

PRACTICE DIRECTIVE #33C

**LONG-TERM AVERAGE EARNINGS: SECTION 33.4
EXCEPTIONAL CIRCUMSTANCES**

Effective Date: October 1, 2005

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. Effective June 30, 2002, Practice Directive #33 was issued.

Effective July 16, 2002, changes to the exceptional circumstances policy necessitated an amendment to Practice Directive #33. At that time, practice concerning section 33.4 of the *Act* and *Rehabilitation Services and Claims Manual* ("RSCM") Volume II, Policy item #67.60, *Exceptional Circumstances*, was contained in Practice Directive #33.

On October 31, 2003, further practice changes were made, which necessitated additional 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.34.4 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. These changes include the following:

- Where a worker has an absence of more than four, but less than six weeks, and the Board officer is of the opinion that this may result in a "significant atypical and/or irregular absence", the claim will be referred to the Manager of the Long-Term Rate Setting Unit ("LTRS").
- Where there is some likelihood that a student or young worker's injury may result in a functional impairment, a provisional rate should be set at 10 weeks.

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**, *Initial and Long-Term Average Earnings*.

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:

REPLACED by BPIS#21 on May 1, 2008

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

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

2. PURPOSE

This practice directive provides guidance in the interpretation and application of the “exceptional circumstances” provisions found in section 33.4 of the *Act*, and RSCM Vol. II, Policy item #67.60. These provisions provide situations where it would be “inequitable” to use the general long-term average earnings rule found in s.33.1(2).

3. EFFECTIVE DATES AND TRANSITION RULES

This practice directive applies to all decisions made on or after October 31, 2003, on all claims to which the *Act*, as amended by Bill 49, applies.

See Practice Directives #38A, *Effective Dates and Transition Rules*, and #38B, *Reopenings and Recurrences*, for more details.

4. LAW

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.”

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 (Personal Optional Protection).

5. POLICY

RSCM Vol. II, Policy item #67.60, *Exceptional Circumstances*, states, in part:

“Section 33.4 is a discretionary provision and an exception to the application of section 33.1(2) for determining a worker’s long-term average earnings. As such, it

will only be applied where the Board determines that, due to exceptional circumstances, the application of section 33.1(2) is inequitable.

The inequity is that the level of compensation calculated does not best reflect the worker's long-term loss of earnings. In making this determination, "best" does not mean the highest level of compensation possible, but rather, that the level of compensation reflects the actual loss incurred by the worker."

The policy provides three criteria for determining if a worker's circumstances, that give rise to the inequity, are exceptional. **Only one criterion needs to be met.**

6. CRITERION A – SIGNIFICANT ATYPICAL AND/OR IRREGULAR DISRUPTION

"Where the Board determines that the worker had a history of regular full time employment, and the worker's earnings in the 12-month period immediately preceding the date of the injury do not reflect the worker's historical earnings because of a significant atypical and/or irregular disruption in the pattern of employment during that period of time."

"Atypical"

The policy provides that the worker **must** have had a history of regular full-time employment **and** that there was a significant atypical and/or irregular disruption in that pattern. While the policy refers to "full-time employment", the Division interprets that the intent of the policy is to apply to regular workers who work permanent part-time or permanent full-time. The worker must provide evidence of regular, permanent, uninterrupted employment in recent years, and the absence in the 12-month period prior to the injury must represent an aberration in that pattern.

"Significant"

Board officers should also note the use of "significant" preceding "atypical and/or irregular disruption". "Significant" refers to the economic impact that would produce an obvious inequitable result. This is demonstrated by the example given in the policy: an absence of more than six consecutive weeks would represent a significant financial impact on the 12-month average earnings. By inference, the Division's position is that an absence of less than six weeks would produce a modest impact on the worker's 12-month earnings and thus use of these earnings would generally not produce an inequitable result.

However, RSCM Vol. II, Policy item #67.60 uses an absence of more than 6 consecutive weeks as an **example** of when exceptional circumstances *may* arise. There may be rare circumstances where an atypical and/or irregular absence of *less than 6 consecutive weeks* is nonetheless significant, such that not providing credit for the absence would produce an inequitable result. In order to ensure consistency, claims

where Board officers believe this may be the case should be forwarded to the Manager, Long-Term Rate Setting Unit, to determine whether Policy item #67.60 has been met.

