

**AVERAGE EARNINGS –
INITIAL AND LONG-TERM WAGE RATES**

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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.

2. PURPOSE

This practice directive provides guidance for calculating average earnings for initial and long-term wage rates in relation to the new categories set out in the legislative and policy provisions.

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

See Practice Directive #38, *Effective Dates, Recurrences and Transition Rules*.

4. LAW

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

- Section 33.1(1) provides the general rule that, for all regular workers, the initial wage rate is based on the rate at which the worker was remunerated at the time of injury.

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- Section 33.1(2) provides the general rule that, for all regular workers, the long-term wage rate is based on the earnings in the 12-month period immediately preceding the date of injury.

The following are the exceptions to the above general rules:

- Sections 33.2 relates to Apprentices/Learners and states that the long-term wage rate is 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.*”
- Section 33.3 relates to regular workers who have not yet been employed by their employer for 12 months and states that the long-term wage rate “...*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) 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 a worker who is an apprentice or learner worker, a worker employed less than 12 months, a casual worker, and a person who has POP.

- Section 33.5 relates to casual workers and states that both the initial wage rate and the long-term wage rate “...*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 relates to self-employed persons who have purchased Personal Optional Protection (“POP”) and states that both the initial and long-term rates are “... *based on the gross earnings for which the coverage is purchased.*”
- Section 33.7 relates to non-earners [volunteers admitted to the scope of the Act under section 3(5)] and provides the Board with discretion to determine the amount of average earnings to establish both the initial and long-term wage rates.

Two or More Categories May Apply

Section 33.1(3) states that:

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

6. INITIAL WAGE RATES

Initial Wage Rates - General Rule - All Workers

As noted in section 33.1(1) of the *Act*, the general rule is that, for all workers, the earnings at the time of injury must be used to establish a worker’s initial average earnings rate, up to the maximum allowed under the *Act*. This provision applies to workers who are regularly employed and includes workers who are:

- Permanent part-time;
- Permanent full-time;
- Labour contractors who operate their own business;
- 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 the following periods:

- (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) The Board’s policies with respect to workers who work variable shifts remain the same.

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- (b) Where a worker works regular overtime, it is included in time of injury earnings. In these cases, a worker's 3-month earnings immediately preceding the injury will be used to establish an initial average earnings rate. Where a worker is not casual and 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 an initial average earnings rate.
- (c) Labour contractors without POP are generally considered to be permanent regular workers who are self-employed. As such, the earnings at the time of injury should be used for the purposes of establishing an initial wage rate.

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 the initial and long-term wage rates.

For the purposes of an initial wage rate, the gross 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, *Net System of Compensation*.

- (d) Fishers may be self-employed or employed by others. Where they are self-employed, the guidelines in RSCM Vol. II, Policy items #65.03 and 68.63 apply. Where the fisher is not self-employed, they are normally treated as casual workers. See RSCM Vol. II, Policy item #67.10. However, in those circumstances where the Board officer determines that the fisher is a regular worker (e.g. a full-time fisher), the initial average earnings may be calculated in accordance with RSCM Policy item #65.03.
- (e) Principals' initial wage rates should be established in accordance with Practice Directive #22, *Principals' Earnings Information*.

Exceptions to the General Rule for Initial Rates

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."

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The length of time a worker has been employed with the employer prior to the injury is not necessarily the prime consideration in determining whether a worker should be classified as casual. For example, a worker may have recently commenced a permanent job. In some cases, workers hired on a temporary basis might not be considered casual where it can be demonstrated that the job/employment would generally have lasted more than three consecutive months.

The policy concerning longshore workers (stevedores) remains unchanged. Therefore, they continue to be considered casual workers.

Fishers who are not self-employed, are generally treated as workers engaged in casual employment.

The category of seasonal no longer exists and workers will now be categorized as casual or regular workers depending on the terms of employment at the time of the injury.

(b) Average Earnings

In accordance with section 33.5, the wage rate for a casual worker should be based on 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, *Net System of Compensation*.

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 90% net compensation rules. These rules apply notwithstanding that the POP amount purchased is less than the statutory minimum.

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

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.

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The gross average earnings are not reviewed after 10 weeks of short-term disability. However, the average net earnings may vary due to re-calculating average net earnings after 10 weeks. See Practice Directive #32, *Net System of Compensation*.

For a person who has POP coverage and secondary 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.

Exception #3 - Section 33.7 - Non-earners

Volunteers are not "workers". However, in certain circumstances, under section 3(5) of the *Act*, they may be covered under the *Act* by Order-in-Council. Where a volunteer is granted coverage, section 33.7 provides the Board with discretion to determine the amount of average earnings in establishing both the initial and long-term wage rates. 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 (\$101.47 effective January 1, 2002) are less than the statutory minimum, and are not subject to the 90% average net earnings rule. However, any secondary earnings the volunteer has may be subject to the 90% net compensation rules.

7. LONG-TERM WAGE RATES

Overview of Long-Term Wage Rates

A rate review is conducted after 10 weeks of cumulative temporary disability benefits or on the effective date of a permanent disability award.

Long-Term Wage Rate General Rule – All Workers

There is no review of the gross average earnings for casual workers, persons who have purchased POP, or workers with no earnings at the time of injury as their long-term average earnings are set from the outset of the claim.

