

Additions in Bold; Deletions Strikethrough

## VOLUME II

### CHAPTER 6

## PERMANENT DISABILITY AWARDS

### #36.00 INTRODUCTION

Permanent disability awards are made when a worker fails to completely recover from an industrial **work-related** injury or **occupational** disease, but is left with a permanent residual disability. They commence at the point when the worker's temporary disability under the claim ceases and the condition stabilizes. They may be total (section 22) or partial (section 23).

Permanent disability awards are calculated on the basis of a worker's **long term** "average **net** earnings". The computation of **long term** average **net** earnings is dealt with in Chapter 9.

### #36.10 Transitional Provisions for Permanent Disability Awards (see Chapter 1, policy item #1.00)

### #37.00 PERMANENT TOTAL DISABILITY

Section 22(1) **of the Act** provides: ~~that "Where permanent total disability results from the injury, the compensation must be a periodic payment to the injured worker equal in amount to 75% of the worker's average earnings and must be payable during the lifetime of the worker."~~

**Subject to sections 34 and 35, if a permanent total disability results from a worker's injury, the Board must pay the worker compensation that is a periodic payment that equals 90% of the worker's average net earnings.**

~~A pension is awarded to a worker which continues for life.~~ Some examples of permanent total disability are paraplegia, quadriplegia, hemiplegia, and total or near total blindness, ~~and severe loss of cerebral powers.~~ Combinations of permanent partial physical impairments can also become permanent total disabilities, such as bilateral amputations of arms and legs.

**Permanent total disability periodic payments continue until a worker reaches age 65, or later if the Board is satisfied that the worker would have worked past age 65. (Policy item #41.00)**

**On reaching retirement age, a worker who has received a permanent disability award is entitled to a retirement benefit (policy item #116.00). Permanently totally disabled workers are also entitled to rehabilitation and health care services and personal supports after reaching retirement age (policy item #116.30). Board policies on the retirement benefit are contained in Chapter 18 of the *RS&CM*.**

### **#37.10 Commencement of Pension/~~Wage-Loss Payments~~ ~~Prior to Award~~ Permanent Total Disability Payments**

**Awards for permanent total disability** ~~Permanently totally disabled workers are awarded granted pensions as soon as it is clear to the Board that they will survive their injuries.~~ **the medical evidence confirms that the worker is permanently totally disabled as a result of the work injury or occupational disease.**

~~From the date of the injury up to the date of the award, wage-loss payments are made at the same rate as the eventual pension. (Reference should be made to #66.20 regarding minimum policy in personal optional protection cases.) However, it may be necessary to make these payments at a provisional rate pending clarification of the worker's pre-injury earnings. (1)~~

**However, it may be necessary to make these payments at a provisional rate pending clarification of the worker's pre-injury earnings. (1)**

**Following the calculation of a worker's permanent total disability award, the Board must deduct from a worker's periodic payment an amount equal to 50% of any Canada Pension Plan (CPP) disability benefit that the worker is paid in respect of the work injury. The required CPP disability benefit deduction is subject to the Board's statutory minimum (policy items #36.20 to #36.24).**

### **#37.20 Minimum Amount of Compensation**

**Section 22(2) provides that the compensation awarded for permanent total disability cannot be less per month than the minimum set out below. This minimum is subject to ~~Consumer Price Index increases~~ **cost of living adjustments as described (policy item #51.20).****

Date			\$ Minimum
July 1, 2000	—	December 31, 2000	1,269.36
January 1, 2001	—	June 30, 2001	1,294.21
July 1, 2001	—	December 31, 2001	1,314.54
January 1, 2002	—	June 30, 2002 <b>December 31, 2002</b>	1,319.06

If required, earlier figures may be obtained by contacting the Board.

~~Section 33(5) provides that the compensation payable to workers who, on July 1, 1974, were in receipt of compensation for permanent total disability cannot be less than the amount set out above. This amount is subject to Consumer Price Index adjustments.~~

~~Where workers partially commuted their pension prior to July 1, 1974, and are eligible for the increased minimum provided by Section 33(5), they do not simply receive a percentage increase on the benefits currently being received. The full amount of the increased minimum is paid, less the actual dollar amount that has been commuted. (2)~~

### ~~#37.21~~ ***Dual System of Measuring Disability*** **Statutory Minimum Application**

The statutory minimum only applies in cases where a worker is found to be 100% disabled on a physical impairment basis **under the section 23(1) method of permanent disability assessment**. It does not apply when the percentage of disability on a physical impairment basis is less than 100% but the worker is found to be totally unemployable under the ~~dual system of measuring disability~~ **section 23(3) method of permanent disability assessment**. (32)

### ~~#37.30~~ **Manner of Payment**

~~A monthly pension is awarded which is paid by cheque or, if the worker elects, by electronic direct bank deposit, at the end of each month. The same procedures apply as in the case of permanent partial disability awards. These are set out in #41.00.~~

## **#37.430 Reopening Claims**

Where a claim involving a permanent total disability is reopened, no payments of wage loss can be made. Wage loss may, however, be payable where a worker receiving a permanent total disability pension award of less than the current maximum suffers a new injury at work. The amount payable would be the difference between the pension ~~periodic payment~~ **periodic payment** being paid on the old claim and ~~75% of the wage rate~~ **90% of the long term average net earnings** on the new claim, limited by the current maximum.

## **#38.00 COMPENSATION FOR PERMANENT PARTIAL DISABILITY**

~~The Board has two basic methods of assessing permanent partial disabilities. These are:~~

- ~~1. Loss of function/physical impairment method.~~
- ~~2. The projected loss of earnings method.~~

~~The use of these two methods is termed the "Dual System" These two methods are considered in every case where applicable, the amount of the pension being the higher of the two figures produced by the two methods.~~

**Section 23 of the Act pertains to the determination of a worker's entitlement to compensation for a permanent partial disability award. An award granted under section 23 compensates a worker for permanent partial disability that results from a work injury. Section 23(1) is the mandatory provision that must be applied in the assessment of permanent partial disabilities. Only in exceptional circumstances will an assessment be done under section 23(3).**

**In all cases where a permanent partial disability results from a work injury, a worker's entitlement to a permanent partial disability award must be calculated using the method set out in section 23(1) of the Act. In determining the compensation payable under 23(1), the Board may be guided by section 23(2), which permits the use of a schedule of percentages of impairment of earning capacity for specified injuries or mutilations.**

**In all but exceptional cases, the effect of the disability on a worker will be appropriately compensated under section 23(1).**

**Only in exceptional cases will section 23(1) not be the method of assessment used to determine a worker's entitlement to a permanent partial disability award. In these cases the Board considers whether the combined effect of a worker's occupation at the time of injury and the**

disability resulting from the injury is so exceptional, that the section 23(1) method does not appropriately compensate the worker for the injury. In these exceptional cases, the Board has the discretion to assess a worker's entitlement to a permanent partial disability award under section 23(3) of the *Act*.

### **#38.10 — Decision Making Procedure**

The Disability Awards Officer or Adjudicator in Disability Awards is responsible for seeing that the necessary examinations and other investigations are carried out with respect to the physical impairment assessment and they make the decision on the degree of disability and whether a pension should be awarded. Permanent functional impairment evaluations will be conducted by either a Disability Awards Medical Advisor or a Board authorized External Service Provider. The Rehabilitation & Compensation Services Division sets protocols and procedures for these evaluations. The Board determines whether the evaluation is referred to a Disability Awards Medical Advisor or an External Service Provider based on the nature of the injury and other relevant criteria as set out in the protocols.

The determination of whether there is a permanent psychological impairment, and the severity of the impairment, is made by either a Board Psychologist or a Board authorized External Service Provider. Once this evaluation is completed, the claim is referred to the Psychological Disability Committee to assess the percentage of disability resulting from the permanent psychological impairment. The Disability Awards Officer or Adjudicator assesses any percentage of disability for physical impairment and, in conjunction with the Committee's percentage of psychological disability, decides the worker's permanent disability award under the loss of function method.

The Disability Awards Committee is ultimately responsible for the conclusion on projected loss of earnings awards implemented under Section 23(3) of the *Act*. The Disability Awards Officer or Adjudicator is required to conduct the necessary investigations and make a specific recommendation to the committee. It is the function of the committee, following any further investigation it considers necessary, to agree or disagree with the Disability Awards Officer's or Adjudicator's recommendation. If the committee agrees, the Disability Awards Officer or Adjudicator will establish a pension according to the initial recommendation. If the committee disagrees with the Disability Awards Officer's or Adjudicator's recommendation, it will either establish an award which it deems appropriate to the circumstances or return the file for further investigation. The Disability Awards Committee consists of one senior representative from the Disability Awards, Medical, and Vocational Rehabilitation Services Departments.

Physical impairment and projected loss of earnings assessments are made at the same time. It is not proper to establish a physical impairment pension alone and delay a projected loss of earnings assessment on the grounds that it is difficult at the time to assess the claimant's potential loss of earnings. An assessment must be made, however great the difficulty. An automatic review of an award made on a projected loss of earnings basis will be made two years from the date of assessment or, if there is an appeal, two years from the date of the last decision resulting from the appeal process. Following that review, there will be no further automatic reviews, but the Adjudicator will have a discretion to set up a claim for reviews at future dates which she or he determines. Neither a worker nor an employer has the right to apply for a review of a projected loss of earnings pension at any time unless there has been a change in the claimant's physical condition.

In exercising discretion whether to set up a pension for later review, an important factor considered by the Adjudicator is whether the review just conducted resulted in any change. The Adjudicator will normally set up a later review if there was a change in the pension. If a review results in no alteration in the pension, it may be reasonable to conclude that the long term projection made at the time of the initial assessment was correct and that there is no need for further review. On the other hand, the Adjudicator may feel that at least one further review is required to ensure that the correct result is obtained. If a further review is set up and that review again results in no change, then the Adjudicator would not likely set up a further review. If, on a subsequent review, it appears that an error was made or there is new evidence to suggest that the original assessment was wrong, the readjudication procedures set out in #108.30 should generally be followed.