Where an absence of less than 6 consecutive weeks nonetheless has a significant impact on the worker's 12-month earnings, it is the Division's position that some latitude must be provided. For example, if a worker had a collection of absences in the year preceding the injury, each of which was less than 6 weeks, but collectively totalled more than 6 weeks, the Manager, LTRS, would review the worker's past pattern of employment. If the worker's pattern of employment indicates that there were no similar absences in the years preceding the injury, the Manager may then consider crediting the collection of absences in the year prior to the injury.

However, if a collection of absences in the year prior to the injury totalled between 4 and 6 weeks, the worker must have had an especially strong employment history of no such absences before credit may be given. There is an inverse relationship between the cumulative number of weeks of absences and the strength of the history of absence-free employment required. For example, a worker with absences totalling 4 weeks would need a stronger history of absence-free employment than a worker with absences totalling 5.5 weeks, before credit will be given for those absences.

Absences totalling less than 4 weeks would not be credited since it is the Division's position that crediting absences of less than 4 weeks would be inconsistent with the use of the term "significant" and with the example given in policy.

"Disruption"

Where a worker has experienced an assortment of significant previous disruptions (each in itself unusual), the exceptional circumstance policy would not apply. For example, if a worker had an educational leave in the past year, a lengthy illness in the second year, and a plant shutdown in the third year, the general long-term rule (using the 12-month average earnings in the period immediately preceding the injury) would be equitable. Deducting the absence would, in fact, produce an inequitable result. The exception would be maternity/paternity absences because most parents have two children on average. Recent interruptions for maternity/paternity are therefore an aberration in the working life of an otherwise fully employed worker.

The policy provides *examples* of disruptions in the employment pattern that are considered atypical and/or irregular (illness, educational or maternity/paternity leave). However, Board officers are reminded that the *reason* for the absence is NOT relevant, nor does the absence need to be similar in nature to those listed in the policy. An absence, **for any reason**, may be considered, so long as it represents an atypical/irregular disruption in a history of otherwise regular employment.

Where the above criteria are met, Board officers may deduct the period of absence, unless a longer period of time is clearly more appropriate. Since the policy uses "or",

this generally means that Board officers cannot deduct the absence AND use a longer period of time. Board officers should note that where the disruptions represent regular lay-offs, this policy will not apply. However, they should consider whether EI payments might be added to the composition of the 12-month earnings. See Practice Directive #35, *Employment Insurance Payments*.

7. CRITERION B – DIMINISHED FUTURE CAREER OPTIONS DUE TO THE INJURY: STUDENTS & YOUNG WORKERS

“Where the Board is satisfied that the worker’s earnings in the 12-months immediately preceding the date of injury do not address the worker’s diminished future career options because of the nature and degree of the injury.”

The policy provides an example of a student on a designated path of study at a provincially recognized institution AND who was in temporary employment (part-time or full-time) unrelated to his or her field of study at the time of the injury.

The policy also provides the example of a young worker who is under the age of 25 AND has completed a designated course of study within the last two years.

Please refer to Appendix A for an overview of the policy and practice regarding students and young workers.

A. Initial Average Earnings

I. Attachment to the Employer

As students, in general, are normally unattached to permanent employment specifically due to their studies, they are **categorized as regular**, not casual, workers when determining initial average earnings.

Unlike students, however, it is not readily apparent with young workers whether they are unattached to permanent employment or whether they would have stayed with the accident employer. Despite this, the policy has allowed for special consideration for young workers – due to their young age, they may not have yet decided on their future career path. The Division believes that the presumption in favour of non-attachment to the employer is reasonable for these workers. In such cases, the young worker would be categorized as a regular worker.

However, where there is clear evidence that the young worker was permanently attached to the employer, the exceptional circumstances policy does not apply. Instead, the worker will be categorized according to his or her employment situation at the time of injury.

