Amended and split into 33A and 33C

PRACTICE DIRECTIVE #33

AVERAGE EARNINGS – INITIAL AND LONG-TERM WAGE RATES
Amended Effective July 16, 2002

This practice directive is organized under the following headings:

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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. **On July 16, 2002, the Panel of Administrators approved further amendments relating to RSCM Vol. II, Policy item #67.60, *Exceptional Circumstances,* necessitating an amendment to Practice Directive #33, issued on June 30, 2002. The Resolution of the Panel of Administrators states that the amendment applies to all decisions made on or after July 16, 2002. Therefore, where a claim is being adjudicated under the section 33.4 of the current legislative provisions, Board officer should apply the amended Policy item #67.60.**

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. **It rescinds and replaces Practice Directive #33, which was effective June 30, 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

See Practice Directive #38, *Effective Dates, Recurrences and Transition Rules*. **RSCM Vol. II, Policy item #67.60 was amended on July 17, 2002.**

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.

- 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 be 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 the12 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:

> *"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

Amended and split into 33A and 33C

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.

(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) For the purposes of section 33, 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

Amended and split into 33A and 33C

(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."*

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]

[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.

Amended and split into 33A and 33C

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).

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. 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 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*

<u>Exceptions to the General Rule for Long-Term Rates</u>

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.

[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).

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

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, *Exceptional Circumstances*, states, in part that:

> *"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.

Amended and split into 33A and 33C

Criteria #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."

- It is important to note that 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. This means that the worker must provide evidence of regular, permanent, uninterrupted employment in recent years and the absences in the 12-month period prior to the injury must represent an aberration in that pattern.

- Also, Board officers should note the use of the modifier "significant" when referring to atypical and/or disruption. "Significant" refers to the economic impact that would produce an obvious inequitable result. This is demonstrated by the example given by the Panel of Administrators in the policy: An absence of six or more consecutive weeks would represent a significant financial impact on the 12-month average earnings. By inference, the Division believes that, if a worker had a significant injury, compensable or otherwise, during the 12 months that caused an absence of less than six weeks the disruption would be modest and the use of the 12-month earnings would not produce an inequitable result.

- Where a worker has experienced an assortment of significant previous disruptions (each in itself atypical), the exceptional circumstance policy would not apply. For example, a worker with an education absence in the past year and a lengthy illness in the second year and a plant shutdown in the third year. In that situation, 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. The reason for this is due to the fact that based on statistical averages 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 types of examples that are considered atypical and/or irregular disruptions in the pattern of employment such as illness, education or maternity/paternity leaves. Other disruptions such as those due to labour dispute or unplanned shutdown, which represent a significant atypical and/or irregular disruption for the worker's type of industry, may be considered. In all cases, however, the criteria above must be met.

- Where the above criteria are met, Board officers may deduct the period of absence, unless a longer period of time is clearly more appropriate. 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 Benefits*

Criteria #B - Diminished Future Career Options Due to the Injury

> *"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."*

Section 33 bases average earnings on a prospective consideration of the impact of the injury on future earnings. As such, this consideration should have very limited application so as to treat other workers fairly. Potential applications are best illustrated by example. The following examples, of students and young workers, best represent the intention of the policy when determining whether exceptional circumstances exist. Board officers should note that the policy does not provide examples of situations other than students and young workers. Therefore, other situations such as cases where a worker intends to obtain a future promotion, or has been promised a promotion, should not generally represent exceptional circumstances.

1. Students

- 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 further provides that due to the nature and degree of the injury, the 12-month earnings do not address the student's future loss.

- As students are normally unattached to permanent employment specifically due to their studies, they are categorized as temporary, not casual workers. However, all other non-permanent workers, other than students, are classified as casual workers and are precluded from the application of section 33.4.

The determination of average earnings for students should be made as follows:

When determining long-term average earnings for a student at the 10-week rate review, consideration should be had as to whether the student is likely to have a permanent impairment. If not, or if not yet apparent at 10 weeks, the exceptional circumstance policy would not apply. Long-term average earnings for those students would then be calculated as follows:

- Regular Part-time Student Employed 12 Months – Use general rule: 12-month earnings immediately prior to date of injury.

