

# DISCUSSION PAPER

## 1. TITLE

Room and Board

## 2. WHAT IS THE NATURE OF THE PROBLEM TO BE SOLVED?

- By policy, where a worker receives room and board as part of his or her remuneration, the dollar value of this benefit is considered in the calculation of average earnings. However, under current policy, where a worker continues to receive room and board from the employer during the course of the disability, it is excluded from the average earnings calculation.
- The Worker and Employer Services (“WES”) Division has advised that there have been cases where an employer has withdrawn room and board more than 75 days after the average earnings decision had been made. In these cases, WorkSafeBC (“WCB”) is unable to adjust the worker’s average earnings due to the time limit on reconsiderations and therefore, the worker’s compensation benefits may be lower.<sup>1</sup>

## 3. ISSUE

Under current policy, the dollar value of room and board provided as remuneration is included in average earnings unless the worker continues to receive it during the disability. For example, resident caretakers of apartment buildings are commonly provided with room and board by the employer.

Challenges arise when the employer withdraws the room and board after 75 days have past and the WCB is unable to adjust the worker’s average earnings.

At issue is whether policy should be revised to clarify if employer-provided room and board should be included in the calculation of average earnings, regardless of whether or not the employer continues to provide it during the claim.

## 4. GOALS IN ADDRESSING ISSUE

The goal of this policy review is to ensure that a worker’s average earnings are appropriately determined and to resolve a situation where a worker is negatively impacted when an employer withdraws room and board.

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<sup>1</sup> Section 96(5) of the *Workers Compensation Act*.

## 5. BACKGROUND

### 5.1 Law, Policy and Practice

#### 5.1.1 Average Earnings Calculation

The *Workers Compensation Act* (“*Act*”) directs that a worker’s compensation benefits such as wage-loss and permanent disability benefits are based on his or her pre-injury average earnings.<sup>2</sup>

#### 5.1.2 Room and Board

The room and board policy primarily applies to workers who earn a portion of their remuneration as room and board, such as resident caretakers of apartment buildings.

The policy sets out that room and board provided to a worker as part of remuneration is considered in the determination of the worker’s average earnings, unless the worker continues to receive room and board during the period of disability.<sup>3</sup> Where however, room and board is considered an expense, policy provides that it is not considered in the calculation of average earnings.

This policy also provides that where the employer continues to pay the disabled worker’s full salary and provide room and board, any reimbursement for wage-loss made to the employer by the WCB include the value of room and board, subject to the maximum wage-rate payable under the *Act*.<sup>4</sup>

#### 5.1.3 Pay Employer Claims

Policy refers to situations where the employer continues to provide a disabled worker with some or all of his or her earnings during the claim as “*Pay Employer Claims*”.<sup>5</sup>

In these situations, the *Act* directs that the WCB must take into consideration any special allowances or payments made to the worker at the employer’s expense during the period of disability. The *Act* also provides that such payments are deducted from the worker’s compensation payments and may be reimbursed to the employer.<sup>6</sup>

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<sup>2</sup> With exceptions, sections 33.1(1) and 33.1(2) of the *Act* provide respectively, that short-term average earnings are based on earnings “at the time of injury” and long-term average earnings are based on earnings in the 12-months preceding the injury.

<sup>3</sup> Policy item #68.22, *Room and Board, Rehabilitation Services & Claims Manual*, Volume II (“*RS&CM*”).

<sup>4</sup> Policy items #68.22, *Room and Board* and #34.40, *Pay Employer Claims, RS&CM*.

<sup>5</sup> Policy item #34.40, *Pay Employer Claims, RS&CM*.

<sup>6</sup> Section 34(1) of the *Act*.

#### 5.1.4 Reconsideration Provision

Prior to March 2003, the *Act* did not place any time limits on the WCB's authority to rehear, reopen or redetermine previous decisions.<sup>7</sup> Consequently, the WCB could amend a worker's average earnings decision if the information on which it was based changed at some point in the future.