II. Determining Initial Average Earnings

STUDENTS

- If a student works part-time during the entire year (including part-time during the summer) and is injured, the initial wage rate should be set using earnings during the three-month period prior to the time of injury.
- If a student works full-time during the summer (but does not otherwise work during the rest of the year) and is injured, then the initial wage rate should be set using earnings at the time of injury.
- If a student works sporadically during the entire year and is injured, the initial wage rate should be set using earnings during the 12-month period prior to the time of injury.
- If a student works part-time during the year and also works full-time during the summer, then the method by which the initial wage rate would be set depends on when the student was injured.

For example, if the student was injured while working part-time during the year, Board officers would use the three-month earnings prior to the time of injury. If the student was injured while working full-time during the summer, Board officers would use the time of injury earnings.

Board officers should note that RSCM Policy item #66.15, *Part-Time and Temporary Workers*, has been rescinded effective June 30, 2002. Therefore, regardless of whether the student returned to school before 10 weeks of cumulative benefits had been paid, if there is ongoing disablement, the initial payment period lasts 10 weeks.

YOUNG WORKERS

If the young worker **does not have an attachment** to his or her accident employer, the young worker is categorized as regular, and initial average earnings are based on “time of injury” earnings. Since such a young worker may be eligible for the exceptional circumstances provision, should he or she develop a PFI, the young worker should not be categorized as casual.

If the young worker **does have an attachment** to his or her accident employer, the exceptional circumstances policy does **not** apply. In these circumstances, the young worker will be categorized according to his or her actual employment circumstances at the time of injury, and initial average earnings are established accordingly.

B. Long-Term Average Earnings

Unlike all other sections, which base average earnings retrospectively, this aspect of section 33.4 policy bases average earnings on a prospective consideration of the impact of the injury on future earnings. As such, it should have very limited application so other workers are treated fairly. The examples of students and young workers best represent the intention of this policy criterion when determining whether exceptional circumstances exist. Board officers should note that this criterion does not provide examples other than students and young workers. Therefore, other situations, such as where a worker intends to obtain a future promotion, or has been promised a promotion, should not generally represent exceptional circumstances.

When determining long-term average earnings at the 10-week rate review for a student, or a young worker with no attachment to the accident employer, consideration should be had to whether there is some likelihood that the student/young worker may have a permanent impairment resulting from the injury.

I. Where There is Some Likelihood that the Student/Young Worker May Have a PFI

If, at 10 weeks, the Board officer is able to determine from the nature of the injury (e.g. amputation) that the student/young worker will have a PFI (even though the injury has not yet plateaued), long-term average earnings should be based on the regional class average of a qualified person in an occupation related to the worker's field (or previous field) of study.

If, at 10 weeks, there is some likelihood that the student/young worker may suffer a PFI (i.e., it is a *possibility*, although not yet a certainty), a provisional rate should be set. RSCM Vol. II, Policy item #65.04, *Provisional Rate*, provides that, "*this is a preliminary determination pending receipt of further information required to determine a worker's average net earnings*". In this case, the required "further information" is whether the worker's injury will actually result in a PFI, thereby entitling him or her to have long-term average earnings set according to s.33.4 and the exceptional circumstances policy. As such, until this information is received, the provisional rate will NOT be set using the class average of a qualified person in an occupation related to the worker's field (or previous field) of study. Instead, the student/young worker's provisional rate will be set on the student or young worker's own earnings in the 12-month period immediately preceding the date of injury.

As per Policy item #65.04, Board officers "*will review the rate at least every four weeks from the date of the preliminary determination until the decision on average net earnings is made.*" Once a student/young worker's injury has either resolved or plateaued (or the likelihood of a PFI becomes a known certainty), a decision on the worker's long-term average earnings must be made. Under no circumstances can a claim be closed or deactivated until a decision on the long-term wage rate has been made.

Once it is known that the student/young worker has suffered or will suffer a permanent impairment, it is assumed that the nature and degree of the injury will diminish the worker's future career options, and therefore, that the student/young worker meets the exceptional circumstance policy. The long-term average earnings may then be based on:

- For **students**: the regional class average of a qualified person in an occupation directly related to the student's field of study.
- For **young workers**: if a young worker recently graduated from a specific trade or field of study, the long-term average earnings may then be based on the regional class average of a qualified person in an occupation related to the young worker's previous field of study.

