors in the region, and the Division does not wish to create such an administrative burden for Board officers, or for employers in the region. Further, if a Board officer relies on a seemingly similar employer, it then becomes open to the accident employer and/or worker to dispute before the Review Division that a different employer should have been chosen instead.

Therefore, caution should be exercised when Board officers are considering contact with a similar employer for the purposes of gathering information upon which the worker’s average earnings will be based. Consideration should be had to factors which may distinguish seemingly similar competitors such as: union status of its workers and forms of remuneration like bonuses, overtime, vacation allowances. It should be plainly obvious that the employer’s competitor is indeed similar. It is anticipated that, because of these difficulties and potential inaccuracies, it will be more appropriate, in most cases, to obtain regional class average information. [See below].

9.3 Class Averages

As the references to “employer” in sections 33.2 and 33.3 can be read in their plural forms, and as Policy items #67.40 and #67.50 specifically state that Board officers are not limited to obtaining wage rate information from a single employer, the Division is not precluded from gathering earnings information from more than one source (i.e., employer).

Therefore, where the information is not reasonably available from the employer, the Board officer should contact the Board’s Statistics Department. The request should include detailed information concerning the worker’s date of injury occupation, type of employment and the locality where the worker worked. The Statistics Department will provide the Board officer with a regional class average.

When obtaining the regional class average, the “full-time” class average should be used. If the worker worked full-time, but had interruptions in the year, the full-time class

average should be prorated to reflect these interruptions. If the worker was employed on a permanent part-time basis, the full-time figure may be prorated accordingly. . The “all workers” class average should **not** be used in any of these cases.⁴

Board officers should ensure that the class average information upon which the worker’s average earnings are based is documented in E-File and in a decision letter.

10. ADJUDICATIVE GUIDELINES

1. To calculate the effective date of the 10-week rate review, days on which the worker received section 29 and/or section 30 benefits are included as full days. In cases where a worker has returned to work on a full-time basis during portions of the 10-week period, Board officers should count the number of days by reference to the normal work week.
2. The Board’s policy relating to Federal Government claims remains the same, in that: *“where no refunds are made to the employer concerning workers who are covered under the Government Employees Compensation Act, no rate review should be undertaken.”* Therefore, where a worker’s employment is with the Federal Government and they are kept on full salary, neither a “gross” nor a “net” average earnings review is conducted at 10 weeks. However:
 - If the worker has secondary employment, a "gross" and "net" review of the total employment earnings should be conducted at 10 weeks.
 - If payments made by the employer are discontinued at any time beyond 10 weeks of disability and a worker is still disabled, a 10-week rate review is conducted at that time.
3. Where a worker returns to his or her pre-injury employment on a section 30 basis after the 10-week rate review is conducted, there is no reversion to the initial wage rate on the claim. This is regardless of whether the worker’s long-term average earnings are less than his or her hourly or daily earnings.
4. Where the Board misses the 10-week rate review, it has failed to comply with section 33.1(2). Even if such a failure could be seen as a “decision”, it could also be characterized as an oversight, resulting in a failure to carry out an action mandated by law. Since the long-term rate review must be conducted by law, this error must be corrected as soon as it is discovered so that the legislative intent of s.33.1(2) is implemented.

The Division considers that this is still the case, even if more than 75 days have passed since the 10-week rate *should have been* conducted. In every case, the

⁴ The “all” category consists of **all** types of workers in a particular occupation, including those who are part-time and seasonal. Using an average of multiple types of employment situations would, in effect, negate the intention of section 33.3, which is to find a similar status worker.

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long-term wage rate will be effective once the 10 week rate review is completed, not retroactively to the date it should have been undertaken.

5. If a provisional initial or long-term wage rate is set, the Board's provisional wage rate policy continues to apply. However, where the worker fails to provide the requisite information, see Practice Directive #40, *Obligation to Provide Information*.
6. The prior policy of including teachers' prospective earnings has been amended. Teachers employed at least 12 months are considered regular workers. The initial rate is set on the teacher's salary at the time of injury and the long-term average earnings is based on the teacher's 12-month prior earnings.
7. Where a pension must be deducted from a wage rate, its full monthly value before a possible CPP award is integrated should be deducted. This is regardless whether it was established under the 75% gross compensation rules.
8. There has been no change in section 34 or the Board's policies with respect to "pay employer" claims. Board officers should establish average earnings in accordance with the new legislative framework and policies.