After the legislative changes, the *Act* restricted the WCB's authority to reconsider previous decisions after 75 days.<sup>8</sup> The effect of this provision is that the WCB is unable to change an average earnings decision after 75 days, even if new information becomes available to warrant reconsideration.<sup>9</sup>

#### 5.1.5 Assessment Practice

The WCB's current assessment practice is to include room and board in the employer's assessable payroll where it is remuneration for the worker and exclude it where it is a business expense of the employer.<sup>10</sup>

This practice is consistent with the policy on average earnings and room and board.

## 6. OTHER JURISDICTIONS

The majority of jurisdictions do include room and board provided to the worker as part of remuneration in the calculation of average earnings.<sup>11</sup>

In eight jurisdictions, employer-provided room and board is excluded from the average earnings calculation when it is provided as a business expense of the employer, and therefore, not considered as part of the worker's overall remuneration.<sup>12</sup>

None of the other Canadian jurisdictions have restrictions on reconsidering previous decisions.

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<sup>7</sup> Section 96(2) of the former *Workers Compensation Act* sets out that the WCB could reopen, rehear and re-determine any decision with the exception of decisions of the former Appeal Board.

<sup>8</sup> Section 96(5) of the *Act*.

<sup>9</sup> Section 96(7) of the *Act* provides an exception to this general rule where there is fraud or misrepresentation.

<sup>10</sup> The Canada Revenue Agency provides that room and board may be excluded from income when it is considered as board and lodging at a remote worksite; and board and lodging at a special worksite.

<sup>11</sup> Northwest Territories and Nunavut do not consider room and board in the calculation of average earnings. This Board advised that in practice, the most common type of room and board paid to workers in these provinces were non-taxable live-out allowances which are also excluded in the majority of other jurisdictions.

<sup>12</sup> Alberta, Ontario, Nova Scotia, Yukon, Saskatchewan, Newfoundland and Labrador, Northwest Territories and Nunavut.

The Boards that include room and board in the average earnings calculation advised that if a worker subsequently lost this benefit after the average earnings had been established, the calculation would be amended accordingly on a prospective basis.

## **7. DISCUSSION**

### **7.1 Challenge with Current Policy<sup>13</sup>**

As previously noted, current policy sets out that the dollar value of room and board provided as part of remuneration is not included in the calculation of a worker's average earnings, when the worker continues to receive the benefit during the course of the claim.

However, situations have arisen where the employer withdraws room and board from the worker after 75 days from the date of the average earnings decision. Under the pre-2003 legislation, the WCB was able to adjust the worker's average earnings to include the room and board amount, when these cases arose.

As a result of the 75-day time limit, the WCB is no longer able to adjust the average earnings and workers have had to file requests for review with the Review Division in order to have the average earnings changed.

### **7.2 Inclusion of Room and Board in Average Earnings**

A possible approach to address this challenge is to amend the policy to provide that the value of room and board would be included in average earnings, regardless of whether or not the worker continues to receive room and board during the claim.

Under this approach, where an employer continues to provide a worker with room and board during the claim, the WCB would deduct the dollar value of the room and board from the worker's wage-loss payment and may reimburse that portion to the employer.

If the employer withdraws the room and board benefit at some point during the claim, the WCB would be able to adjust the wage-loss payment to the worker to reflect the loss of room and board.

This approach is consistent with the legislation and the WCB's current policy addressing how payments are split between the worker and employer in various

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<sup>13</sup> The average earnings policies in Chapter 9 of the *RS&CM* are scheduled for review in 2010. However, a review of the room and board policy was undertaken in advance of this general review given the impact that the average earnings calculation has on a worker's benefits.

situations.<sup>14</sup> The proposed approach would also minimize any adverse impact on workers by ensuring that a worker's average earnings better reflects his or her pre-injury earnings.