The rules of evidence followed by Disability Awards Officers, Adjudicators and the Disability Awards Committee are discussed in #97.40.

Appeals from the decisions of the Disability Awards Officer, Adjudicator or Committee are discussed in Chapter 13.

## **#39.00      ~~LOSS OF FUNCTION/PHYSICAL IMPAIRMENT~~** **SECTION 23(1) ASSESSMENT**

Section 23(1) provides that "Where permanent partial disability results from the injury, the impairment of earning capacity must be estimated from the nature and degree of the injury, and the compensation must be a periodic payment to the injured worker of a sum equal to 75% of the estimated loss of average earnings resulting from the impairment, and must be payable during the lifetime of the worker or in another manner the board determines."

**Section 23(1) of the Act provides:**

**Subject to subsections (3) to (3.2) and sections 34 and 35, if a permanent partial disability results from a worker's injury, the Board *must***

- (a) estimate the impairment of earning capacity from the nature and degree of the injury, and**
- (b) pay the worker compensation that is a periodic payment that equals 90% of the Board's estimate of the loss of average net earnings resulting from the impairment.**

**(emphasis added)**

**In all cases where a permanent partial disability results from a worker's injury, the Board must assess the worker's entitlement to a permanent partial disability award under section 23(1) of the Act. Section 23(1) is a mandatory legislative provision which sets out the rule the Board follows in determining a worker's impairment of earnings capacity resulting from a work injury.**

**The percentage of disability determined for the worker's condition under section 23(1)(a), reflects the extent to which a particular injury is likely to impair a worker's ability to earn in the future.**

**A permanent partial disability award calculated under section 23(1) also reflects such factors as:**

- short term fluctuations in the compensable condition;**
- reduced prospects of promotion;**
- restrictions in future employment;**
- reduced capacity to compete in the labour market; and**
- variations in the labour market.**

**In assessing a worker's entitlement to a permanent partial disability award under section 23(1), the Board may make reference to section 23(2) of the Act. Section 23(2) of the Act provides:**

**The Board may compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations which may be used as a guide in determining the compensation payable in permanent disability cases.**

~~The physical impairment method is the primary one used for measuring permanent disabilities. It is the method provided for in Section 23(1). In applying~~

~~this method, the Board does not normally have regard to the individual worker's actual loss of earnings. It considers the physical and/or psychological condition of the worker. It results in a percentage of disability being allocated to the claimant's condition.~~

Once the percentage of disability is determined, it is applied to the worker's **long term average net earnings**, and the ~~pension~~ **permanent partial disability award** is ~~75%~~ **90%** of the amount so determined. **The permanent partial disability award is granted following the determination of a worker's entitlement under section 23(1) of the Act.**

**Under the section 23(1) method of permanent partial disability assessment, a worker's percentage of disability is expressed as a percentage of total disability, with one hundred percent (100%) being the maximum possible rating for a totally disabled worker. A worker's percentage of permanent partial disability is based on the whole person. A worker, therefore, cannot be more than 100% disabled as a result of a work injury or combination of injuries.**

~~For instance, consider a worker with a 30% disability with average earnings of \$3,400.00 per month:~~

	<del>30% of 3,400.00</del>	<del>1,020.00</del>
Monthly pension	<del>75% of 1,020.00</del>	<del>765.00</del>

~~There are two basic methods for assessing the percentage of disability. These are the Scheduled method and the Non-Scheduled method.~~

~~Where a claim is reopened more than three years after the injury and a worker has a compensable permanent disability or an increased permanent disability, but is unemployed at the time of the reopening otherwise than through the effects of the injury, and it is determined that the worker has no potential loss of earnings, a pension will be assessed on a physical impairment basis under section 23(1) of the *Workers Compensation Act*. It will be calculated on the basis of the wage rate originally set on the claim subject to any appropriate wage rate review being carried out or adjustments.~~

## **#39.01 Decision-Making Procedure under Section 23(1)**

**Section 23(1) assessments are undertaken once a worker reaches medical plateau.**

**A Board officer in the Disability Awards Department is responsible for ensuring that the necessary examinations and other investigations are carried out with respect to the assessment and making a decision on a worker's entitlement to a permanent partial disability award.**

**Permanent functional impairment evaluations may be conducted by either a Disability Awards Medical Advisor or a Board authorized External Service Provider. The Rehabilitation & Compensation Services Division sets protocols and procedures for these evaluations. The Board determines whether the evaluation is referred to a Disability Awards Medical Advisor or an External Service Provider based on the nature of the injury and other relevant criteria as set out in the protocols. The Board officer in Disability Awards may determine the worker's functional impairment without examination by a Disability Awards Medical Advisor or a Board authorized External Service Provider, if there is sufficient medical information on file to complete the assessment.**

**The determination of whether there is a permanent psychological impairment, and the severity of the impairment, is made by either a Board Psychologist or a Board authorized External Service Provider. Once this evaluation is completed, the claim is referred to the Psychological Disability Committee to assess the percentage of disability resulting from the permanent psychological impairment. The Board officer in Disability Awards assesses any percentage of disability for physical impairment and, in conjunction with the Committee's percentage of psychological disability, decides the worker's permanent disability award under the section 23(1) method.**

### **#39.012**    *Subjective Complaints*

In making a determination under section 23(1), the **Board officer in** Disability Awards ~~Officer or Adjudicator in Disability Awards~~ will enquire carefully into all of the circumstances of a worker's condition resulting from a compensable injury. This means that both the objective physical findings noted by the doctors who examined the worker and the subjective complaints of pain will be considered. The fact that the complaints are largely subjective does not automatically preclude a finding that a worker has a disability within the meaning of section 23(1). Nor, on the other hand, does the fact that subjective complaints exist automatically warrant a finding of disability. In all cases, a decision must be made on the particular facts of the claim as to whether or not a disability exists.

With regard to the question as to what type of evidence will be sufficient to justify a conclusion that a permanent disability exists in these cases, it is not possible to lay down an exclusive list. However, some suggestions can be made. There will, in the first place, be the worker's own evidence regarding the nature and extent of the complaints and whether that evidence is credible and consistent.

Regard must also be had to the worker's conduct and activities and whether they are consistent with the complaints. There will then be the evaluations of the worker by the various professional personnel and Board's staff who have been involved in the case, for example, doctors, psychologists, and rehabilitation

consultants. Consideration will have to be given to the objective observations of these persons as well as their subjective assessments. They may be able to comment on whether the worker's complaints are of a type and extent that might reasonably result from the type of injury which was suffered.

When there is little clinical evidence of objective impairment, extreme caution must be exercised in concluding that there is a permanent disability resulting from that injury. The evidence that is relied upon to support the assessment of such an award must be fully documented. It must clearly demonstrate that there is a permanent disability for which the payment of a ~~pension~~ **permanent disability** award may be supported.

Sometimes cases occur where, although the worker has subjective complaints of pain and discomfort, the actual impairment reported by the Disability Awards Medical Advisor or External Service Provider is negligible or too minimal to justify an award of the lowest percentage of disability ordinarily recognized. Where there is appropriate medical rationale to support the subjective complaints, the **Board officer in** Disability Awards ~~Officer or Adjudicator~~ still has some discretion to make an award, having regard to the worker's particular circumstances, and may do so where, for instance, there is evidence that the stress of the worker's occupation or other physical activity could result in an impairment. The **Board officer in** Disability Awards ~~Officer or Adjudicator~~ will not grant an award if she or he considers that the impairment is unlikely to affect the worker's earning capacity. There is, in that situation, felt to be no "impairment of earning capacity" within the meaning of section 23(1).

In making this determination, the **Board officer in** Disability Awards ~~Officer or Adjudicator~~ may, in some cases, have to ask the ~~Rehabilitation Consultant~~ **Board officer in Vocational Rehabilitation Services** to investigate the ~~jobs~~ **occupations** which are, in the long term, available and which the worker is able to do. This represents one exception to the general principle that, in assessing the degree of physical impairment, no regard is had to the actual loss of earnings suffered by the worker because of permanent impairment. On the other hand, if in such a case it is ultimately determined that the impairment, though minimal, will affect earning capacity, the assessment of the ~~pension on a physical impairment~~ **permanent partial disability award under section 23(1)** is still on a percentage basis. ~~A separate assessment of the pension will be made under the projected loss of earnings which will result in a pension based on the actual loss of earnings. The higher of the two pensions will, according to normal principles, be the one awarded.~~

### **#39.10      ~~Scheduled Awards~~ Permanent Disability Evaluation Schedule**

~~Scheduled awards are awards~~ **Section 23(1) awards may be made with reference to** ~~under~~ the Permanent Disability Evaluation Schedule, which is set

out in Appendix 4. This is a rating schedule of percentages of impairment for specific injuries or mutilations. (43)

The Permanent Disability Evaluation Schedule is a set of guide-rules, not a set of fixed rules. The Board ~~o~~Officer in Disability Awards is ~~still~~ free to apply other variables in arriving at a final ~~pension-award~~; but the “other variables” referred to means other variables relating to the degree of physical **or psychological** impairment, not other variables relating to social or economic factors, nor rules (including schedules and guide-rules) established in other jurisdictions. In particular, the actual or projected loss of earnings of a worker because of the disability is not a variable which can be considered. (54)

Any revision of the schedule must be undertaken by procedures that are appropriate to changes of a legislative nature. It will not be done through appeal decisions in individual cases. The schedules in use in other jurisdictions are part of the material that would be looked at in any revision of the schedule used here; but they are not part of the material relevant in the decision of any individual claim.

