

**PRACTICE DIRECTIVE #38**

**EFFECTIVE DATES, RECURRENCES AND TRANSITION RULES**

**Amended: August 13, 2002**

**Effective Date: June 30, 2002**

**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.

**This directive has been amended to reflect the correct business process relating to reopening claims for temporary wage loss benefits over three years from date of injury. In particular, the amendment outlines the correct procedure when comparing prior gross average earnings to current gross average earnings. This directive applies to all recurrences of disability on or after June 30, 2002.**

**C. LAW**

**REPLACED by PD#s 38A and 38B on Oct. 16, 2002**

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 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 as of June 30, 2002.**

Where the date of injury (section 5 claims) was 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).**

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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*

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**

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.

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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.

## **REPLACED by PD#s 38A and 38B on Oct. 16, 2002**

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 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

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administrative reinstatement of benefits and does not necessarily equate to “recurrence” of disability.

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

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**

Where a claim is reopened due to a recurrence prior to 3 years from the date of injury, 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 as much as possible, 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 adjustments 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.

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If the claim is reopened again, within three years of the date of injury after a long-term (10-week) rate has been set, the rate need not be converted again: only applicable cost of living adjustments would be applied.

### H. REOPENINGS OVER 3 YEARS

Section 32 of the *Act* has not been amended. In the case of reopening a claim for temporary disability benefits more than three years after the injury, the former policy provisions, relating to when and how the Board officer may exercise discretion to use new earnings, continue to apply. 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".

In order to ensure an accurate and consistent comparison, the Board officer must first compare the new average earnings to the former average earnings. To do so, the following steps should be applied:

1. Apply cost of living adjustments, formerly known as consumer price indexing allowances ("CPI"), to the original annualized average earnings on the claim, which can be derived by multiplying the long-term (8-week) weekly wage by 52.14.
2. Obtain and determine current annualized initial gross average earnings in accordance with the current provisions.
3. Compare the original annual gross average earnings with CPI to the current annual gross average earnings.
4. If the Board officer determines that the former gross average earnings with CPI is more appropriate because the new earnings are lower due to the effects of the injury,<sup>3</sup> the former earnings should be used. It follows that it is not necessary to recategorize the worker in accordance with the current section 33. However, compensation must be calculated and paid in accordance with the "net 90%" current provisions outlined in Practice Directive #32, *Net System of Compensation*.
5. If the Board officer determines that the current gross average earnings (new earnings) are not reduced due to the injury, these earnings must be used and compensation calculated in accordance with the current section 33 and with the "net 90%" current provisions. In such cases, the worker is entitled to an initial payment period of up to 10 weeks. If the worker remains disabled beyond 10 weeks, a long-term wage rate must be established in accordance with the current provisions.

### I. TRANSITION RULES AND PERMANENT DISABILITIES

For information regarding transition rules for permanent disabilities, please see Practice Directive #44 - *Overview of Changes, Transition Rules & Recurrences for Permanent Partial Disability Benefits*.

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<sup>3</sup> See RSCM Vol. II, Policy item #70.20(2)(a) which states that care must be exercised to ensure that the determination is consistent with prior decisions on the claim (for example, a prior decision concerning potential loss of earnings).

**J. 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."*