

PRACTICE DIRECTIVE #38A

EFFECTIVE DATES AND TRANSITION RULES

Amended: October 16, 2002

Effective Date: October 16, 2002

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. The amendments change the rules for calculating compensation benefits.

On October 16, 2002, further amendments were made to the transition rules outlined in Chapter 1 of the *Rehabilitation Services and Claims Manual* ("RSCM"), Vol. I and II.

For convenience, the law and policy as they read immediately before June 30, 2002, are called the "former provisions". The law and policy as they read after June 30, 2002, are called the "current provisions".

B. PURPOSE

This Practice Directive reflects the amendments to Chapter 1 of the RSCM approved by the Panel on October 16, 2002.

This Directive provides guidance to Board officers in determining when to apply either the former provisions or the current provisions with respect to the transition situations outlined in Parts F to I below.

C. EFFECTIVE DATE

This Directive is effective October 16, 2002. It replaces Practice Directive #38, *Effective Dates, Recurrences & Transition Rules*, which was issued on June 30, 2002 and amended on August 13, 2002.

D. LAW

The government has declared June 30, 2002 as the transition date for the transition rules in the *Amendment Act, 2002*. Section 35.1(8) of the *Act* states that:

If a worker has, on or after the transition date, a recurrence of a disability that results from an injury that occurred before the transition date, the Board must determine compensation for the recurrence based on this Act, as amended by the Workers Compensation Amendment Act, 2002.

E. POLICY

Chapters 1 of RSCM, Vol. I and II, provide the transitional guidelines:

- Where the former provisions apply, compensation payable will generally be based on 75% of gross average earnings, subject to minimum and maximum.
- Where the current provisions apply, compensation payable will generally be based on 90% of average net earnings, subject to minimum and maximum.¹

F. TRANSITION PROVISIONS - NEW CLAIMS AND ACTIVE CLAIMS ON OR AFTER JUNE 30, 2002

1. Date of injury is before June 30, 2002 and claim has not yet been adjudicated as of June 30, 2002.

Where the date of injury (section 5 claims) is before June 30, 2002, and the claim has not yet been adjudicated as of June 30, 2002, possible temporary benefits will be paid under the former provisions except in those extremely rare cases where the first payment is judged to result from a recurrence of temporary disability.

2. Wage loss benefits commenced before June 30, 2002 and continue to be paid on an ongoing basis as of June 30, 2002.

Workers in receipt of ongoing wage loss or wage loss equivalency benefits, which commenced before June 30, 2002, and which continue on past June 30, 2002, will continue to be paid in accordance with the former provisions.

3. Date of injury is on or after June 30, 2002 (section 5 of the Act).

Where the date of injury is on or after June 30, 2002, compensation will be based on the current provisions.

4. Date of disablement is on or after June 30, 2002 in the case of an occupational disease (section 6 of the Act).

In the case of an occupational disease, where the exposure or disease occurred before June 30, 2002, but the date of disablement is on or after June 30, 2002, compensation will be based on the current provisions.

G. TRANSITION PROVISIONS - APPELLATE RETURNS/NEW EVIDENCE RECEIVED ON OR AFTER JUNE 30, 2002

¹ See Practice Directives #32, *Net System of Compensation* and #33, *Average Earnings – Initial and Long-Term Wage Rates*

Where a decision is made, or new evidence is received, on or after June 30, 2002, relating to compensation benefits effective prior to June 30, 2002, the former provisions apply.

This means that notwithstanding the fact that a decision was made on or after June 30, 2002, the transition rules are determined by the effective date of the commencement of the entitlement. For example:

- On September 1, 2002 an appellate decision found that a worker had a deterioration in his pensionable condition. If the effective date of the deterioration were prior to June 30, 2002, the former provisions apply to the entire deterioration.
- On October 1, 2002, a Case Manager reviewed a consultation report which provided evidence that the worker had been disabled, or continued to be disabled, prior to June 30, 2002. If compensation were payable, it would be paid under the former provisions. This is regardless of the date of the consultation report or the date that the Case Manager made the decision.

H. TRANSITION PROVISIONS - REOPENINGS/RECURRENCES OF TEMPORARY AND PERMANENT DISABILITY ON OR AFTER JUNE 30, 2002

If the injury occurred before June 30, 2002, and the claim is reopened on or after June 30, 2002, due to a recurrence of disability that commenced on or after June 30, 2002, the current provisions apply.

For guidance regarding the limited circumstances under which a reopening of a claim will remain subject to the former provisions, please refer to Practice Directive #38B, *Recurrences*.