In cases where the specific impairment is not covered by the schedule, but the part of the body in question is covered, **the Board officer in Disability Awards** ~~Officer or Adjudicator~~ must first determine the percentage loss of function in the damaged area. This determination is based on the findings of the permanent functional impairment evaluation and other medical and non-medical evidence available. The final award is arrived at by taking this percentage of the percentage allocated in the schedule to the disabled part of the body. Because the schedule is used in the calculation, this type of award is still considered as a scheduled one. For example, the amputation of an arm down to the proximal third of the humerus or its disarticulation at the shoulder is scheduled at 70% of total disability. Suppose a worker suffers a severe crush injury to the arm which culminates in a permanent loss of half its function. The final assessment would be 50% of 70%, i.e. 35% of total disability.

### **#39.11**      *Age Adaptability Factor*

The percentage rate derived by use of the ~~simple physical impairment~~ **schedule method** is modified by the application of an age variable. This age adaptability factor is used for workers over the age of 45 where the disability is calculated in accordance with the Schedule. The disability is increased by 1% of the assessed disability for each year over 45 up to a maximum of 20% of the assessed disability.

Example:

Award effective at age 55  
Scheduled disability 50% of total disability

Age adaptability factor 10% of 50% = 5% of total disability  
Disability assessed at 55% of total disability

The worker's age at the effective date of the disability award is used, not his or her age at the time of the injury.

The age adaptability factor is not applied to non-scheduled awards. However, the worker's age is one of the overall considerations in making the judgment.

~~The age adaptability factor set out above has only been applied since October 2, 1958. Awards made prior to that date were subject to differing rules.~~

### **#39.12      *Enhancement***

The combined effect of two separate disabilities may be greater than the separate effect of each. Therefore, where a worker has an additional disability which pre-existed the injury or the injury causes more than one disability, the Board may, in certain situations, increase the overall percentage of disability that would otherwise be awarded. This is known as the "enhancement factor".

One situation where this may be done is where the worker has impairment in both arms or both legs. An enhancement factor of 50% of the lesser disability may be added to the total of the percentages awarded for each separate disability. Suppose, for example, a worker suffers an injury causing total immobility in the right ankle. That would be assessed pursuant to the schedule at 12% of total disability. There may be an adjustment for age; but suppose it appeared that, at the time of the work injury, the worker was already suffering from a serious disability involving total immobility in the left knee. The **Board officer in Disability Awards Officer or Adjudicator in Disability Awards** may well conclude that having regard to the impaired mobility that the worker was already suffering through the disability in the left leg, the compensable disability in the right ankle results in a greater degree of physical impairment than it would for a person with a normal left leg.

Enhancement factors applied where more than one finger of the same hand is affected are dealt with in **policy items #39.22 to #39.32**.

~~Prior to October 27, 1977, the Board did not normally permit an enhancement factor in respect of spinal column disabilities. However, subsequent to that date, the Board has concluded that such a factor may be added for combinations of disabilities when one of those disabilities involves the spinal column and that disability is shown to have been enhanced by the others. A factor of 50% of the disability attributed to the spine is added. Therefore, if the disability in the back is 10%, and the sum of the other disabilities is 16%, the enhancement factor is 5% and the total disability awarded 31%. This has not been retroactively applied to awards made prior to October 27, 1977.~~

### #39.13 Devaluation

The percentages set out in the Permanent Disability Evaluation Schedule represent the loss occurring when a disability exists alone in an otherwise healthy limb or body. When a disability exists alongside another disability in the same or another part of the body, adjustments may have to be made. This adjustment may be in an upward direction. For instance, as indicated in **policy item #39.12**, an enhancement factor may be added in certain cases when the combined effect of two disabilities in different areas of the body exceeds the sum of the schedule percentages allocated to each disability. On the other hand, where the sum of the schedule percentages allocated to several disabilities exceeds their actual combined effect, a downward adjustment is required. This is known as “devaluation”.

If the schedule provides that the total loss of a particular part of the body causes a certain percentage loss of future earning capacity, then a partial loss of the use of that particular part will leave only a portion of the function of that part of the body remaining. If the schedule allocates 70% to the amputation of an arm at the shoulder, the occurrence of a fused index finger and thumb, worth 18%, will leave only 52% of the value of the arm. Any subsequent disabilities will be measured by reference to the remaining percentage, not the whole percentage set out in the schedule, i.e. 52% rather than 70% in the above example. Therefore, if, following the fused index finger and thumb, the claimant suffers a fused elbow, and then a frozen shoulder, the relevant percentages of disability awarded will be as follows:

A.	Value of whole arm in schedule	70% of total
B.	Value of fused index finger and thumb disability in schedule	18%
C.	Remaining value of arm (A-B)	52%
D.	Value of fused elbow in schedule	20%
E.	Percentage awarded for fused elbow $\frac{D}{A} \times C$	14.9%
F.	Remaining value of arm (C-E)	37.1%
G.	Value of frozen shoulder in schedule	35%
H.	Percentage awarded for frozen shoulder $\frac{G}{A} \times F$	18.6%
I.	Total percentage of disability awarded (B + E + H)	51.5%

A worker will never receive more than 70% for disabilities existing in one arm.

## **#39.20 Amputations of Arms or Legs**

In assigning a rating level to any amputation, it must be assumed that the stump is structurally perfect, that it is well padded, that the scar is properly placed and that there is no undue tenderness on areas which are subject to pressure. Uncorrectable defects such as scarring, tenderness, grafts, muscle wasting, nerve damage may warrant a rating level higher than the schedule. In the case of major limb amputations, rating levels assigned should have regard to the type and probable usefulness of the prosthesis to which they are adaptable. Amputations always involve scheduled awards.

Where a worker suffers a permanent disability to the dominant hand, the fact the worker is unaccustomed to using the other hand to the same extent does not affect the percentage of measured disability. It is usually a temporary handicap rather than a permanent problem. Whether the worker was left- or right-handed is, therefore, not a relevant factor in establishing an ~~award pension~~ **award** for a permanent partial disability. It is, however, a factor that may sometimes be relevant in establishing temporary benefits, or in the provision of rehabilitation services.

For example, it might be relevant in deciding exactly when the worker is fit to return to work, whether more exercise is needed, or whether retraining may be needed.

## **#39.24 Amputation of Thumb and One or More Fingers**

The percentage of disability of the thumb is determined and the percentage of disability for the finger or fingers is determined. Normally, an enhancement factor of 100% of the lesser of these two disabilities is then added. The **Board officer in Disability Awards** ~~Officer or Adjudicator in Disability Awards~~ does have discretion, based on the severity of the injuries, to adjust the enhancement factor, but normally a 100% multiple of the lesser is used.

More serious disabilities of this type are awards listed in the Permanent Disability Evaluation Schedule, items 9-12.

## **#39.30 Restrictions of Movement in Arms or Legs**

Restrictions of movement in the joints of the body are measured and documented during the permanent functional impairment evaluation. The **Board officer in Disability Awards** ~~Officer or Adjudicator in Disability Awards~~ then applies the measurement to the appropriate item in the Permanent Disability Evaluation Schedule.

These awards are always scheduled.

### #39.32 *Thumb Restrictions*

The basic principles set out in **policy item #39.31** also apply here. The formula used to compute a percentage value for restriction of thumb movement is:

$$\frac{\text{Restriction Degrees}}{\text{Normal Degrees}} \times 1/2 \times \text{amputation value at the joint concerned}$$

This formula is used in that it is normally considered that a fused thumb joint is equal to 1/2 of the value of an amputation at the same level.

Where a finger and thumb are affected, an enhancement factor is added in the manner set out in **policy item #39.24**.

### #39.40 **Sensory Losses**

Some sensory losses are specifically listed in the Permanent Disability Evaluation Schedule. Others, though not specifically referred to, may be assessed on a judgment basis as part of the overall disability incurred in a part of the body covered in the schedule.

The complete loss of the major nerves in the arms and legs is covered in items 73 to 76 of the Permanent Disability Evaluation Schedule.

When the fingers lose sensitivity as the result of an injury, an award of up to the full amputated value of the joint can be granted. This especially relates to the thumb, index and middle fingers, when the pinch grip is involved.

Awards for hearing loss are dealt with in **policy item #31.00**.

### #39.41 *Loss of Taste and/or Smell*

Although there is not a scheduled award for the loss of either or both of these senses, the Board's policy is to allow 3% for a loss of smell. This includes the partial loss of taste, which always in practice accompanies a complete loss of smell. A loss of taste alone is regarded as a non-scheduled award.

If the loss of sense of taste or smell results from an occupational disease, the requirements of section 6 must be met before an **award pension** can be **awarded**, including the requirement that there be a disablement from earning full wages. (65)

## #39.42 *Visual Acuity*

For ~~pension~~ **permanent disability award** purposes, loss of visual acuity should be measured both before and, if correction is possible, after correction with conventional lenses. The intent of this evaluation is to determine the nature and degree of the injury.

Section 23(1) of the *Act* provides compensation based on the existence of a permanent partial "disability". The degree of disability is the extent to which the injury is presumed to impair the earning capacity of the average worker. In determining the degree of disability for the purposes of calculating an award under section 23(1), measurement of the loss of visual acuity is usually based on the best vision obtainable after correction with conventional lenses. Effective application of corrective lenses should eliminate any impairment of earning capacity.

The Permanent Disability Evaluation Schedule, items 84 to 90, sets out the percentages of disability payable for loss of visual acuity. These values have been developed based on corrected vision in order to establish an accurate measure of disability.

