

PRACTICE DIRECTIVE #33B

CASUAL WORKERS
Effective Date: March 18, 2003

A. BACKGROUND

On June 30, 2002, the *Workers Compensation Act* (the "Act"), 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.

This practice directive was first issued on November 20, 2002, in response to a request from Board officers for guidance in determining whether or not a worker should be categorized as a casual worker, for the purposes of determining average earnings under sections 33.1 to 33.7 of the *Act*.

On March 18, 2003, *Rehabilitation Services and Claims Manual* ("RSCM") Vol. II, Policy item #67.10, *Casual Workers*, was further amended, which necessitated a change to this practice directive. In particular, the reference to longshore workers in Policy item #67.10 was removed. Therefore, longshore workers were no longer automatically treated as casual workers for the purpose of establishing average earnings. These workers may now be categorized as regular, casual, or otherwise, depending upon the circumstances of the employment.

On October 31, 2003, in an effort to group all average earnings-related practice directives under a common heading, this practice directive was renumbered Practice Directive **#33B**. This renumbering coincided with amendments to Practice Directive #33, *Average Earnings* (please see "Background" section of Practice Directives #33A and #33C for more details).

Also on October 31, 2003, Practice Directive #56, *Secondary Employment*, was renumbered Practice Directive **#33D**. No substantive changes were made to either the *Casual Worker* or *Secondary Employment* practice directives.

B. PURPOSE

This practice directive assists Board officers in determining whether a worker should be categorized as casual (s.33.5) or regular (s.33.1(2)).

C. EFFECTIVE DATE

Since no substantive changes were made as a result of renumbering this practice directive, this directive continues to apply to all decisions made on or after March 18, 2003, on all claims to which the *Act*, as amended by Bill 49, applies. It continues to replace Practice Directive #55, *Casual Workers*, which was effective November 20, 2002.

Please see Practice Directive #38A, *Effective Dates and Transition Rules*, and Practice Directive #38B, *Reopenings and Recurrences*, for the appropriate transition rules.

D. LAW

The Act has two general rules: one for initial and another for long-term average earnings. For the purposes of this practice directive there are two notable exceptions to those rules.

Section 33.3 – Exception to section 33.1(2) – employed less than 12 months, states that:

In the case of a worker employed, on other than a casual or temporary basis, by the employer for less than 12 months immediately preceding the date of the injury, the Board's determination of the amount of average earnings under section 33.1(2) 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

(a) by the same employer, or

(b) If no person is so employed, by an employer in the same region.

Section 33.5, Exception to section 33.1 – casual worker, states:

If a worker's pattern of employment at the time of the injury is casual in nature, the Board's determination of the amount of average earnings under section 33.1 from the date of injury must be based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of the injury.

E. POLICY

RSCM Vol. II, Policy item #67.10, *Casual Workers*, states:

This is an exception to both general rules for determining a worker's average earnings. For a casual worker, the Board officer must use the worker's gross earnings for the 12-month period immediately before the date of the injury to establish the worker's average earnings. There is no 10-week average earnings review. Thus, the worker's average earnings determined at the outset of the casual worker's claim are also the worker's long term average earnings.

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.

Fishers are treated as workers engaged in casual employment. However, this rule cannot be rigidly applied without regard to the particular circumstances of the case. For instance, it is conceivable that a particular fisher could be employed 52 weeks a year, five days a week. The fisher would then have to be treated as a regular worker rather than a casual worker. Where a job is to last more than three months, the worker is generally regarded as a regular worker rather than a casual worker...

F. DISCUSSION

The legislative intent of the Bill 49 changes, as evidenced by the general rule, is to compensate most workers based on their time of injury earnings for the first ten weeks, rather than on an average of the previous year's earnings. One exception to the general rule relates to those workers whose *"pattern of employment at the time of the injury is casual in nature"*. In those cases, average earnings are set at the outset of the claim on the worker's 12-month prior earnings.

The Board does not wish to create an administrative burden by requesting long-term earnings information at the outset of most claims, nor was that the intent of the legislation. Therefore, the general initial average earnings rule prevails unless the worker meets the section 33.5 casual exception (or has purchased POP or is a Non-earner).

Section 33.3 relates to the determination of long-term average earnings for regular, permanent workers who have not yet been employed with their employer for 12 months. **Board officers should note that, when determining long-term average earnings, section 33.3 specifically excludes those workers who work "on a casual or temporary basis".**

As the legislative direction is clear, it is important that Board officers correctly categorize a worker at the onset of the claim, not after 5 or 10 weeks of benefits have been paid. This will be even more important in light of the provisions of Bill 63 which significantly restrict the Board's ability to reconsider its decisions.

G. ADJUDICATIVE GUIDELINES

Average earnings are arrived at by determining the appropriate category in the context of the worker's employment situation. As noted above, Policy item #67.10 discusses the following situations:

- 1. "A casual worker is a worker who has a short-term/sporadic attachment to employment. Generally the employment lasts less than three consecutive months."**

This policy is directive, in that workers with short-term/sporadic attachment to employment are casual. Given the policy's direction, and in order to ensure consistent and equitable treatment of workers in similar situations, it is the Division's

position that, in the absence of clear evidence to the contrary, there is a presumption that any employment which lasts less than three consecutive months is casual employment. Clear evidence to the contrary might be evidence from the employer that although the one job will end within three months, the worker was expected to continue working for that employer in a different capacity. Other evidence might be that, although the time of injury position would have lasted less than three months, the worker had at the time of injury been employed by that employer on a continuous basis for more than three months.

