

## **EFFECTIVE DATES, RECURRENCES AND TRANSITION RULES**

### **A. BACKGROUND**

On June 30, 2002, the *Workers Compensation Act* (the “Act”), was amended by Bill 49, the *Workers Compensation Amendment Act, 2002* (“*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. For convenience, the law and policy as they were immediately before the June 30, 2002 amendments are called the “former provisions”. Changes on or after the amendments are called “current provisions”.

### **B. PURPOSE**

This practice directive provides guidance to Board officers in determining when to apply either the former provisions or the current provisions, with respect to the following situations:

#### **Transitional**

1. Date of injury is before June 30, 2002 and the claim has not yet been adjudicated.
2. Wage loss benefits commenced before June 30, 2002 and continue to be paid on an ongoing basis as of June 30, 2002.
3. Date of injury is on or after June 30, 2002 (section 5 of the *Act*).
4. Date of disablement is on or after June 30, 2002, in the case of an occupational disease (section 6 of the *Act*).

#### **Recurrences/Reopenings**

1. Where the date of injury was before June 30, 2002, and the claim is reopened for a recurrence of temporary disability on or after June 30, 2002.

### **C. LAW**

The government has declared June 30, 2002 as the transition date for the transitional 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*

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*determine compensation for the recurrence based on this Act, as amended by the Workers Compensation Act, Amendment Act, 2002.*

### **D. POLICY**

Chapters 1 of *Rehabilitation Services and Claims Manual* (the "RSCM") Vol. I and Vol. 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.<sup>1</sup>

### **E. TRANSITION**

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

Where the date of injury (section 5 claims) was before June 30, 2002, and the claim has not yet been adjudicated, possible temporary benefits will generally be paid under the former provisions.

#### **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, which continue on 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.

### **F. RECURRENCES/REOPENING FOR TEMPORARY DISABILITY**

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

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As noted in the legislation, where a worker suffers a recurrence and the claim is reopened, the current provisions apply<sup>2</sup>. The term “reopening” is used in both policy and in practice. In the majority of cases, it relates to a recurrence of temporary disability that results in reopening a prior claim. Care must be exercised not to label all reopened claims as a “recurrence of the disability”. Occasionally, a claim might be reopened due to a recent failed return-to-work program or an administrative error. (Discussed in more detail below.) For the purposes of applying the current provisions, the worker must suffer a recurrence of the disability.

The following provide examples of where a worker’s claim was finalised before June 30, 2002, and the Board officer reopens that claim for a recurrence on or after June 30, 2002. The applicable guidelines are:

### **1. Health Care Only before June 30, 2002 and reopen for temporary disability**

- If less than 12 weeks have elapsed between the last treatment and the date of the temporary disability, this would not constitute a recurrence. In the absence of evidence to the contrary, the reopening would be treated as a continuation of the original claim. As such, the former provisions would apply.
- If 12 or more weeks have elapsed between the last treatment and the date of the temporary disability, in the absence of evidence to the contrary, it is presumed that the reopening is a recurrence. As such, the current provisions would apply.

### **2. Temporary disability benefits finalised before June 30, 2002 and reopen for temporary disability**

Where temporary disability benefits were terminated before June 30, 2002, and a worker suffers a temporary recurrence (s. 29 or s. 30), the current provisions would apply. This includes situations where only an actual loss payment had been made.

It is recognized that by “finalising” a claim, the Board officer has made an administrative determination that the worker is no longer temporarily disabled. In most cases, this means that the worker is fit to return to full pre-injury duties. However, the following are examples of situations where this may not necessarily be the case.

For example, an employer might accommodate the worker in full-time selective light or modified employment in spite of objective signs of disablement with respect to his or her pre-injury job demands. For administrative purposes, the Board officer

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<sup>2</sup> See Chapters 14 of RSCM Vol. I and Vol. II with respect to reopening prior claims and establishing new claims.

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finalled the claim because the worker did not experience any further “economic” disablement.

If a worker is no longer able to continue with full-time modified work, or the modified work is no longer available, Board officers must determine whether a worker’s inability to work is a continuation of the original condition, notwithstanding that the claim may have been finalled. Criterion to consider may include objective medical evidence indicating that the worker remains unable to perform the regular/appropriate available alternate duties.