~~The Board recognizes that certain occupations require perfect uncorrected vision as a condition of employment. A worker who was employed in such an occupation prior to the injury may suffer an actual loss of earnings. In these circumstances, it may be more equitable to provide compensation under Section 23(3). A Section 23(3) pension is calculated by determining the difference between the average earnings of the worker before the injury and the average amount the worker is able to earn in some suitable occupation after the injury.~~

As total blindness in one eye is assessed at 16% of total and total blindness in two eyes is equal to 100% of total disability, the value attached to the total loss of the second eye is 84%. When assessing a bilateral visual loss which is less than total, each eye is first assessed separately in accordance with the schedule. 84/16 times the percentage applied to the better eye is then added to the percentage applied to the poorer eye.

Where the work injury leaves the worker with an aphakic eye, an award of 12% of total is made. This award is on the assumption that the worker has 20/20 vision. If the vision is worse, the worker receives an additional award equal to the percentage allocated in the schedule to the loss of visual acuity, but this additional award is devalued according to the rules set out in **policy item #39.13**. If, for example, a worker with an aphakic eye has 20/60 vision the percentage is calculated as follows:

A.	Percentage for blind eye	16%
B.	Percentage for aphakic eye	12%
C.	Percentage for loss of visual acuity equal to 20/60 (Item 87 in schedule)	4%
D.	Additional percentage awarded where B combined with C	
	$\frac{4\% (C)}{16\% (A) \times [16\% (A) - 12\% (B)]}$	1%
E.	Total percentage awarded [(B) + (D)]	13%

The above formula would also apply in other situations where a compensable eye disease is combined with a loss of visual acuity.

### **#39.43      *Sexual and Reproductive Function***

Sexual function is defined as the ability to engage in sexual activity. It must be distinguished from reproductive function, which is defined as the ability to procreate.

Cases involving sexual or reproductive function are classified as follows:

1. Impaired sexual or reproductive function resulting from paraplegia, quadriplegia, or similar disabilities.

In these cases, the worker is generally receiving an award for total disability, and where that is so, there is no scope for considering impaired sexual or reproductive function as a separate compensable item.

2. Where a physical injury other than to the genital organs or their related structures results in a psychological disturbance, and impaired sexual function is a symptom or consequence of the psychological disorder.

In this situation, the psychological problem, including the impaired sexual function, should be considered according to the principles applicable to psychological problems, and the impaired sexual function should not be considered as a separate matter. In cases of this kind, it is normal to explore the possibilities of treatment before regarding the case as one for a permanent disability award.

3. Where a compensable injury or occupational disease has caused permanent damage to the genital organs or related structures resulting in impaired sexual or reproductive function.

The reference here is to cases where the remedial treatment has been considered and found not to be possible. Where impaired sexual or reproductive function in this category occurs, a permanent disability award will be given. The *American Medical Association Guide to the Evaluation of Permanent Impairment* will be used to **assist in** determineing the appropriate percentage of disability.

A worker with impaired sexual or reproductive function derived from physical damage to the sexual or reproductive organs or related structures may suffer actual psychological symptoms over and above what might normally be assumed for impaired sexual or reproductive function. In such a case, it will not be appropriate to simply grant an award which is based on the ordinary assumed psychological effect. An assessment of the actual psychological disability suffered by the worker should be carried out in accordance with the general policy for assessing such disabilities under section 23(1) of the *Act*. If, after that assessment, it is found that the worker is entitled to a general psychological award of an amount higher than what might normally be awarded for impaired sexual or reproductive function, the worker will be paid this award in lieu of the award for impaired sexual or reproductive function.

~~With regard to impairment of sexual function, this policy applies to impairments occurring on or after April 6, 1992. For impairments occurring prior to that date, the policy was to use a table of percentages of disability for an impairment resulting from physical damage to the genital organs. The percentage varied according to the age of the worker. There was a maximum of 15% for a worker aged 45 at the time of injury reducing to 5% for a worker aged 65 or over. The table of percentages did not apply to an impairment of sexual function resulting from paraplegia, quadriplegia or similar disabilities, to impairment of sexual function resulting from psychological causes, to female workers or to impairment of reproductive function. Awards in these situations were considered separately. (7)~~

~~With regard to impairment of reproductive function, this policy applies to impairments occurring on or after April 6, 1992 as well as to existing impairments in respect of which a request for an award is subsequently submitted to the Board. However, no payments under this policy will be made in respect of the time period prior to April 6, 1992.~~

### #39.44 Assessment of ~~Pension~~Awards for Hand-Arm Vibration Syndrome

To measure the extent of any permanent disability resulting from Hand-Arm Vibration Syndrome, the evaluation is carried out in the following manner:

1. The Disability Awards Medical Advisor assesses the vascular, sensorineural and musculoskeletal impairments of the worker in reference to the following table.

<b>ELEMENTS</b>	<b>Process (Assess each hand separately)</b>	<b>Points Applied</b>
<i>Vascular Element:</i>	Assess vascular elements: blanching of fingers in cold temperature, pain, swelling, ulcers, gangrene & amputations: <ul style="list-style-type: none"> <li>• Distal phalange on index, middle and ring finger = 1 point each</li> <li>• Middle phalange on index, middle and ring finger = 1 point each</li> <li>• Proximal phalange on index, middle and ring finger = 2 points each</li> <li>• All phalanges on little finger = 1 point</li> <li>• All phalanges on thumb finger = 1 point</li> <li>• Distal half of palm (top) = 1 to 2 points</li> <li>• Proximal half of palm (bottom) = 1 point</li> </ul>	17 points max per hand
	ADD: Double value of sum of above if there is evidence of trophic changes (i.e., ulcers)	17 points max per hand
	MAXIMUM points for Vascular element	34 points per hand
<i>Sensorineural Element:</i>	Assess sensorineural impairment (evidence of numbness, tingling and reduced sensory perception)	2 points max per hand
	Assess manual dexterity (i.e., difficulty with buttons and writing) <ul style="list-style-type: none"> <li>• Additional 1 to 2 points per hand if reduction occurs</li> </ul>	2 points max per hand
	MAXIMUM points for sensorineural element	4 points per hand
<i>Musculoskeletal Element:</i>	Assess musculoskeletal impairment (loss of grip strength)	2 points max per hand

	MAXIMUM points from vascular, sensorineural and musculoskeletal elements for each hand	40 points per hand
	Add total points for both hands.	

- The ~~Adjudicator~~ **Board officer in Disability Awards** assesses the worker's disability using the Disability Awards Medical Advisor's assessment of impairment and the following table.

Conversion of Points to Percentages of Disability

Points System	% Disability	Points System	% Disability	Points System	% Disability
1 – 4	1	21 – 30	6	Beyond 40	Maximum of 20
5 – 15	2	31 – 35	8		
16 – 20	4	36 – 40	10		

- If evidence from the **Board officer in Vocational Rehabilitation Consultant Services** shows that the worker has not returned to the worker's normal or equal paying occupation, then an award in accordance with the conversion table is granted.
- If evidence from the **Board officer in Vocational Rehabilitation Consultant Services** shows that the worker has returned to the worker's normal or equal paying occupation, then no award is payable.

~~Where the Adjudicator considers it more equitable, section 23(3) of the Workers Compensation Act will apply in the assessment of pensions for Hand Arm Vibration Syndrome.~~

### #39.50 Non-Scheduled Awards

Any award where the schedule is not directly or indirectly used in the assessment is a non-scheduled award. This covers impairments in all parts of the body not listed in the schedule. Disabilities resulting from multiple injuries or occupational diseases may also involve non-scheduled awards. The rules governing respiratory and skin diseases are set out in **policy item #29.00** and **policy item #30.50** respectively.

In the case of non-scheduled awards, the **Board officer in Disability Awards** ~~Officer or Adjudicator in Disability Awards~~ use their own judgment to arrive at a percentage of disability appropriate to the particular claimant's impairment. Regard will be had to, inter alia, the permanent functional impairment evaluation,

the circumstances of the claimant, medical opinions of Board or non-Board doctors, and to schedules of disability used in other jurisdictions.

Neither the age adaptability or enhancement factors nor devaluation are formally applied in respect of non-scheduled awards. (The exception is that an enhancement factor may be added with respect to spinal injuries as outlined in **policy item #39.12.**) However, in making a judgment as to the correct percentage of disability, **the Board officer in Disability Awards Officer or Adjudicator** will have regard to the age of the worker, to existing disabilities in other parts of the worker's body, or to the combined effect of more than one disability in the same part of the body.

### **#39.60      Minimum Pension Award**

The minimum compensation for permanent partial disabilities is calculated in the same manner as for temporary total disability but only to the extent of the partial disability. (86) Thus, for example, if a worker is injured on January 2, 1986, and suffers a residual disability assessed at 10% of total disability, the minimum compensation will be the lesser of 10% of \$197.25 or 10% of his average earnings prior to the injury. (The formula for converting this weekly figure to the monthly equivalent is contained in #68.00.)

The minimum for permanent total disability does not apply simply because a worker is found to be totally unemployable under section 23(3). (97)

### **#39.61      Injury Prior to March 18, 1943**

Notwithstanding any other provision of the *Act*, all periodic payments awarded as compensation for permanent partial disability to workers injured prior to March 18, 1943, who, on January 1, 1955, or after that are in receipt of those periodical payments are calculated or recalculated at a rate of sixty-six and two-thirds per cent of average earnings of not less than two thousand dollars nor more than two thousand five hundred dollars per annum. Compensation is not payable under this provision for any period prior to January 1, 1955. (408)

### **#39.62      Injury Prior to January 1, 1965**

In regard to payments made on or after January 1, 1965, permanent partial disability pensions awarded in respect of injuries occurring before that date were recalculated in accordance with the then minimum for permanent total disability but to the extent only of the partial disability. This minimum was an amount equal to \$30.00 per week (\$130.00 per month), unless the worker's average earnings were less, in which case compensation would be paid in an amount equal to the average earnings.