For all regular workers, the long-term wage rate should be established on the average earnings in the 12-month period immediately prior to the date of injury.

- (a) Long-term wage rates 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 Board's method in determining the long-term wage rate for a labour contractor who has not purchased POP. As noted in both RSCM Vol. I and Vol. II, the prior 12-month earnings declared on the labour contractor's individual tax return will include the business' gross and net income. To

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).

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assist in determining what component of the business income represents 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, and are 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, the guidelines in RSCM Vol. II, Policy item #68.63 apply. Where fishers are not self-employed, they are normally treated as casual workers and therefore, the guidelines in RSCM Vol. II, Policy item #67.10 apply. In those occasional circumstances where a fisher is a regular worker, the long-term wage rate general rule applies.
- (c) Principals' initial wage rates should be established in accordance with Practice Directive #22, *Principals' Earnings Information*

Exceptions to the General Rule for Long-Term Rates

There are three exceptions to this general rule.

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 wage rate 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

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The long-term wage rate for a worker in this category is 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.”

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, provides 4 circumstances when the exceptional circumstance provision may be applied. These are:

1. Students on a designated path of study employed in temporary employment unrelated to his or her field of study;
2. Young workers, under the age of 25 and who last attended school on a full-time basis no longer than two years ago;
3. Regular workers with an absence from their employer of at least 6 consecutive weeks during the prior 12 months, where previously, the worker had a history of regular employment and the absence was due to illness, education leave or maternity/paternity leave; or
4. Self-employed workers with no POP, where the earnings information is not available for the immediate 12-month period prior to the injury.

In the above 4 circumstances, the Board must be provided with independently verified evidence. For example, where a regular worker had a medical absence of at least six weeks in the prior year, a doctor’s note of confirming disablement would be required. Another example is where a student was temporarily employed at a summer or weekend job (such as at a restaurant), but the student’s field of study was clearly related to Education. In that case, proof of attendance from the provincially recognized institution would be required.

Where a worker meets the above exceptional circumstance category, Board officers have the discretion to determine average earnings in a different manner. For the “student and young worker” exceptional circumstances category, Board officers should consider the student’s or young worker’s probable yearly earning capacity. In this

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respect, the Board's methods for validating probable yearly earning capacity have not changed. For the "6 week absence" exceptional circumstances category, Board officers may deduct the period of absence from the worker's average earnings calculation or use a longer period of the worker's employment history to determine the worker's average earnings (for example, a 24-month period). For the "self-employed person with no POP" exceptional circumstances category, the Board may use the earnings over a longer period of time to determine the person's average earnings.

The Board has narrowly confined the application of section 33.4 to these 4 situations. Exceptional circumstances not identified in the policy may, however, be considered, with the approval of President, or delegate.

Board officers should note that, prior to June 30, 2002, Board policy allowed for adjustments to the 12-month period where a worker had been absent from the workforce for certain reasons (e.g. WCB claims, labour disputes or medical absences). However, this type of adjustment is no longer allowed, except in accordance with the exceptional circumstance policy.

8. ADDITIONS/EXCLUSIONS TO COMPOSITION OF AVERAGE EARNINGS

- Certain items may be included or excluded in the composition of average earnings (vacation pay, room and board, and overtime). See RSCM, Policy items #68.00-#68.90.
- Section 33(3.2) states that Employment Insurance Benefits may be considered when calculating long-term wage rates in certain situations. Refer to Practice Directive #35, *Employment Benefits*.
- 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 allowance paid to the worker because of the nature of the worker's employment.

The latter normally includes items that assist the worker to perform the job and are generally paid for by the employer. The RSCM Vol. II, Policy item #68.24 provides a list of 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 INFORMATION

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Section 33.2 (Apprentice/Learner) and Section 33.3 (Employed Less than 12 months) provide methods for determining long-term “comparable” information. In this respect, both provisions direct the Board officer to first contact the employer to obtain the required information. Board officers must caution employers not to disclose co-workers’ names to the Board in order to ensure compliance with the provisions of the *Freedom of Information and Protection of Privacy Act*.

As noted in RSCM Vol. II, Policy items #67.40 and #67.50, the Board is not limited to obtaining wage rate information from a single source or one employer. The Board may use relevant information from other sources. 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 information concerning the worker’s date of injury occupation, type of employment and the locality where the worker worked. The Board’s Statistics Department will provide the Board officer with a regional class average. The above information should be noted on the claim and in the decision letter.

10. ADDITIONAL ADJUDICATIVE INSTRUCTIONS

1. To calculate the effective date of the 10-week rate review, both section 29 and section 30 benefits are included. 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 workweek.
2. The Board’s policy relating to Federal Government claims remain 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.*”
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, any resulting overpayment would be declared as an error outside of the Board’s jurisdiction and would be recoverable. See Practice Directive #40, *Obligation to Provide Information*.
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 are considered regular workers. The initial rate is set on the worker’s earnings at the time of injury and the long-term wage rate is based on the 12-month prior earnings.

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7. Where a pension must be deducted from a wage rate, its full monthly value 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. However, Board officers must establish wage rates in accordance with the new legislative framework and policies, rather than conforming to an individual employer's payroll system. For example, a wage rate cannot be established on the 12-week prior earnings, simply because this figure is readily available from an employer.