

SECONDARY EMPLOYMENT Effective June 17, 2003

A. BACKGROUND

On June 30, 2002, the *Workers Compensation Act* (the “Act”), was amended by the *Workers Compensation Amendment Act, 2002* (“Bill 49”). As a result, the Panel of Administrators approved amendments to the Board's policies. The amendments changed the rules for calculating compensation benefits.

B. PURPOSE

Section 33 of the amended *Act* provides that Board officers are to categorize a worker based on his or her employment at the time of injury for the purpose of establishing average earnings. This practice directive provides guidance in categorizing the worker where the worker has more than one employment at the time of injury, and thus, it may not be clear which category/earnings rule applies.

C. EFFECTIVE DATES AND TRANSITION RULES

This practice directive applies to all adjudicative decisions made on or after June 17, 2003, on all claims to which the *Act*, as amended by Bill 49, applies.

Please see Practice Directive #38A, *Effective Dates and Transition Rules*, and Practice Directive #38B, *Reopenings and Recurrences*, for the appropriate transition rules.

D. LAW AND POLICY

Section 33.1(1) of the *Act* provides that **initial average earnings** are generally based on:

“...the rate at which the worker was remunerated by each of the employers for whom he or she was employed at the time of the injury.”

The *Rehabilitation Services and Claims Manual* (“RSCM”), Vol. II, Policy item #65.02, *Worker with Two Jobs*, provides some guidance in determining “date of injury earnings” (initial wage rate). It states, in part:

“If a worker holds two jobs and is disabled from both by an injury arising out of and in the course of one of them, date of injury earnings will be based on the combined earnings of both jobs, up to the statutory maximum...”

Where a worker is engaged in two jobs, one of which is a job for which personal optional protection has been purchased, the income earned in the non-personal optional protection job will be combined with the amount of personal optional

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protection purchased for the other job, up to the statutory maximum, in order to determine average earnings.”

Sections 33.1 to 33.7 of the *Act*, and Chapter 9 of the RSCM, Vol. II, provide additional instructions for determining **long-term average earnings**. As well, section 33.1(3) states, in part, that:

“If 2 or more sections of sections 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.”

It should be noted that, while section 33.1(3) precludes the Board from applying more than one *exception to the general rule* for the same injury, it does not prohibit the inclusion of income earned from two or more jobs in the determination of average earnings. For example, if the predominant employment falls within an exception to general rule, the secondary employment(s) may be captured under the general rule. Since the general rule is based on s.33.1(2), the Board is not required to apply the exception to the exclusion of the general rule.

E. MULTIPLE EMPLOYERS AND PREDOMINANT EMPLOYMENT

The *Act* requires that Board officers categorize a worker’s employment situation in order to determine average earnings. Where a worker has only one job, this process is straightforward. However, where a worker has more than one job (multiple employers/employment) at the time of the injury, it is not always clear which job should be selected for categorization purposes. Categorizing both employment situations may lead to inequitable results and/or overcompensation, or may be contrary to section 33.1(3). Furthermore, categorizing the worker according to the accident employer may result in serious undercompensation, as the injury may not have occurred at the worker’s “predominant” job, but at a secondary job where the worker only works occasionally.

Therefore, to ensure:

- compliance with the new average earnings rules,
- that workers in similar situations are treated consistently, and
- that workers with more than one job receive appropriate compensation,

Board officers should determine which employment (job) is predominant.¹ By identifying the predominant employment, Board officers will be better able to apply the average earnings rule that best reflects the worker’s employment circumstances. The following provides guidance in making this determination.

1. Once it is determined that the worker has at least one regular job, determine which of those jobs is the predominant employment. The predominant employment is the one that best captures the worker’s primary employment at the time of the injury,

¹ By determining that a particular employment is “predominant”, this does NOT mean that the claims costs will be transferred from the accident employer.

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although it is not necessarily held with the “accident employer”. Regard should be had to:

- Whether the positions are full-time or part-time
- Whether there is a permanent attachment to each employer
- The comparative number of hours worked per week in each position
- Prior training and/or education completed in each field
- Remuneration received from each employment
- Seniority

Board officers should consider and weigh these, and any other relevant factors, on a case-by-case basis. Generally, the job producing the greatest income at the time of injury will be considered the predominant employment.

2. If the worker has more than one regular job, and none appears predominant because all relevant factors are equally weighted for both/all jobs, then the predominant employment will be the accident employment.
3. Once the predominant employment has been identified, categorize the worker based on that predominant employment. Then, apply the appropriate average earnings rule to determine the average earnings figure for the predominant employment.