Any increase resulting from the above provisions did not apply to a commuted pension or the commuted portion of a pension.

In considering whether the worker's earnings were less than the minimum, the artificial wage created by the application of **policy item #39.61** was not taken into account. Only the worker's actual earnings were relevant.

## **#40.00      ~~PROJECTED LOSS OF EARNINGS METHOD SECTION 23(3) ASSESSMENT~~**

~~Section 23(3) provides that "Where the board considers it more equitable, it may award compensation for permanent disability having regard to the difference between the average weekly earnings of the worker before the injury and the average amount which the worker is earning or is able to earn in some suitable occupation after the injury, and the compensation must be a periodic payment of 75% of the difference, and regard must be had to the worker's fitness to continue in the occupation in which the worker was injured or to adapt to some other suitable employment or business."~~

~~On October 2, 1973, the Board introduced a dual system for assessing permanent disability pensions involving the spinal column. Effective October 1, 1977, this system was extended to non-spinal injuries. This system implements Section 23(3) of the Act.~~

~~Under this system, awards are calculated as follows:~~

- ~~1. \_\_\_\_\_ The degree of physical impairment is calculated using the method described in #39.00, and a possible pension is calculated in accordance with this.~~
  - ~~2. \_\_\_\_\_ A possible pension is calculated according to the projected loss of earnings method described in #40.10.~~
  - ~~3. \_\_\_\_\_ The higher of these two results is then used as the pension.~~
- ~~Where the claimant is aged 51 years or above, this system is modified in the manner set out in #40.20.~~

~~It is not the policy of the Board to grant an award under the dual system without regard to the nature of the condition or disability causing the unemployability or loss of earnings. The worker must not only have a disability accepted by the Board, but the disability accepted by the Board must be a significant factor in the reduced employability or loss of earnings potential. Therefore, the Board has declined to grant awards under the dual system when the unemployability of the worker is related directly to psychological problems which are not considered acceptable as part of the claim.~~

~~Where a Disability Awards Officer or Adjudicator in Disability Awards decides that no pension can be awarded on a physical impairment basis because the impairment is unlikely to affect the worker's earning capacity, no pension can be awarded on a projected loss of earnings basis. While Section 23(3) is not~~

~~expressed to be dependent on an award being made under Section 23(1), this must in practice be the case. The Board could not consistently decide at the same time both that a worker's impairment was too minimal to affect earning capacity and that it would cause a loss of earnings in the future. The Board will not make a temporary award on a projected loss of earnings basis.~~

**Section 23(3) of the Act provides:**

**Subject to sections 34 and 35, if**

- (a) a permanent partial disability results from a worker's injury; and**
- (b) the Board makes a determination under subsection (3.1) with respect to the worker;**

**the Board may pay the worker compensation that is a periodic payment that equals 90% of the difference between**

- (c) the average net earnings of the worker before the injury, and**
- (d) whichever of the following amounts the Board considers better represents the worker's loss of earnings:**
  - (i) the average net earnings that the worker is earning after the injury;**
  - (ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.**

**(3.1) A payment may be made under subsection (3) only if the Board determines that the combined effect of the worker's occupation at the time of injury and the worker's disability resulting from the injury is so exceptional that an amount determined under subsection (1) does not appropriately compensate the worker for the injury.**

**(3.2) In making a determination under subsection (3.1), the Board must consider the ability of the worker to continue in the worker's occupation at the time of injury or to adapt to another suitable occupation.**

**Section 23(3) is a discretionary provision that establishes rules for compensating a worker for a permanent partial disability in exceptional circumstances. Section 23(3) is only applied where the test set out under section 23(3) and (3.1) is met.**

**This test requires that the Board determine whether the combined effect of a worker's occupation at the time of injury and a worker's disability resulting from the injury is so exceptional that an amount determined under section 23(1) does not appropriately compensate the worker for the injury. Occupation is broadly defined as a collection of jobs or employments that are characterized by a similarity of skills.**

**For the purposes of determining whether the worker meets the test set out under section 23(3) and (3.1), the Board must consider the combined effect of a worker's occupation at the time of injury and the resulting disability. While a worker may experience a loss of earnings as a result of a work injury, that fact alone is not sufficient to meet the test set out under section 23(3) and (3.1).**

**The following is a list of criteria that must be considered under section 23(3) and (3.1). Each of these criteria must be satisfied in order for a worker to be assessed under section 23(3).**

- **The occupation at the time of injury requires specific skills which are essential to that occupation or to an occupation of a similar type or nature;**
- **As a result of the compensable disability, the worker is no longer able to perform the essential skills needed to continue in the occupation at the time of injury or in an occupation of a similar type or nature;**
- **The effect of the compensable disability is that the worker is unable to work in his or her occupation or in an occupation of a similar type or nature, or to adapt to another suitable occupation, without incurring a significant loss of earnings.**

**Skills are defined in this context as the learned application of knowledge and abilities.**

**In all cases, the Board must determine if, following recovery from a work injury, a worker is either able to return to the occupation at the time of injury or to adapt to another suitable occupation. This determination includes consideration of both the worker's transferable skills and the worker's post-injury functional abilities. In the vast majority of cases a worker's entitlement to a permanent partial disability award is determined under the section 23(1) method and this estimate of impairment of earning capacity is considered to be appropriate compensation.**

**However, in exceptional cases, the amount determined under section 23(1) may not appropriately compensate a worker. In these cases, medical evidence confirms that the work injury makes it impossible for a worker to continue in the occupation at the time of injury or in an occupation of a similar type or nature. In addition, the worker is considered unable to**

adapt to another suitable occupation without incurring a significant loss of earnings due to the work injury.

For the purposes of this policy, a significant loss of earnings means the Board may conclude in these exceptional cases, that the loss of earnings a worker will experience as a result of the combined effect could not have been anticipated under the section 23(1) method of estimating a worker's long term loss of earning capacity.

An example of when the combined effect may be considered so exceptional is one where a work injury results in a significant disability of two digits on the dominant hand of a worker whose occupation requires fine motor skills. As a result of the disability, the worker is no longer able to perform fine motor skills, and consequently, is unable to continue in the pre-injury occupation, or another occupation of a similar type or nature. In addition, due to the disability, the worker is unable to adapt to another suitable occupation without incurring a significant loss of earnings.

As a result, the section 23(1) award may not be considered to appropriately compensate the worker for the impact of the combined effect, and may therefore result in a consideration under section 23(3).

#### **#40.01 Decision-Making Procedure under the Section 23(3) Method**

Section 23(3) assessments are undertaken if a permanent partial disability results from a worker's injury, and the Board makes a determination under subsection (3.1) with respect to the worker.

The Disability Awards Committee is ultimately responsible for the conclusion on permanent partial disability awards assessed under 23(3) of the *Act*. The Board officer in Disability Awards is required to conduct the necessary investigations and make a specific recommendation to the committee regarding a worker's eligibility for a section 23(3) assessment and, in cases where an assessment is undertaken, the worker's entitlement to an award.

It is the function of the Committee, following any further investigation it considers necessary, to agree or disagree with the Board officer's recommendation. If the committee agrees, the Board officer will implement the initial recommendation. If the committee disagrees with the Board officer's recommendation, it will either implement its findings or return the file for further investigation. The Disability Awards Committee consists of one senior representative from the Disability Awards, Medical, and Vocational Rehabilitation Services Departments.

The rules of evidence followed by Board officers in Disability Awards and the Disability Awards Committee are discussed in policy item #97.40.

Appeals from the decisions of Board officers in Disability Awards or the Disability Awards Committee are discussed in Chapter 13.

## **#40.10 Section 23(3) Assessment Formula**

~~The rules, set out in #40.10 #40.30 apply to assessments of new permanent disability awards carried out on or after April 18, 1985.~~

~~These rules do not apply to earlier projected loss of earnings awards unless those awards are reassessed on the basis of a change in the worker's physical impairment. Where, on such a reassessment, there is found to have been a deterioration in the worker's physical impairment and these rules produce a lower pension than the projected loss of earnings pension the worker is currently receiving, the current pension will remain unchanged. The pension will, however, continue to be adjusted in the normal way in accordance with changes in the Consumer Price Index.~~

~~Where a pension was calculated on the policies prior to April 18, 1985, and an appeal results in a reconsideration of the pension, the reconsideration will be carried out under the same rules that applied at the time the **original decision** was made.~~

~~The rules for assessing a projected loss of earnings awards under section 23(3) adopted by the Board are:~~

**This assessment is undertaken in exceptional cases where the Board determines that a worker is eligible for an assessment under section 23(3) of the Act. The following guidelines apply in considering a worker under section 23(3):**

- 1. Long term Average net earnings that the worker is earning after the injury** prior to the injury will be determined in accordance with established policies and procedures in **Chapter 9**.
- 2. In considering the amount that better represents the worker's loss of earnings after the injury, the Board officer will compare the average net earnings that the worker is actually earning after the injury, with the average net earnings the Board estimates the worker is capable of earning in a suitable occupation after the injury.**
- 23. In estimating what a worker is capable of earning after the injury, a Board officer gives** Having regard to the evidence, including the medical evidence, of the limitations imposed by the compensable disability and the fitness of the worker for different types of work, occupations. **and having The Board also gives**

regard to the evidence of the **Vocational** Rehabilitation Consultant about the suitability of the worker for **jobs occupations** that could reasonably become available, ~~the~~ **Following these considerations, the Adjudicator in Disability Awards Board officer** will arrive at a conclusion about suitable occupations that the worker could be expected to undertake over the long-term future.