Another example where a claim might have been finalled is where a worker was scheduled to perform a graduated return-to-work program, after which the worker would have been deemed fit for full duties. In these cases, Board officers must exercise caution in prematurely finaling a claim, as the original return-to-work date may have been based on an estimate. Also, where a return-to-work is unsuccessful within a very short period of time, a reopening would not likely be deemed a recurrence of disability, but simply a continuation of the existing disability. Board officers may therefore choose to monitor the durability of a return-to-work prior to finaling the claim.

### **3. Temporary disability benefits had been paid for less than 10 weeks prior to the reopening**

The same reopening considerations noted in No. 2 above would apply. If the Board officer determines that there was a recurrence, the current provisions would apply. Board officers should note that, where less than 10 cumulative weeks of temporary disability benefits had been paid prior to finaling the claim, the worker would be entitled to an initial payment period (initial wage rate) of up to 10 weeks. Therefore, in these situations, the initial wage rate must be converted to conform with the current provisions. Please see the process outlined below.

### **4. Temporary disability benefits finalled before June 30, 2002 and reopened for Vocational Rehabilitation assistance after June 30, 2002**

Where a worker’s claim was finalled before June 30, 2002, but is reopened at a later date for vocational rehabilitation assistance, the former provisions apply, unless it is demonstrated that the worker suffered a recurrence of disability (either permanent or temporary). In these cases, the “reopening” only refers to the administrative reinstatement of benefits and does not necessarily equate to “recurrence” of disability.

### **5. Temporary disability benefits finalled with immediate referral to Vocational Rehabilitation, and Vocational Rehabilitation benefits commenced on or after June 30, 2002.**

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Where a worker's claim reaches plateau on or after June 30, 2002 and is therefore referred for Vocational Rehabilitation assistance, the former provisions continue to apply. However, if a worker is no longer able to continue with the vocational plan due to suffering a recurrence of disability, the current provisions apply – i.e. where the worker has to undergo revision surgery and the claim is reopened for wage loss benefits.

### **G. CONVERTING PRIOR WAGE RATES TO CONFORM WITH CURRENT PROVISIONS**

After a lapse of 3 years following the occurrence of the injury, new (recent) earnings may be considered when establishing a wage rate for reopening purposes<sup>3</sup>.

Where a claim is reopened prior to 3 years, the former rate (with cost of living allowances) can no longer be used. This is because the former rate will be based on the former provisions. Rather, the current provisions for calculating average net earnings must be used for all recurrences. The following is a step-by-step process for converting a former wage rate based on 75% of gross average earnings, into a current wage rate based on 90% average net earnings:

1. Using historic information on file, determine what current category the worker would fit into, based on the situation relating to the worker at the time of injury. If there is insufficient information on the file, the Board officer may need to contact the worker, employer or Board's Statistics Department, as necessary.
2. Calculate gross average earnings based on the current rule for the respective category, subject to statutory minimum and maximum. See Practice Directive #33, *Average Earnings – Initial and Long-term Wage Rates*.
3. Once the gross average earnings are obtained, subject to the statutory minimum, determine the allowable deductions for calculating average net earnings in accordance with the guidelines in Practice Directive #32, *Net System of Compensation*.
4. Once the average net earnings are obtained, subject to statutory minimum, apply the 90% compensation factor.
5. Once the 90% average net earnings are obtained, relevant cost of living allowances must be applied (formerly known as consumer price indexing). This ensures that the converted figure is representative of present-day values. In this respect, Board officers should contact the Statistics Department for the applicable factors.
6. The final figure represents the current wage rate for the purposes of reopening the claim.

If the claim is reopened again, the rate need not be converted again: only applicable cost of living allowances would be applied.

### **H. REOPENINGS OVER 3 YEARS**

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<sup>3</sup> See section 32.

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Section 32 of the *Act* has not been amended. The former policy, relating to when the Board may exercise its discretion to use new earnings, remains the same. In the case of reopening a claim more than three years after the injury, the Board officer must compare the new earnings to the former wage rate. In order to ensure an accurate and consistent comparison, the steps noted in "G" above must be undertaken. Once the former rate has been converted, it may be compared to new employment earnings. RSCM Vol. I and Vol. II, Policy item #70.20, *Reopenings Over Three Years*, provide guidance as to which rate "...would more nearly represent ... a worker's loss of earnings suffered by reason of the recurrence".

### **I. TRANSITIONAL RULES AND PERMANENT DISABILITIES**

The transitional rules relating to permanent disabilities will be provided at a later date.

### **J. TRANSITIONAL 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.*"