2. “A worker who works “on call” for one or more employers may also be a casual worker.”

On Call with Single Employer

- a) Where a worker works varying shifts for the same employer on a continuous basis, he or she would normally be categorized as a regular worker. In such cases, although the work is unscheduled, the worker has an ongoing attachment to the employer i.e. – the worker is regularly called in to work and makes himself/herself available to that employer.

An example is a nurse who only works for one employer but reports to one of four hospital sites, all of which are managed by the same employer. Another example is a teacher who works for one school district but is assigned to different schools. These workers would be categorized as regular. Therefore, initial average earnings would be based on the earnings at the time of injury.¹ The long-term average earnings would be based on the general rule – i.e. the 12-month period immediately preceding the date of injury.

If the worker had not been employed with that employer for 12 months, section 33.3 [less than 12-month rule] would be applicable, as the nurse or teacher is neither casual nor temporary. Caution, however, should be exercised so that the average earnings of an appropriate similar status co-worker are comparable to that of an on-call worker.

- b) Where the on-call employment with the single employer is so sporadic, occasional and unpredictable that attachment to the employer cannot be demonstrated, a worker would be categorized as casual. An example is a worker who works on-call for only a few days a month, for the same employer, on an unscheduled basis.

On Call with Multiple Employers

Generally, these workers have no attachment to any one employer and have the ability to voluntarily decline work. It is the Division’s position that, in the absence of

¹ See RSCM Vol. II, Policy item #65.01, *Variable Shift Workers*

clear evidence to the contrary, any workers hired “on call” for a multitude of employers should be categorized as casual. This would include workers hired by temporary agencies and/or union hiring halls. These workers have a casual relationship with the agency or hiring hall – i.e. they are not regular workers of that agency/hiring hall, regardless of the number of assignments the agency/hiring hall refers the worker to.

However, clear evidence to the contrary might be evidence that, although the worker was hired “on call”, that particular assignment/job was expected to last longer than three consecutive months.

3. “Fishers”

The policy also notes that fishers (who do not own their own vessel) are generally treated as casual workers.

In addition to the foregoing, the following are other situations for which clarification has been requested:

4. Workers with Temporary Assignments/Contracts

- Where the job with the employer is three or more months in duration, but has a known termination date, the worker will be categorized as regular, except where there is clear evidence to the contrary, in which case, they should be categorized as casual. Regular workers are entitled to an initial payment period based on their earnings at the time of injury.
- When determining long-term average earnings, where a worker on a temporary assignment does not meet the casual exception, the general rule prevails – i.e. the long-term average earnings would be based on the worker’s 12-month prior earnings. **Board officers should note that the exception in section 33.3 [less than 12-month rule] is not applicable, as it specifically excludes “temporary basis” workers.**
- For example: a worker is hired to work on a construction project for a six-month period and is injured on the third day of employment. This worker will be categorized as a regular worker who has a long-term temporary assignment. Initial and long-term average earnings would be calculated in accordance with the above.

5. Workers Recently Hired on Temporary Assignment with Unknown End Date

Where a worker is recently hired on a temporary assignment with an unknown end date, in the absence of clear evidence that the temporary assignment would have lasted three or more months, the worker will be categorized as a casual worker.

6. Workers Recently Hired on a Permanent Basis

Where there is clear evidence that a new employee is hired on a permanent basis, the worker would be categorized as a regular worker. Therefore, the initial average earnings would be based on the earnings at the time of injury. The long-term average earnings would be based on the section 33.3 exception [less than 12-month rule].

7. Workers with Seasonal Component to their Employment

The former policy relating to “seasonal workers” has been deleted. As well, there is no reference in the new legislation to these types of workers. There are a number of occupations that operate during a given season such as tree planters, berry pickers, harvesters, fishers and certain ski industry workers. Their jobs usually terminate at the end of a season. Despite the fact that the availability of work is seasonal, these workers are not, for that reason alone, categorized as casual. Claims for these types of workers should be handled in accordance with the preceding guidelines relating to sporadic/short-term attachment to the employer.

8. Workers Recently Hired on Probationary Basis

Probationary employment, (as opposed to a worker hired on a temporary basis with a possibility of extension) generally relates to the suitability of a worker in continuing a particular position, not the expected length of the employment or attachment to that employer at the time of injury. These workers would be categorized as regular workers. Therefore, the initial average earnings would be based on the earnings at the time of injury. The long-term average earnings would be based on the section 33.3 exception [less than 12-month rule].

9. Collective Agreements/Contracts

Collective agreements or other contracts might deem a worker as casual. However, for the purposes of determining average earnings, section 33, RSCM Vol. II Policy Item #67.10, and the practice directives prevail.