- 34. **Average net e**Earnings that maximize the worker's long-term potential will be selected from the **jobs occupations** that are suitable and reasonably available **over the long-term**. Earnings in those occupations will be determined as at the time of the injury.
- 45. The possible ~~pension~~ **award** will then be ~~75%~~ **90%** of the **average net** amount by which the earnings level thus established is less than the average **net** earnings prior to the injury.
- 56. Any increase that may be due to the worker because of a cost of living adjustment will then be added.
- 67. Since the assessment ~~on a projected loss of earnings basis~~ **under section 23(3)** aims to predict the worker's actual loss of earnings over the future, no award can be made when the worker is unemployed for reasons unrelated to the injury and it is determined that there will not be a potential loss of earnings.

**These guidelines are discussed further in policy items #40.12 to #40.14.**

~~It may be helpful to illustrate how the dual system works. Consider the example of a skilled tradesperson in a trade that involves manual labour earning an average of \$3,500 per month. Assume, in 1985, the worker suffered a back injury as a result of being crushed under a load dropped from an overhead crane and had spinal surgery, following which the worker was unfit to return to the former occupation. Having regard to age and educational background, the worker is not considered suitable for retraining; but is able to take an unskilled clerical job and can now earn \$2,150 per month. Average earnings in 1985 for that occupation would be approximately \$1,900 per month. The pension is now being assessed in 1986. The way it might work out is as follows:~~

**Method 1**

<del>Medical assessment estimates the degree of physical impairment, measured according to the physical impairment method, at 10% of total disability</del>	<del>10%</del>
<del>Average actual earnings prior to injury</del>	<del>\$3,500.00 per month</del>
<del>Statutory ceiling applicable in 1985</del>	<del>\$2,700.00 per month</del>

~~Amount that would be payable for total disability (75% x \$2,700.00) \$2,025.00 per month~~

~~Compensation payable as partial disability pension (10% of total disability) \$202.50 per month~~

**Method 2**

~~Actual average earnings in 1985 \$3,500.00 per month~~

~~Statutory ceiling in 1985 \$2,700.00 per month~~

~~Average earnings obtainable in unskilled clerical work in 1985 \$1,900.00 per month~~

~~Compensable loss of projected earnings (\$2,700.00 less \$1,900.00) \$800.00 per month~~

~~75% thereof \$600.00 per month~~

~~Being entitled to the greater of the two amounts, the claimant will now receive a pension of \$600.00 per month plus applicable Consumer Price Index increases.~~

~~#40.11 Average Earnings Prior to Injury~~

~~Further comment is required on items 1 to 3 in #40.10.~~

~~Section 23(3) of the *Workers Compensation Act* requires the Board to have regard to the “average weekly earnings of the worker before the injury”. This is generally in line with the other sections of the Act which govern the payment of temporary or permanent disability benefits, namely Sections 22, 23(1), 29 and 30. All of these provisions base compensation on the worker’s earnings, but use the slightly different term “average earnings”.~~

~~It has been suggested that the use of the term “average weekly earnings” in Section 23(3), as opposed to the term “average earnings” is significant. This arises in relation to the provisions of Section 33(1) which give the Board a wide authority to determine the “average earnings and earning capacity of a worker”, but place a limit on the earnings that can be used in the form of the maximum wage rate. It is contended that since it specifically refers to “average earnings”, Section 33(1) is not relevant to determining “average weekly earnings” under Section 23(3) with the result that the maximum wage rate does not limit those earnings. Rather, the maximum limits only the ultimate pension that can be awarded under that section.~~

~~While noting the slight difference in terminology, Section 23(3) clearly requires the Board to determine a worker’s earnings prior to the injury and Section 33 is the only section in the Act which provides for how this is to be done. The Board has concluded that “average weekly earnings” prior to the injury must be determined under the projected loss of earnings method in the same manner as~~

~~“average earnings” are determined for the purpose of pensions assessed under Section 23(1) and the maximum wage rate must apply to limit those earnings. The average earnings prior to the injury are calculated according to the normal rules set out in #68.00.~~

~~In making this calculation, regard will not normally be had to promotions which might have been received if the worker had not been injured. This is so even though the worker returns to the pre-injury job following the injury, is promoted, but is unable to remain in the job because of the disability.~~

~~When calculating the pre-injury earnings of a person covered by personal optional protection, a departure is made from the normal rule of using the rate of earnings for which coverage has been purchased. (11) For the purpose of the projected loss of earnings assessment, actual pre-injury earnings are used, but the amount of the award can never exceed the amount of earnings for which the coverage was purchased.~~

#### **#40.12      *Suitable and Available Occupations for the Claimant Worker***

The purpose of ~~direction~~ **guideline 2** in the assessment formula set out in **policy item #40.10** is to arrive at a long-term projection of the earning capacity of the worker. The evidence of the **Board officer in Vocational Rehabilitation Services Consultant** should relate to occupations ~~jobs~~ that are suitable and reasonably available to the worker in the long run and the conclusion of the ~~Adjudicator in Disability Awards~~ **Board officer** should be concerned with ~~such of those jobs~~ **occupations as that** will maximize the worker’s long-term earnings potential.

**An occupation differs from a “job” which is defined as a specific position with a particular employer. Occupation is a collection of jobs or employments that are characterized by a similarity of skills.**

It is not satisfactory simply to take the wage rate in a job to which the worker actually returns. For a variety of reasons, the long-term ~~employment~~ prospects of a worker may be different from the most immediate job opportunities. On the other hand, the phrase “available ~~jobs~~ **occupations**” does not mean any ~~job position~~ **occupation** in which there are vacancies. An available ~~job~~ **occupation** means one reasonably available to the worker in the long run. ~~For example, a city may have several theatres, and there may be occasional job vacancies for the position of theatre usher; but if there are always numerous better qualified applicants and the realities are that a worker with the particular disability is not likely to obtain such a job, that is not a reasonably available job.~~

In advising on the suitability of the worker for reasonably available ~~jobs~~ **occupations**, the **Board officer in Vocational Rehabilitation Services Consultant** must have regard to the limitations imposed by the residual compensable disabilities of the worker. **The Board officer in Vocational Rehabilitation Services** ~~and also assesses~~ the worker’s earnings potential in

light of **the worker's residual abilities, transferable skills and** all possible rehabilitation measures that might be of assistance, including the possibility of retraining or other measures that may be appropriate to the particular worker.

The guidelines set out below are followed in determining suitable and reasonably available jobs **occupations** for a worker:

1. Where the worker is doing his or her best to maximize earnings, and is following the advice of the **Board officer in Vocational Rehabilitation Consultant Services**, and is presenting himself or herself in good faith to obtain a job at the highest level of earnings among the jobs **within the identified occupation** that the worker is fit to undertake, then the earnings level in the job that is actually obtained is generally the earnings level that should be taken, unless there is evidence that this position is transitory and that jobs at another level of earnings will **within that occupation** be available to the worker in the near future.
2. Regard may be had to other jobs than the present one with the same employer to which the worker might in future progress and this is not limited to jobs which the worker has a right to because of seniority. The fact that there is a formal or informal competition for a higher jobs is not a bar to its being considered. On the other hand, it would not be fair to assume that a worker will receive all possible promotions that might theoretically be open. The Board is only concerned with jobs that are, in practice, reasonably available. Thus, the Board will, in general, only have regard to higher paying jobs which a person in the worker's present job **occupation** would ordinarily be expected to obtain.
3. A reasonably available job **occupation** must be one that the worker is fit to undertake, and which would not involve adverse health consequences either immediately or in the long run compared with other job **occupation**.
4. Where a suitable job **occupation** is reasonably available over the long term, it is taken into consideration even though it is not reasonably available at the time of assessment because of general economic conditions.
5. In deciding whether it is reasonable for a worker to refuse **vocational rehabilitation assistance offered by the Board officer in Vocational Rehabilitation Services to become employable in a suitable a-job occupation**, regard should be had to the long term as well as the immediate position. For example, **jobs in occupation job A** may have an earnings rate of \$16.00 an hour, and **jobs in occupation job B** may have an earnings rate of

\$15.00 an hour; but if job **occupation A** is subject to fluctuations in the economy and job B appears more stable in the long run, then job B may be the better-paying **occupation job** in the long run. Therefore, the wage rate in **occupation job B** should be used in the calculation of projected loss of earnings.

6. A reasonably available job must be one that is within a reasonable commuting distance of the worker's home. Where there is no available job within that commuting distance that the worker could reasonably be expected to undertake, the worker might be expected to relocate, depending on age, the availability of a suitable job elsewhere, and other factors; but relocation will not normally be expected unless the worker is offered the expenses of relocation, either by the ~~Canada Employment and Immigration Commission~~ **Human Resources and Development Canada** or by the Board or by some other government agency.
7. If the worker declines **vocational rehabilitation assistance offered by the Board officer in Vocational Rehabilitation Services to become employable** in the best-paying reasonably available job because of a personal preference for a lower-paying occupation or for an alternative life-style, the wage rate in the best-paying reasonably available job **occupation** should be used in the formula.

~~For the distinction between the jobs which can be considered properly available for the purpose of the projected loss of earnings method and those which can be considered as available for the purpose of assessing temporary partial disability benefits, reference should be made to #35.21.~~

#### **#40.13      *Measurement of Earnings Loss***

~~Section 23(3) requires the Board to compare the average weekly earnings of the worker before the injury with "the average amount which the worker is earning or is able to earn in some suitable occupation after the injury".~~

**Sections 23(3)(c) and (d) sets out the process for determining a worker's entitlement to a permanent partial disability award under this method. These subsections provide that the Board may pay a worker compensation that is a periodic payment that equals 90% of the difference between the average net earnings before the injury, and either the average net earnings that the worker is earning, or that the Board estimates the worker is capable of earning, after the injury.**

The latter figures **is are** obtained by ascertaining the earnings in the occupations which have been found to be suitable and reasonably available according to the

criteria set out in **policy item #40.12** and determining the earnings figure which will maximize the worker's long-term earnings potential.

