

**2008/03/19-01**

**THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA**  
**RESOLUTION OF THE BOARD OF DIRECTORS**

**RE: Average Earnings – Exceptional Circumstances**

**WHEREAS:**

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto (“*Act*”), the Board of Directors must set and revise as necessary the policies of the Board of Directors, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

**AND WHEREAS:**

Section 33.4(1) of the *Act* provides that if exceptional circumstances exist making the application of the general rule in section 33.1(2) of the *Act* inequitable, then the Workers' Compensation Board may determine an amount that the Board considers best reflects the worker's loss of earnings;

**AND WHEREAS:**

The current application of section 33.4(1) of the *Act* in *Rehabilitation Services & Claims Manual*, Volume II, policy item # 67.60 *Exceptional Circumstances*, has been identified as requiring review;

**THE BOARD OF DIRECTORS RESOLVES THAT:**

1. The POLICY statements in *Rehabilitation Services & Claims Manual*, Volume II, policy item # 67.60 *Exceptional Circumstances*, are amended as set out in Appendix A of this Resolution.
2. The above amendments to policy apply to all decisions including appellate decisions made on or after May 1, 2008.

3. This resolution is effective May 1, 2008.

DATED at Richmond, British Columbia, March 19, 2008.

**By the Workers' Compensation Board**

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**DOUGLAS J. ENNS, CHAIR  
BOARD OF DIRECTORS**

## APPENDIX A

### REHABILITATION SERVICES & CLAIMS MANUAL, VOLUME II

#### #67.60 Exceptional Circumstances

Section 33.4 of the Act provides:

- (1) If exceptional circumstances exist such that the Board considers that the application of section 33.1(2) would be inequitable, the Board's determination of the amount of average earnings of a worker may be based on an amount that the Board considers best reflects the worker's loss of earnings.
- (2) Subsection (1) does not apply in the circumstances described in sections 33.2, 33.3, 33.5 or 33.6.

As stated in section 33.4(2), this provision does not apply to the following:

- a worker determined by the Board to be an apprentice or a learner;
- a permanently employed worker who has been employed by the employer for less than 12 months;
- a casual worker; or
- a person who purchased coverage under section 2(2) of the Act.

Section 33.4 is a discretionary provision and an exception to the application of section 33.1(2) for determining a worker's long-term average earnings. As such, it will only be applied where the Board determines that, due to exceptional circumstances, the application of section 33.1(2) is inequitable.

The **purpose of this policy is to assist in identifying inequities where due to exceptional circumstances** is that the level of compensation calculated **using the general rule** does not best reflect the worker's long-term loss of earnings.

In making this determination, "best" does not mean the highest level of compensation possible, but rather, that the level of compensation reflects the actual loss incurred by the worker.

**The general rule uses one year of a worker's earnings history to account for typical variations in earnings. Short absences from work for non-compensable reasons, minor fluctuations in hours worked or rate of pay, or similar reasons for changes to earnings are typical and will not be considered exceptional circumstances.**

## APPENDIX A

### REHABILITATION SERVICES & CLAIMS MANUAL, VOLUME II

The following criteria shall be applied to determine if a worker's circumstances are exceptional. ~~exceptional~~ **are circumstances that are generally accepted as being exceptional. This list is not exhaustive. The Board may consider other reasons to find that exceptional circumstances exist, if those reasons are consistent with the Act and the purpose of this policy:**

- (a) **An exceptional circumstance affecting a worker's average earnings is any prior period(s) when a worker received wage-loss compensation (or wage-loss equivalent rehabilitation allowances/benefits) during the 12 month period immediately preceding the worker's date of injury. It would be inequitable to reduce a worker's average earnings by including periods of compensable wage-loss (or wage-loss equivalent rehabilitation allowances/benefits) in the average earnings calculation.**
- **This circumstance may arise, for example, if a worker has received temporary total disability benefits, temporary partial disability benefits, a vocational rehabilitation training allowance or other types of wage replacement benefits.**

**The Board excludes any periods during which the worker received wage-loss compensation (or wage-loss equivalent rehabilitation allowances/benefits) from the total period over which earnings are averaged. In some cases, the Board may use a shorter or longer period of the worker's employment history to determine what best reflects the worker's average earnings.**

- ~~(a)~~(b) **Where the Board determines that the worker had a history of regular full-time employment, and the worker's earnings in the 12-month period immediately preceding the date of the injury do not reflect the worker's historical earnings because of a significant atypical and/or irregular disruption in the pattern of employment during that period of time.**
- **This circumstance may arise, for example, if the worker has had an absence of more than six consecutive weeks in the 12-month period immediately preceding the date of injury and the absence was due to a non-compensable illness or injury, educational or maternity/paternity reasons.**

**In such cases, the Board may deduct the period of the absence. ~~or~~ In addition, the Board may use a shorter or longer period of the**

## APPENDIX A

### REHABILITATION SERVICES & CLAIMS MANUAL, VOLUME II

worker's employment history (e.g., 24-month period) to determine long-term average earnings.

~~(b)~~(c) Where the Board is satisfied that the worker's earnings in the 12-months immediately preceding the date of injury do not address the worker's diminished future career options because of the nature and degree of the injury.

- This circumstance may arise, for example, where the worker is a student on a designated path of study at a provincially recognized training or educational institution and was in temporary employment unrelated to his or her field of study (e.g. a part-time or seasonal job) at the time of the injury. Due to the nature and degree of the injury, the student is unable to continue in his or her chosen field of study.

In such cases, the Board may determine the worker's long-term average earnings with reference to the class average of a qualified person in an occupation directly related to the worker's field of study.

- This circumstance may also arise where the worker is under the age of 25 (BC Stats defines youths as individuals aged 15 to 24) and has completed a designated course of study at a provincially recognized training or educational institution in the two years immediately preceding the date of injury. Due to the worker's young age, the employment at the time of injury may not be representative of the worker's career path, as provided for by the worker's recent course of study.

In such cases, the Board may determine the worker's long-term average earnings with reference to the class average of a qualified person in an occupation related to the young worker's previous field of study.

~~(e)~~(d) Where deductions must be made from the worker's gross income to derive the labour component of the worker's average earnings.

- This circumstance may arise where the worker is self-employed and receives remuneration based, in part, on operating costs or expenses that must be deducted from the worker's gross business income to obtain the worker's average earnings (e.g., ~~revenue-generating~~ **costs for purchasing, operating or maintaining major equipment and/or employee wages**).

## **APPENDIX A**

### ***REHABILITATION SERVICES & CLAIMS MANUAL, VOLUME II***

In such cases, the Board may consider the worker's earnings history for a longer time period in order to incorporate information required to accurately determine the worker's long-term average earnings.

**EFFECTIVE DATE:**           **May 1, 2008**

**APPLICATION:**           **Applies to all decisions including appellate decisions made on or after May 1, 2008.**