As per RSCM Policy item #1.00, there are three situations in which the recurrence provisions apply to bring a claim with a date of injury prior to June 30, 2002 under the current provisions:

- 1) Recurrences of temporary disability, on or after June 30, 2002, where no permanent disability award has been provided in respect of the compensable injury or disease.
- 2) Recurrences of temporary disability, on or after June 30, 2002, where a permanent disability award has been provided in respect of the compensable injury or disease.
- 3) Any permanent changes, on or after June 30, 2002, in the degree of a worker's permanent disability.

I. TRANSITION PROVISIONS - PERMANENT DISABILITY AWARDS

For an injury that occurred before June 30, 2002, where the first indication of permanent disability also occurs before June 30, 2002, the permanent disability award will be adjudicated under the former provisions. Where the first indication of a permanent

disability is on or after June 30, 2002, the award will be adjudicated under the current provisions, using the modified formula outlined in section 35.1(5) of the *Act* and RSCM Policy item #1.00.

J. ADJUSTING THE ORIGINAL RATE SET ON THE CLAIM

Reopenings Under Three Years

Where the date of injury is prior to June 30, 2002, and the claim is reopened after June 30, 2002, but within three years of the date of injury, Board officers must use the gross average earnings previously established on the claim at the time of injury. For the purposes of “transitioning” those earnings, the following steps are applied:

1. Apply cost of living adjustments, formerly known as consumer price indexing, to the gross average earnings (the established wage rate). If average earnings were above the statutory maximum, apply CPI to the wage rate established on the claim.
2. Determine the allowable deductions for calculating average net earnings. (Having regard to the statutory minimum and maximum.) The tax information to be used is the relevant tax provisions at the time of the reopening. Refer to the guidelines in Practice Directive #32, *Net System of Compensation*.
3. Once the average net earnings are obtained, apply the 90% compensation factor. (Having regard to the statutory minimum and maximum.)
4. The final figure is the current wage rate for the purposes of reopening the claim pursuant to the transition rule.

If, prior to the reopening, less than 10 cumulative weeks of temporary disability benefits had been paid on the claim, the worker is entitled to compensation at the initial wage rate for the remainder of the initial payment period. If 10 or more cumulative weeks of temporary disability benefits had already been paid on the claim, the worker is NOT entitled to another initial payment period.

If the claim is reopened later within three years of the date of injury after a rate has been set according to the above rules, the rate would not be adjusted again: only the applicable cost of living adjustments would be applied.

Reopenings Over Three Years

Section 32 of the *Act* has not been amended. This section gives Board officers discretion to determine compensation benefits where a claim has been reopened more than three years after an injury, by reference to the worker’s current earnings. In comparing the average earnings at the time of the injury with the average earnings at the time of the recurrence, RSCM Vol. I and II, Policy item #70.20, *Reopenings Over Three Years*, provides guidance regarding the rate that “...would more nearly represent...a worker’s loss of earnings suffered by reason of the recurrence.”

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For the purposes of an accurate comparison, Board officers should compare the previous gross average earnings established on the claim (the long-term wage rate) plus applicable cost of living adjustments, with the current gross average earnings. Only the current average earnings need to be “categorized” in accordance with the current provisions.

Board officers may then, having regard to Policy item #70.20, choose which gross average earnings would more nearly represent the worker’s loss of earnings suffered by reason of the recurrence of the injury.

In accordance with the transition rules, compensation benefits must be paid according to the “net 90%” provisions. Therefore, regardless of whether former gross average earnings or current gross average earnings are used, the steps for calculating average net earnings outlined above in Part H, must be followed.

If former gross average earnings are used and, prior to the reopening, less than 10 cumulative weeks of temporary disability benefits had been paid on the claim, the worker is entitled to compensation at the initial wage rate for the remainder of the initial payment period. A rate review is conducted after 10 cumulative weeks of temporary disability benefits have been paid.

If **former** gross average earnings are used and, prior to the reopening, 10 or more cumulative weeks of temporary disability benefits had already been paid on the claim, the worker is NOT entitled to another initial payment period.

If **current** gross average earnings are used, the worker IS entitled to a new initial payment period.

Section 32 requires a comparison of average earnings at the time of injury and at the time of the recurrence each time the claim is reopened after three years from the date of injury. As such, the process outlined above would again be applied.

K. TRANSITION RULES AND COST OF LIVING ALLOWANCES

As noted in Chapters 1 of RSCM Vol. I and Vol. II, “Regardless of the date of injury or death, the current rules on indexing apply to compensation paid on or after June 30, 2002. In the case of fatalities, the current rules are the same as the former rules. Indexing of retroactive awards payable before June 30, 2002, will be based on the former rules.”