- Regular Part-time Student Employed Less than 12 Months – Use section 33.3: earnings in the 12-month period immediately prior to the date of injury of a person of a similar status part-time co-worker (or, if necessary, the part-time regional class average).

- Full-time Student Employed 12 Months - While generally students only work full-time during the summer months and return to school in the fall, where a student has worked for 12 months, the general long term rule applies. Board officers should note that RSCM Vol. I, Policy item #66.15, *Part-Time and Temporary Workers*, has been rescinded effective June 30, 2002. Therefore, regardless 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.

- Full-time Student Employed Less than 12 Months - Use section 33.3: earnings in the 12-month period immediately prior to the date of injury, of a person of similar status co-worker (or, if necessary, the full-time regional class average).

If a student is expected to have full medical recovery, the exceptional circumstances policy would not apply.

If the Board later determines that a student will suffer a permanent impairment, it is assumed that the nature and degree of the injury will diminish the worker's future career options. It is irrelevant to this determination to consider if the student was actually able to continue with his or her path of study or was successful in achieving that goal. The only prerequisite is evidence of a permanent impairment. In such cases, the student meets the exceptional circumstance policy and average earnings may then be retroactively based on the regional class average of a qualified person in the occupation directly related to the student's field of study. In these cases, a retroactive wage rate adjustment may be made, based on the new information/evidence (the permanent impairment).

2. Young Workers

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

- Board officers should note that it is much easier to determine that a student is not attached to the employer, due to the fact that they are studying for entry into a different occupation. With young workers it is not readily apparent whether the young worker would have stayed with his or her date of injury employer. However, the policy has allowed for special consideration for young workers, as they may not have decided what their future career path might be. The Division believes that the presumption, in favour of non-attachment to the employer, is reasonable for these workers. However, where there is clear evidence that the young worker was permanently attached to the employer, despite the completion of a significant educational undertaking, the exceptional circumstances policy does not apply.

Amended and split into 33A and 33C

The determination of average earnings for young workers should be made as follows:

When determining long-term average earnings for a young worker at the 10-week rate review, consideration should be had as to whether the young worker is likely to have a permanent impairment. If not, or if not yet apparent at 10 weeks, the exceptional circumstance policy would not apply. Long-term average earnings for those young workers would then be calculated in the same manner as for students and as follows:

- Regular Part-time Young Worker Employed 12 Months – Use general rule: 12-month earnings immediately prior to date of injury.
- Regular Part-time Young Worker Employed Less than 12 Months – Use section 33.3: earnings in the 12-month period immediately prior to the date of injury of a person of a similar status part-time co-worker, (or, if necessary, the part-time regional class average.
- Full-time Young Worker Employed 12 Months – Use general rule.
- Full-time Young Worker Employed Less than 12 Months - Use section 33.3: earnings in the 12-month period immediately prior to the date of injury, of a person of similar status full-time co-worker (or, if necessary, the full-time regional class average).

If a young worker is expected to have full medical recovery, the exceptional circumstances policy would not apply.

If the Board later determines that a young worker will suffer a permanent impairment, it is assumed that the nature and degree of the injury will diminish the worker's future career options. In such cases, the young worker would have met the exceptional circumstances policy. For young workers who recently graduated from a specific trade or field of study, the average earnings may then be retroactively based on the regional class average of a qualified person in the occupation directly related to the field of study. In these cases, a retroactive wage rate adjustment may be made, based on the new information/evidence (the permanent impairment).

Where a young worker meets the exceptional circumstances policy, but whose last schooling (such as high school diploma) does not identify a specific trade or field of study, a probable occupation may be determined with regard to the nature of the young worker's present job, previous academic achievements or other training. As well, consideration may be had as to whether he or she had recently enrolled, or provided evidence of future enrollment in a particular field of study. The average earnings would then be based on the regional class average of that probable occupation.

Criteria #C - Self-employed Labour Contractors

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

- The policy provides leeway in calculating a labour contractor's prior 12-month average earnings, where those earnings include business income and expenses. In most cases, the labour contractor'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 persons who have not been employed 12 months. They fall into the provisions of section 33.3.

Evidence of Exceptional 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 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.

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, 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 #68.23 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

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 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."*

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 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 wage rate 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 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.