The intention of the *Act* is to protect workers' earnings only up to the maximum wage rate. This is shown by section ~~33(4)~~ **33(3)** which results in payments for total disability being limited to ~~75~~**90**% of the maximum and by section 31 which ensures that, where a worker is already receiving payments for a disability, additional payments can be made for any further disability only to the extent that they do not take the total payments above the maximum. No ~~pension award~~ can be ~~made on a projected loss of earnings basis~~ **under section 23(3)** where, following the injury, the worker is earning or is able to earn at or above the maximum wage rate. Where a worker was earning at or above the maximum prior to the injury and it is projected that because of the injury earnings will be less than the maximum, a projected loss of earnings ~~pension award~~ can be ~~awarded~~ **made** but only to the extent of the difference between the maximum and the projected earnings.

Although assessment of a ~~pension~~ **permanent partial disability award** will often be made some time after the original injury, it would not be fair to compare directly the actual pre-injury **average** earnings with the earnings the worker might now earn in the ~~jobs~~ **occupations** available. The effect of inflation upon earnings levels would mean that the real loss would not be properly determined in that way. The practice of the Board is to use the earnings in the ~~jobs~~ **occupations** available after the injury as they stood at the date of the injury. It occasionally happens that earnings in ~~jobs~~ **occupations** at the time of the injury are not available. If this occurs, it may be necessary to use the earnings in those ~~jobs~~ **occupations** as they were at another date and bring the pre-injury earnings into line by applying ~~Consumer Price Index~~ **cost of living** adjustments **as described in policy item #51.00**.

**When calculating a worker's average net earnings for the purposes of the section 23(3) assessment, the Board will also consider the formulas used to determine the CPP contributions, EI premiums and income taxes applicable to the level of average earnings. The formulas used are those in effect on the earlier of the first day after the date temporary disability benefits have been payable to the worker for a cumulative period of 10 weeks; or on the effective date of a worker's permanent disability award.**

#### **#40.14**      *Provision of Employability Assessments*

Workers are provided with a copy of a completed employability assessment before a ~~pension~~ decision is **made on entitlement to a section 23(3) award**. They have 30 days in which to provide a written submission. All such submissions received within this time frame will be considered before the final decision is made. Workers are also advised that, at their request, a copy will be made available to their treating physicians. If the details of the employability

assessment and its impact on the pension **section 23(3) award** are known and agreed to, the 30-day waiting period may be waived.

#### ~~#40.20 — Duration of Projected Loss of Earnings Pension~~

~~Pensions assessed on a physical impairment basis are, under the terms of Section 23(1), payable for life. It was suggested that projected loss of earnings pensions should also be payable for life in every case, but the Board does not accept this. Section 23(3) does not specifically require this, but rather gives the Board a discretion in the matter. Compensation is only payable under Section 23(3) “Where the board considers it more equitable”. Since the section authorizes the Board to calculate a worker’s actual loss of earnings resulting from the injury, it is reasonable for the Board to have authority to terminate benefits payable under the section at a time when, even if not disabled because of the compensable injury, the worker would not have been working.~~

~~The situation where this issue arises is when the worker reaches retirement age. The Board considers age 65 years to be the standard retirement age. Any direct loss of earnings the worker suffers because of the compensable disability will normally cease at that time. However, the Board does not, in practice, feel this is an automatic reason for terminating a projected loss of earnings pension. Rather, it is recognized because of the compensable disability, the worker may be less able to accumulate retirement benefits. The Board, therefore, allows the projected loss of earnings pension to continue in whole or part past the standard age of retirement where the worker was under 65 years of age at the time of the injury. The portion of the pension so continued depends on how close the worker was to the age of 65 years, the assumption being that the older the worker, the less the ability to build up retirement benefits would be affected by the injury.~~

The following principles apply:

- ~~1. — Where, at the date of injury, the worker is at or below the age of 50 years, the pension is established based on the higher of the physical impairment and projected loss of earnings assessment, and the pension so established, unless modified on a review, is payable for life.~~
- ~~2. — Where, at the date of injury, the worker is at or above the age of 65 years, the pension will usually be established by the physical impairment method, and that pension is payable for life. No projected loss of earnings pension is awarded unless clear and objective evidence is presented that the worker would have continued to work past age 65 if the injury had not occurred. Where a projected loss of earnings pension is awarded, it will cease when the worker reaches retirement age, as determined by a~~

~~Board officer, and compensation will thereafter be established by the physical impairment method.~~

- ~~3. Where, at the date of injury, the worker is in the age range of 51 to 64 years, and where a pension calculated by the projected loss of earnings method is payable, the pension so calculated, unless modified on a review, will usually continue until the age of 65 years. From the age of 65, the pension is at a rate calculated by the physical impairment method, plus a proportion of the difference between the two methods according to the following table.~~

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<del>Age at Date of Injury</del>	<del>Proportion of Difference Between Two Methods</del>
<del>51</del>	<del>14/15ths</del>
<del>52</del>	<del>13/15ths</del>
<del>53</del>	<del>12/15ths</del>
<del>54</del>	<del>11/15ths</del>
<del>55</del>	<del>10/15ths</del>
<del>56</del>	<del>9/15ths</del>
<del>57</del>	<del>8/15ths</del>
<del>58</del>	<del>7/15ths</del>
<del>59</del>	<del>6/15ths</del>
<del>60</del>	<del>5/15ths</del>
<del>61</del>	<del>4/15ths</del>
<del>62</del>	<del>3/15ths</del>
<del>63</del>	<del>2/15ths</del>
<del>64</del>	<del>1/15th</del>

~~The revised pension commences on the first day of the month following the worker's 65<sup>th</sup> birthday.~~

~~Where the projected loss of earnings pension is assessed following a recurrence of disability, the age at the date of the recurrence is used for the purpose of the above principles.~~

~~In cases where the worker presents clear and objective evidence that he or she would have worked past age 65 if the injury had not occurred, the projected loss of earnings pension may continue in whole past that age. In these situations, the formula provided in the table above does not apply. From the age of retirement, as determined by a Board officer, compensation will be established by the physical impairment method.~~

4. ~~Where an injury occurs in the age range 51-64 years, and full wage-loss payments are made from the date of injury up to or beyond the worker's 65<sup>th</sup> birthday, a pension will usually be established by the physical impairment method, and that pension will be payable for life.~~

~~A projected loss of earnings pension may be awarded if the worker presents clear and objective evidence that he or she would have worked past the standard retirement age had the injury not occurred. In these situations, the projected loss of earnings pension will cease when the worker reaches retirement age, as determined by a Board officer, and compensation will thereafter be established by the physical impairment method.~~

~~In calculating a worker's projected loss of earnings, no account is taken of any disability or retirement pensions received from the employer to which the worker has contributed or any other source than the Board. However, a Board officer may take into account the fact that the worker has retired or is about to retire in deciding whether there is a projected loss of earnings in the first place. The formula set out above only applies when it has been determined that there is such a loss and the pension is assessed on the basis of that loss.~~

#### **#40.30      Reviews of Projected Loss of Earnings Pensions Permanent Partial Disability Awards under Section 23(3)**

~~The basic rule established when the dual system was first introduced was that a pension assessed under the projected loss of earnings method would not be reviewable by reference to changes in economic conditions, but would be reviewable by reference to any change in the medical condition of the claimant. The effect of this policy was that a projected loss of earnings pension would not be reviewed simply because a worker's future earnings turned out to be greater or less than the amount projected. This would only be done if there was a change in a worker's physical condition. After considering the matter carefully, †The Board has concluded **considers** that reviews should be allowed for reasons other than a change in the worker's physical condition. Such †Reviews can be carried out in a way that would increase the accuracy of pension **section 23(3)** assessments and without unduly interfering with the worker's privacy or rehabilitation.~~

The Board has decided that there should be an automatic review of an **section 23(3)** award made on a projected loss of earnings basis at two years from the date of assessment or, if there is an appeal, two years from the date of the last decision resulting from the appeal process. Following that review, there will be no further automatic reviews, but the Adjudicator **Board officer** in Disability Awards has the discretion to set up a claim for reviews at future dates which he

or she determines. If, for example, where a worker has not changed occupation, but there has been a change in the salary range of that occupation, usually because of a shift in market conditions, if the change is temporary, the file will be set up for further review. If the change is permanent, an adjustment will be made immediately. Neither a worker nor an employer will have the right to apply for a review of a ~~projected loss of earnings pension~~ **section 23(3) award** at any time unless there has been a change in the worker's physical condition.

In exercising discretion whether to set up an ~~pension award~~ for later review, an important factor considered by the ~~Adjudicator~~ **Board officer** is whether the review just conducted resulted in any change. The ~~Adjudicator~~ **Board officer** will normally set up a later review if there was a change in the ~~pension award~~. If a review results in no alteration in the ~~pension award~~, it may be reasonable to conclude that the long-term projection made at the time of the initial assessment was correct and that there is no need for further review. On the other hand, the ~~Adjudicator~~ **Board officer** may feel that at least one further review is required to ensure that the correct result is obtained. If a further review is set up and that review again results in no change, then the ~~Adjudicator~~ **Board officer** would not likely set up a further review. The ~~Adjudicator~~ **Board officer** should not continue to set up a claim for future reviews where such reviews are not likely to result in any change in the ~~pension award~~.