F. INITIAL AVERAGE EARNINGS

General Rule – If a worker’s predominant employment is “regular”, **section 33.1(1)** applies. Therefore, initial average earnings are “*based on the rate which the worker was remunerated by each of the employers for whom he or she was employed at the time of injury.*”

Due to section 33.6, if Personal Optional Protection (“POP”) has been purchased for the worker’s secondary employment, it must be added.

Exceptions

1. **Casual** – If the worker does not have at least one regular job, he or she should be categorized as casual and **section 33.5** applies.

If POP has been purchased for the worker’s secondary employment, it must be added.

2. **Personal Option Protection** – **Section 33.6** states that, if a worker has purchased POP coverage, the Board must determine the amount of average earnings based on the gross earnings for which coverage is purchased.

Before the amount of POP coverage purchased will be considered in determining average earnings, the POP account must be active at the time of injury. It is NOT sufficient that the worker had an active account sometime within the 12 months

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immediately preceding the date of injury, if it is not otherwise active at the date of injury.

If a worker has purchased, for example, \$2,000/month of POP coverage, but the coverage had only been in place for two months prior to the date of injury, the worker's POP amount, for the purposes of average earnings, will be \$2,000 x 12 months, regardless of the fact that the coverage had only been in place for two months. This is because the \$2,000/month figure does not represent earnings, but the amount per month for which coverage has been purchased. Section 33.6 states that "*the amount of average earnings under **section 33.1**...[is] based on the gross earnings for which coverage has been purchased.*" Section 33.1 provides that average earnings are determined over a "12 month period".

Thus, if the worker has purchased POP (for either the predominant or secondary employment), the situation is treated as follows:

If POP has been purchased for:	Method:
Predominant Employment	For first 10 weeks: the POP coverage purchased is added to time of injury earnings in the secondary employment(s)
	After 10 weeks: the POP coverage purchased is added to earnings in the 12 months prior to the date of injury in the secondary employment(s)
Secondary Employment *	The POP coverage purchased is added to the amount arrived at by categorizing the predominant employment and applying the corresponding average earnings rule

* (POP is always added regardless of how the predominant employment is categorized)

3. Non-earner

- If the worker was injured while engaged in non-earner activity (to which the Board has extended coverage under section 3), and that worker has no other employment/job, the situation is treated in accordance with **section 33.7**. The worker's average earnings are based on the stipend amount established pursuant to RSCM Volume II Policy items #67.30 to #67.34.
- If the worker was injured while engaged in non-earner activity (to which the Board has extended coverage under section 3), and that worker has other employment, the worker is categorized according to his or her employment and the appropriate average earnings rule is applied. The stipend amount established in policy is NOT added to the employment earnings.

G. LONG-TERM AVERAGE EARNINGS

General Rule – If a worker's predominant employment is regular, and they have been employed in that job for at least 12 months, **section 33.1(2)** applies. Therefore, long-

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term average earnings are “based on the worker’s gross earnings, as determined by the Board, for the 12-month period immediately preceding the date of injury.” This means that all combined income earned in the past 12 months is included in the composition of long-term average earnings.

If POP has been purchased for any employment, it must be added to long-term average earnings.

Exceptions to the General Rule for Long-Term Average Earnings

- 1. Apprentice / Learner** – Where a worker’s predominant employment is categorized as Apprentice/Learner, **section 33.2** applies. This means that the worker’s average earnings are based on the earnings of a qualified person employed at the starting rate in the same trade, occupation or profession. This section provides the worker with the benefit of the presumption that he or she will complete the apprenticeship, obtain a job as a qualified tradesperson, be paid at the same rate as a tradesperson, and would have worked for 12 months.

Since the worker is given the full benefit of these presumptions, it is not appropriate to add earnings from other employment/employers when establishing the long-term rate. However, as per section 33.6, if POP has been purchased for the worker’s secondary employment, it must be added.

- 2. Permanent but “Employed Less than 12 Months”** – If a worker’s predominant employment is categorized as regular, but “employed less than 12 months”, **section 33.3** applies. Therefore, a similar status (part-time or full time) co-worker’s 12-month earnings, or a class average, should be obtained (see Practice Directive #33, *Average Earnings*, for further guidance on collecting “similar status worker” information).