“OCCUPATION RELATED TO FIELD OF STUDY”

For some students who are in highly specialized fields of study (e.g. medicine, law, nursing), it may be relatively easy to determine an “occupation” related to the field of study (i.e., doctor, lawyer, nurse). However, for other students in general fields of study (e.g. Bachelor of Arts, or a high school diploma), it may be more difficult to determine what a directly related occupation is or would be.

Likewise, a young worker may have recently completed a designated course at a provincially recognized training or educational institution, which is of such a general nature that it does not identify a field of study (e.g., high school diploma). It may be difficult to determine “an occupation related” to the young worker's previous field of study in these circumstances.

Where a student's or young worker's field, or previous field, of study does not readily identify a related occupation, consideration should be had to factors such as:

- the worker's present job
- other training
- previous academic achievements
- whether the worker had recently enrolled, or provided evidence of impending enrolment, in a particular field of study
- whether high school/post-secondary transcripts reveal subjects and areas of interest and/or aptitude
- whether grades were high enough to gain admission to desired program(s)
- extra curricular or volunteer activities
- interest or aptitude testing, and specific career or occupational testing
- career counselling assessment from a professional or credible source (e.g., school guidance counsellor)

This is not an exhaustive list, and other relevant information should be collected and considered.

If possible, one probable related occupation should be identified. Where one occupation cannot be identified, a range of probable related occupations may be compiled. Board officers should then decide if any one of these occupations is more probable than the others.* If no one occupation is more probable than the others, the regional class average for each probable occupation should be obtained and listed in numerical order by wage rates. The Board officer would then select the one rate (and corresponding occupation) falling in the middle of this range, or, if two rates fall in the middle, the higher of the two.* The *Act* does not allow Board officers to average the rates from several different occupations.

If the student's or young worker's injury has resolved, the exceptional circumstances policy does not apply (see below).

II. Where there is No or Little Likelihood that the Student/Young Worker May Have a PFI

If, at 10 weeks, it is apparent that the student/young worker will not suffer a permanent impairment, or there is little likelihood that this will be the case, the exceptional circumstance policy would not apply. Long-term average earnings for these workers would then be calculated as follows:

- Student/Young Worker, permanently and regularly employed full-time or part-time at least 12 months – General Rule
- Student/Young Worker, permanently and regularly employed full-time or part-time for less than 12 months – Section 33.3
- Student/Young Worker, temporarily employed full-time or part time – A student or young worker with no PFI and who was not permanently employed at the time of injury is precluded from the application of s.33.3 because of the “temporary” nature of the employment. Nonetheless, they are not categorized as casual workers. Instead, in these cases, the worker's own earnings in the 12-month period immediately prior to the date of injury would be used.

8. CRITERION C – DEDUCTIONS NECESSARY TO DETERMINE LABOUR COMPONENT OF EARNINGS

“Where deductions must be made from the worker's gross income to derive the labour component of the worker's average earnings.”

* Long-term average earnings would then be based on the regional class average of the selected probable related occupation.

The policy provides leeway in calculating a worker's prior 12-month average earnings where those earnings include business income and expenses and it is therefore necessary to make deductions to determine the labour component of the earnings. In most cases, the worker's taxation year-end does not match the date of injury. Therefore, Board officers may "*consider the worker's earnings history for a longer time period...*", if necessary.

The exceptional circumstances policy does not apply to self-employed workers who have not been employed 12 months. They fall into the provisions of section 33.3.

9. EVIDENCE OF EXCEPTIONAL CIRCUMSTANCES

The Board must be provided with independently verified evidence. For example, where a regular worker had a significant atypical medical absence in the prior year, a doctor's note clearly confirming disablement would be required. Another example where evidence would be required, is where a student was temporarily employed at a summer/part-time job (such as at a restaurant), but the student's field of study was clearly related to physiotherapy. In that case, proof of attendance from the provincially recognized institution would be required.