

2009/03/25-03**THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA****RESOLUTION OF THE BOARD OF DIRECTORS****RE: Variable Earnings****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 33.1 of the *Act* sets out a general rule for how the Workers' Compensation Board must determine the short-term average earnings of workers;

AND WHEREAS:

Chapter 9 of the *Rehabilitation Services & Claims Manual* ("*RS&CM*"), Volume II provides the policies respecting the determination of a worker's average earnings;

AND WHEREAS:

Policy does not presently provide guidance on calculating the short-term average earnings for workers who regularly work on call for one or more employers at differing rates of pay;

AND WHEREAS:

The Policy and Research Division has undertaken stakeholder consultation on this issue;

THE BOARD OF DIRECTORS RESOLVES THAT:

1. POLICY statements in the *RS&CM*, Volume II, policy items #65.00 *General Rule for Determining Short-Term Average Earnings*, #65.01 *Variable Shift Workers*, #65.02 *Worker with Two Jobs* and #65.03 *Fishers* are amended as set out in Appendix A of this Resolution.
2. This resolution is effective June 1, 2009 and applies to all decisions made on or after June 1, 2009.
3. This resolution constitutes a policy decision of the Board of Directors.

DATED at Richmond, British Columbia March 25, 2009.

By the Workers' Compensation Board

**DR. ROSLYN KUNIN, CM, ICD.D
CHAIR, BOARD OF DIRECTORS**

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#65.00 GENERAL RULE FOR DETERMINING SHORT-TERM AVERAGE EARNINGS

Section 33.1(1) of the *Act* provides as follows:

Subject to sections 33.5 to 33.7, the Board must determine, for the shorter of the following periods, the amount of average earnings of a worker 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 injury:

- (a) the initial payment period;
- (b) the period starting on the date of the worker's injury and ending on the date the worker's injury results in a permanent disability, as determined by the Board.

Except for a casual worker, a person who purchased coverage under section 2(2) of the *Act* and a worker with no earnings at the time of injury, the general rule for determining short-term average earnings is to use the worker's rate of pay at the ~~time~~**date** of injury up to the maximum wage rate permitted by the *Act*.

For workers who receive regular remuneration on a standard five-day work week, the determination of ~~time~~**date** of injury earnings will be based on the worker's **rate of pay**~~actual earnings~~ on the day of injury.

The Board recognizes that not all workers receive remuneration based on a five-day work week. Policy items #65.01, #65.02, and #65.03 detail how the Board will determine the earnings at the time of injury for workers in other circumstances.

EFFECTIVE DATE: June 1, 2009
CROSS REFERENCE: Policy items #65.01 *Variable Shift Workers*, #65.02 *Worker with Two Jobs*, #65.03 *Fishers*, #67.10 *Casual Pattern of Employment*, #67.20 *Personal Optional Protection* and #67.30 *Workers with No Earnings of the Rehabilitation Services & Claims Manual*, Volume II.
APPLICATION: To all decisions on or after June 1, 2009.

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#65.01 Variable ~~Shift Workers~~ **Earnings**

The Board recognizes that not all workers receive remuneration based on a regular five-day work week. Accordingly, calculating time of injury earnings based on a worker's rate of pay on the day of injury is not always appropriate. ~~Where a worker is employed on a rotating shift cycle basis, the Board will determine the worker's date of injury earnings based on the worker's shift cycle.~~ The guidelines set out below apply in determining short-term average earnings where a worker is regularly employed with variable earnings.

The Board considers ~~In those cases where a variable shift worker to have~~ variable earnings if the worker:

- works on call for one or more employers at differing rates of pay and does not have a casual pattern of employment;
- has irregular shifts;
- has shifts with no repeating patterns;
- works a shift cycle involving more than five cycles;
- works differing shift hours per cycle;
- is paid shift differentials; or
- is scheduled for a shift cycle change.

For such workers with variable earnings, the Board will usually calculate ~~the worker's short-term average earnings are based on~~ **with reference to the worker's earnings in** the three month period ~~immediately preceding~~ **up to and including** the worker's date of injury. However, the Board may use a shorter time period if it determines that the three month time period is not an accurate reflection of the worker's time of injury earnings.

Situations where a shorter time period may be used include:

- where ~~the variable shift~~ **a regularly employed worker with variable earnings** has been with ~~an~~ the employer for less than three months, the worker's short-term average earnings are based on the worker's earnings from the worker's date of hire **up to and including** the date of injury.

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- where the worker received wage-loss compensation (or wage-loss equivalent rehabilitation allowances/benefits) during the three month period prior to the date of injury.
- where the worker has experienced a significant atypical and/or irregular disruption in the pattern of employment during the three month period prior to the date of injury. This circumstance may arise, for example, if the worker had a lengthy absence due to a non-compensable illness or injury, educational or maternity/paternity reasons.

In such situations, the Board may choose to exclude a portion of the time period over which earnings are averaged if doing so would provide a more accurate reflection of the worker's time of injury earnings. The Board does not generally exclude short absences from work for non-compensable reasons or minor fluctuations in hours worked or rate of pay.

EFFECTIVE DATE: June 1, 2009
CROSS REFERENCE: Policy items #65.00 *General Rule for Determining Short-Term Average Earnings* and #67.10 *Casual Pattern of Employment of the Rehabilitation Services & Claims Manual, Volume II.*
APPLICATION: To all decisions on or after June 1, 2009.

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#65.02 *Worker with Two Jobs*

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, ~~time~~**date** of injury earnings will be based on the combined earnings of both jobs up to the statutory maximum. This applies whether or not the other job is covered by Part 1 of the *Act* or is self-employment. The total days worked in both jobs are merged to obtain the days worked per week. Both employers, if covered by Part 1 of the *Act*, may be reimbursed by the Board if they continue paying the disabled worker. (1)

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

EFFECTIVE DATE: June 1, 2009
CROSS REFERENCE: Policy items #34.40 *Pay Employer Claims*, #65.00 *General Rule for Determining Short-Term Average Earnings*, #67.10 *Casual Pattern of Employment* and #67.20 *Personal Optional Protection of the Rehabilitation Services & Claims Manual, Volume II*.
APPLICATION: To all decisions on or after June 1, 2009.

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#65.03 *Fishers*

The ~~time~~**date** of injury earnings for fishers whose remuneration is based on a share of the catch, the value of which may only be determined at a future date, will be based on the earnings over the ~~3~~**-three** month period immediately preceding the date of injury. Where earnings information is not available for that three-month period, the worker's average earnings may be based on the 12-month period immediately preceding the worker's date of injury. See also policy item #68.62 for information on a fisher's composition of average earnings where the fisher deducts equipment and/or operating expenses from gross income for business or taxation purposes and owns a vessel or other equipment used to harvest fish.

- EFFECTIVE DATE:** ~~October 1, 2005~~**June 1, 2009**
- CROSS REFERENCE:** **Policy items #65.00 *General Rule for Determining Short-Term Average Earnings* and #68.62 *Fishers of the Rehabilitation Services & Claims Manual, Volume II.***
- APPLICATION:** **To all decisions on or after June 1, 2009.**
~~Minor editorial amendments made on October 1, 2005 do not affect the application of this policy.~~