To ensure that these claims are treated consistently, all cases involving multiple employment where the predominant employment is regular “less than 12 months” will be referred to the Manager, Long-Term Rate Setting Unit. Generally, these cases will be treated as follows:

- The worker’s predominant employment is regular less than 12 months, and the worker held secondary employment for 12 months or more prior to the date of injury

Average earnings for the secondary employment will be extrapolated based on earnings paid during the time the worker held the secondary employment concurrently with the predominant employment. This would prevent overcompensation where the worker worked reduced hours in the secondary employment once he or she had started working in the regular less than 12 month employment.

- The worker’s predominant employment is regular less than 12 months, and the worker held secondary employment also for less than 12 months

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- if the worker has a permanent attachment to the secondary employment at the time of injury, both the predominant and secondary employment will be considered together under s.33.3 (this may arise, for example, where a worker returns to the job market after several years of staying home to raise children, and begins two part-time jobs at roughly the same time)
- if the worker does not have a permanent attachment to the secondary employment at the time of injury, only **actual** earnings paid during the time the worker held secondary employment concurrently with the predominant employment will be included (While the secondary employment is no longer active, earnings in that employment were nonetheless still earned in the 12 months preceding the date of injury. However, these secondary employment earnings must have been earned during the time the worker held the secondary employment concurrently with the predominant employment as the worker may have worked reduced hours in the secondary employment in order to begin working in the predominant employment.)

3. Inequitable to Use Worker's Own 12 Months

Section 33.4 is a discretionary provision and another exception to the general rule for establishing long-term average earnings. The section may be applied where the Board determines that, due to exceptional circumstances, use of the worker's 12-month earnings figure would produce an inequitable result. RSCM Vol. II, Policy item #67.60 provides examples where s.33.4 may be met. Discussed below, as they relate to secondary employment, are: significant atypical and/or irregular absence; and students and young workers with permanent functional impairments.

(a) Significant Atypical and/or Irregular Absence

If a worker's predominant employment is regular, employed greater than 12 months, but the worker's earnings in the 12-month period immediately preceding the date of injury do not reflect his or her historical earnings because of a significant atypical and/or irregular disruption, credit may be given for that absence in accordance with s.33.4 (see also RSCM Vol. II, Policy item #67.60 and PD #33). This would not preclude the inclusion of secondary employment income. Thus, if the worker's predominant employment meets the requirements in Policy item #67.60 and PD #33, the worker will be credited for the significant atypical and/or irregular absence. All actual income earned in secondary employment in the 12 months immediately preceding the date of injury will also be added. The secondary employment need not be "active" at the date of injury since these workers are regular workers who otherwise fall under the general rule, but who are simply having significant atypical and/or irregular absences credited.

If POP has been purchased for the worker's secondary employment, it must be added.

(b) Students and Young Workers with Permanent Functional Impairment

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Long-term average earnings for students and young workers with PFIs are based on what best reflects his or her “future loss of earnings”. RSCM Vol. II, Policy item #67.60 and Practice Directive #33 provide a method for determining average earnings for these workers. For students and young workers with PFIs, long-term average earnings are determined with reference to their intended career path and class averages, **not** with reference to what the student or young worker was earning, or the job(s) at which they were working, at the time of injury. As such, for students and young workers, “secondary” employment income is not normally considered.

4. **Casual** – see above.

5. **POP** – see above.

6. **Non-earner** – see above.

H. ADJUDICATIVE GUIDELINES

- RSCM Vol. II, Policy item #35.22 provides:

“Where, prior to the injury, the worker was engaged in two occupations, but the injury only disables the worker from one, the pre-injury earnings are calculated by adding the earnings in both, subject to the statutory maximum. The post-injury earnings are calculated by combining the earnings in the job the worker continues to carry on, with the earnings (if any) which the worker is able to earn in some other suitable and available job in the time that would have otherwise been spent in performing the other pre-injury job.”

Therefore, the wage rate should incorporate all employment earnings, in accordance with this practice directive. However, Board officers are reminded to only pay section 29 benefits where a worker is totally disabled from **all** jobs. Where a worker is only partially disabled (e.g. the worker can perform work on either a full-time or modified basis at one or more jobs), benefits should be paid under section 30 of the *Act* and Policy item #35.22.

- Where two employers maintain a worker on full salary, the compensation payable should be reimbursed to both payee 02 and payee 03 (as the case may be). The amounts payable to each employer would be calculated in accordance with the proportion of earnings earned with each employer. However, in no case can more than the established wage rate be reimbursed by the Board.
- In all cases where the combination of earnings from multiple employments exceeds the statutory maximum, average earnings will be based on the maximum.