### 7.2.1 Consequential Amendment

In order to implement the proposed approach, changes may be necessary to the *Pay Employer Claims* policy. Specifically, this policy may need to be amended to delete a statement providing that the WCB would not reimburse the employer when the employer continues to pay the worker 25% or less of his or her pre-injury wages during the course of the claim ("25% rule").

This policy direction was provided in order to limit splitting wage-loss payments on small amounts. However, it is likely that in some cases room and board would be 25% or less of the worker's salary. As a result, retaining the 25% rule in policy would mean that in practice:

- the worker would receive an average earnings rate that includes the dollar value of room and board;
- the worker would continue to receive room and board from the employer; and
- the employer would not be reimbursed for the room and board provided.
- Removing the 25% rule from policy would still allow the WCB to exercise discretion when determining on individual cases whether or not to reimburse the employer for room and board.

## 8. OPTIONS AND IMPLICATIONS

### Option 1: Status quo

Under this option, policy would remain unchanged.

#### *Implications*

- Workers who lose a room and board benefit after the expiration of the WCB's reconsideration authority would continue to be negatively impacted.
- Workers would continue to seek a remedy through the appellate system and the current volume of requests for review on this issue would remain unchanged.

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<sup>14</sup> Section 34(1) of the *Act* and Policy item #34.40, *Pay Employer Claims, RS&CM*.

## **Option 2: Include the dollar value of the room and board benefit in the calculation of average earnings**

Under this option, policy would:

- provide that the dollar value of room and board would be included in the calculation of average earnings when it is considered to be a part of a worker's earnings;
- provide that where room and board is continued, the portion of wage-loss constituting the value of room and board as determined by the WCB would be deducted from a worker's wage-loss benefits, and may be reimbursed to the employer to the lesser of the maximum wage rate payable under the *Act* or the actual wage-loss entitlement of the worker;
- provide where the room and board benefit is withdrawn or relinquished, the worker would be provided the whole wage-loss payment, to the lesser of the maximum wage-rate payable under the *Act* or the actual wage-loss entitlement of the worker;
- clarify room and board incurred as a business expense of the employer is not included in the average earnings calculation; and
- delete a statement outlining the 25% rule in the *Pay Employer Claims* policy.

### *Implications*

- Compensation benefits would better reflect a worker's loss of earnings in cases where a room and board benefit is withdrawn or relinquished after the average earnings decision has been made.
- There may be an increase in the number of investigations required by the WES Division to determine the dollar value of room and board. However, it is anticipated that the number of claims impacted would be quite small.
- There may be an increase in the number of claims requiring more oversight by the WES Division in order to ensure that wage-loss payments are correctly split between the worker and the employer if the employer provides room and board to the worker during the claim.
- Removing the 25% rule may result in an increase in the number of split payments.
- Minor changes would be required to the Claims Managements Solutions ("CMS") system to accommodate this approach.

## 9. CONSULTATION

Stakeholders are invited to provide feedback on the discussion paper, options, draft policy, and any additional comments that may be relevant to the issue. Stakeholder comments will be accepted until **March 30, 2010**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

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WorkSafeBC's governing body, the Board of Directors, will consider the options expressed by stakeholders before it adopts any amendments to the current policies.

Please note that all comments become part of the Policy and Research Division's database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.

**REHABILITATION SERVICES & CLAIMS MANUAL, VOLUME II  
PROPOSED DRAFT POLICY**

**Additions in Bold, Deletions Struckthrough**

#68.22 Room and Board

The dollar value of room and board **or an allowance in lieu of room and board, that is provided by an employer as part of a worker's remuneration** is included in **the calculation of average earnings. This includes,** ~~unless the worker continues to receive room and board during the disability.~~ However, any payment **made** by the worker for the continuation of room and board while disabled ~~can be included in average earnings.~~

A distinction should be made between room and board which is provided in total or in part by an employer as the remuneration for services rendered and **a room and board incurred as a business** ~~situation where a worker incurs a refundable expense by the employer.~~

~~An~~ **One** ~~example of the latter type of situation~~ **a business expense** ~~occurs is~~ where an official of a company ~~has to~~ **makes** a business visit out of town and incurs the cost of an hotel and meals. On return, the official submits an expense account and the actual expenses are refunded by the employer. **Another example of a business expense is where room and board is provided to a worker at a remote worksite.**

In ~~such~~ situations **where room and board is incurred as a business expense,** the Board does not consider the expenses when ~~computing~~ **calculating** a worker's ~~wage rate~~ **average earnings.**

**A situation where room and board is considered remuneration is for** ~~These principles apply to~~ resident caretakers of apartment buildings. The value of any free or subsidized apartment provided with the job ~~must be~~ **is** considered when determining average earnings. Where specific evidence is not available, section 17 of the *Employment Standards Regulation* may be referred to when valuing an apartment.

Where a worker continues to be provided with room and board during the disability without extra charge and the worker's salary is continued by the employer, any reimbursement to the employer carried out by the Board will, subject to the maximum wage rate under the *Act*, include the value of room and board as well as the worker's salary. ~~Where, however, during a period of disability, the worker is provided with free room and board but is not being paid full salary, there will be no reimbursement made to the employer for the value of the room and board.~~ (9)

**If an employer withdraws room and board during the disability, that portion of wage-loss representing the dollar value of the room and board would be paid directly to the worker, subject to the maximum wage rate under the Act or 90% of the worker's average net earnings, whichever is lower.**

**REHABILITATION SERVICES & CLAIMS MANUAL, VOLUME II  
PROPOSED DRAFT POLICY**

**Additions in Bold, Deletions Struckthrough**

**#34.40 Pay Employer Claims**

Section 34(1) provides that “In fixing the amount of a periodic payment of compensation, consideration must be had to payments, allowances or benefits which the worker may receive from the worker's employer during the period of the disability, including a pension, gratuity or other allowance provided wholly at the expense of the employer, and a sum deducted under this section from the compensation otherwise payable may be paid to the employer . . .”

The section does not provide that any payment made by the employer shall be deducted from the compensation, or that any compensation deducted shall be paid to the employer. It requires that the Board must consider the matter, and that any compensation deducted under this section may be paid to the employer. The section is permissive, not mandatory, and the question is, therefore, in what circumstances a deduction should be made.

In practice, employers who continue paying full wages to disabled workers are reimbursed in amounts equal to the compensation that would normally be paid to their employees. No refund is made for the difference between the amount of compensation and the worker's regular salary. ~~If an employer continues to pay 25% of a worker's salary or less, full wage-loss payments are made to the worker and no refund made to the employer.~~

Refunds are made to all employers except for the Federal Government. However, in any case where the Federal Government is not continuing to pay full salary, the Board must pay the wage-loss benefits to the worker.

If a claim is reopened and the worker is carried on full salary by a different employer from the employer at the time of the original injury, the new employer is reimbursed to the same extent as the original employer would have been. This applies even though the original or new employer is an agency or department of the Federal Government.

If an employer has any outstanding liability to the Board for assessments the amount of the liability is deducted from any payments made to the employer.

**REHABILITATION SERVICES & CLAIMS MANUAL, VOLUME II  
PROPOSED DRAFT POLICY**

**Additions in Bold, Deletions Struckthrough**

**NOTES**

- (1) See policy item #34.40
- (2) See policy item #34.20
- (3) See policy item #65.04
- (4) See policy items #34.20; #35.23; #37.20; #39.60
- (5) See Item AP1-2-3 of the *Assessment Manual*
- (6) See Item C8-56.00 and Item C8-56.40
- (7) See Item AP1-1-5 of the *Assessment Manual*
- (8) See Item AP1-3-1 of the *Assessment Manual*
- ~~(9) See policy item #34.40~~ **DELETED**
- (10) s.33(10)
- (11) s.33(9)
- (12) See policy item #70.20
- (13) See policy item #69.00
- (14) See policy item #69.10