To provide further encouragement to a worker's rehabilitation, the Board feels that it is reasonable to allow a worker to earn a certain amount above the amount projected without the ~~projected loss of earnings pension award~~ being affected. Allowance also should be made for the fact that in serious cases a disabled worker may work for small amounts for therapeutic reasons. The Board feels this concession is consistent with the overall concept of a projected loss of earnings system. Since the object of that system is to predict a worker's long-term earning capacity, it would not, in any event, be reasonable to alter the ~~pension award~~ simply because earnings are marginally different from the predicted amount. There is likely to be a certain degree of fluctuation in a worker's earnings which does not alter the long-term picture. The Board has concluded that if at the time of a review a worker's earnings or projected earnings are 5% or less over the earnings previously projected, the excess amount will be ignored. Conversely, if it turns out that earnings or projected earnings are 5% or less below what was previously projected, there will be no increase in the ~~projected loss of earnings pension~~ **section 23(3) award**.

In carrying out the reviews and determining whether a worker's current earnings are 5% or less above the amount projected, allowance will be made for the effect of inflation.

Where the assessment of a worker's ~~projected loss of earnings~~ is made **under section 23(3)** on an application for reopening following a worsening of the condition, it is the loss at the time of the reopening, not at the time of the original

injury, which is assessed. For the purpose of the rules set out in #40.20, it is the claimant's age at the time of the reopening which is considered.

#### **#40.32      *Worsening or Improvement of Disability***

**If the disability on which an award is based worsens, the extent of the disability is reassessed and a new award is made based on the reassessment. Conversely, if a worker should unexpectedly recover from a disability classified as permanent, the permanent disability award would be subject to termination or downward adjustment.**

#### **~~#40.31      *Existing Pension Assessed Prior to Establishment of Dual System*~~**

~~Differing rules apply to spinal and non-spinal disabilities. Upon any application for reopening of entitlement to a pension benefits in the case of an injury involving the spinal column, the dual method of assessment is applied if the worker is under the age of 64 years and a pension has not previously been calculated or considered under the dual method. This applies regardless of the date of injury, but the effective date for any readjustment is the date of the application for reopening. Where the claimant was in receipt of a term pension that has expired or the claimant has commuted a life pension, the pension so expired or commuted is recalculated as a notional life amount. If the projected loss of earnings method produces a pension in excess of that notional life amount, a new pension will be instituted, but only to the extent of the excess.~~

~~Any pension for a non-spinal disability which has been assessed since October 1, 1977, on the basis of functional impairment only, and where the application of the dual system was not considered, will be reconsidered on that basis should such a request be made. Should an application be made for reopening of a pension assessed before October 1, 1977 on the basis of changed medical circumstances, and it is concluded that the application has merit and the pension should be reassessed, that reassessment will include consideration of a loss of earnings award as of the date of the changed medical condition but not retroactive to the date the pension was first established. In the case of applications for reconsideration on the basis of significant new evidence or error in law in the original decision, even if the new evidence or submission results in a change in the original decision, no consideration can be given to a loss of earnings award unless, of course, the original decision was made since October 1, 1977. In other words, a simple request to reopen the claim on the basis that a claimant wishes to have a pension reassessment under the new system must be rejected on the ground that the "new system" is effective only from October 1, 1977 for non-spinal disability.~~

## **#41.00 DURATION OF PERMANENT DISABILITY PERIODIC PAYMENTS**

**Section 23.1 of the Act provides:**

**Compensation payable under section 22(1), 23(1) or (3), 29(1) or 30(1) may be paid to a worker, only**

- (a) if the worker is less than 63 years of age on the date of the injury, until the later of the following:**
  - (i) the date the worker reaches 65 years of age;**
  - (ii) if the Board is satisfied the worker would retire after reaching 65 years of age, the date the worker would retire, as determined by the Board, and**
- (b) if the worker is 63 years of age or older on the date of injury, until the later of the following:**
  - (i) 2 years after the date of injury;**
  - (ii) if the Board is satisfied that the worker would retire after the date referred to in subparagraph (i), the date the worker would retire, as determined by the Board.**

**Section 23.1 of the Act recognizes age 65 as the standard retirement age for workers. Confirmation of age 65 as the standard retirement age may also be found in the contractual terms of some employer sponsored pension plans and collective agreements. As well, Statistics Canada information lends weight to the general view that, on average, workers retire at or before 65 years of age. (9)**

**Section 23.1 also permits the Board to continue to pay benefits where the Board is satisfied that the worker would retire after the age of 65 if the worker had not been injured.**

**The standard of proof under the Act is on a balance of probabilities as described in policy item #97.00, Evidence. However, as age 65 is considered to be the standard retirement age, the Board requires evidence that is verified by an independent source to confirm the worker's subjective statement regarding his or her intent to work past age 65. Evidence is also required so that a Board officer can establish the worker's new retirement date for the purposes of concluding permanent disability award payments. If the worker's statement is not independently verifiable, the Board officer will make a determination based on the evidence available, including information provided by the worker.**

**Examples of the kinds of independent verifiable evidence that may support a worker's statement that he or she intended to work past age 65, and to establish the date of retirement, include the following:**

- **names of the employer or employers the worker intended to work for after age 65, a description of the type of employment the worker was going to perform, and the expected duration of employment**
- **information from the identified employer or employers to confirm that he or she intended to employ the worker after the worker reached age 65 and that employment was available**
- **information provided from the worker's pre-injury employer, union or professional association to confirm the normal retirement age for workers in the same pre-injury occupation**
- **information from the pre-injury employer about whether the worker was covered under a pension plan provided by the employer, and the terms of that plan**

**This is not a conclusive list of the types of evidence that may be considered. A Board officer will consider any other relevant information in determining whether a worker would have worked past age 65 and at what date the worker would have retired.**

**Where the Board is satisfied that a worker would have continued to work past age 65 if the injury had not occurred, permanent disability award periodic payments may continue past that age until the date a Board officer has established as the worker's retirement date. At the worker's age of retirement, as determined by a Board officer, periodic payments will conclude even if the worker's permanent disability remains.**

**In situations where a worker in receipt of a permanent disability periodic payments dies from causes unrelated to the disability, the periodic payments will continue for the full month in which the death occurred. The effect of this policy will be that no overpayments will be considered to have arisen for the period from the date of the worker's death up to the end of the month covered by the last periodic payment.**

**If the worker dies prior to the implementation of the permanent disability award, the award is calculated and paid to the date of death. The situation where such a worker would have received a lump sum award is dealt with in policy item #45.00.**

## **412.00 PAYMENT OF PENSIONS PERMANENT DISABILITY AWARDS**

~~Pensions~~ **Permanent disability awards under sections 22 and 23** are normally payable monthly ~~and last for life~~ **until the worker reaches retirement age as determined by the Board**. However, some are paid as lump sums. The cheques are mailed to the worker's home address or, if she or he elects, direct to their bank by electronic direct bank deposit.

When a payment to a worker has been lost or stolen or otherwise not received or cashed by the worker, the worker may request a reissue of payment, but the Board will require a written and signed declaration of this from the worker before a reissue will take place.

### **#412.10 Commencement of Pension-Periodic Payments**

The general rule is that the ~~pension~~ **permanent disability periodic payments** commences at the date when the worker's temporary disability ceased and his condition stabilized or was first considered to be permanent.

Where a worker has been paid any temporary disability benefits under section 29 or 30 of the *Act*, the ~~pension~~ **permanent disability periodic payments** will take effect from the date following the termination of these temporary benefits. For the majority of cases, this will adequately reflect the financial impact of the disability on the worker's earnings.

There may, however, be the unusual situation where a worker has or could have returned to a significant level of employment with a minimal loss of income. Wage-loss benefits under section 30 would be ~~75% of this minimal figure~~ **90% of the worker's average net earnings in this employment**. Should the worker eventually be assessed at a ~~pension~~ **permanent disability award** rate which is higher than the rate paid for temporary benefits under section 30, it would appear that the worker may have suffered a loss of compensation income. The *Act*, however, precludes the payment of both temporary and permanent benefits for the same condition at the same time.

A problem of ~~pension~~ **permanent disability award** retroactivity also occurs when, although the worker had a temporary partial disability, the worker had or could have returned to full employment and has not, therefore, actually been paid any benefits under section 30. As previously stated, the *Act* requires that the Board recognize a disability as either temporary or permanent, but not both concurrently. When carrying out the final disability assessment, the **Board** ~~o~~Officer in Disability Awards will have the benefit of the earlier examination, or at least some other documentary evidence on file, on which the decision was made to delay the ~~pension~~ **award**. If the findings on the latter examination are the same as the initial findings, or only show a minimal degree of change, it is

reasonable to consider the condition as having plateaued from the date of the first examination. In that event, the date of the first examination should be the starting date of the ~~pension~~ **permanent disability periodic payments**. If, on the other hand, the latest examination shows a measurable and significant change since the first examination, the worker will be considered as having been, in the interim, temporarily disabled. In that event, the date of the last examination will be the starting date of the ~~pension~~ **periodic payments**.

When there was no examination by either a Board Medical Advisor or an External Service Provider when wage-loss benefits were terminated under section 30, and there is no other measurable data on file with which to make a comparison with the final assessment of the **Board** ~~o~~Officer in Disability Awards, the ~~pension~~ **permanent disability award** will be backdated to the date benefits were terminated under section 30.

#### **#412.11**     *Commencement Following Medical Review Panel Certificate*

Where a ~~pension~~ **permanent disability award** is being revised following an examination and certificate by a Medical Review Panel, it is not proper to automatically make the adjustment only from the date of the certificate. While this may be correct in some cases, it is not defensible as a general policy.

Where a certificate of a Medical Review Panel is received indicating results that differ from previous decisions of the Board or finding of the review board, it must be considered what further decisions are required as a proper response to the certificate of the Panel.

Suppose, for example, there has been a dispute from the outset about whether a worker is suffering from disability "A" (which is compensable), or disability "B" (which is not compensable). The Board decided that it was "B", and that decision was maintained throughout the appeal system. Suppose the Medical Review Panel then decided that the worker is suffering from "A". It may be agreed by all concerned that the worker has not changed from "B" to "A", and that if suffering from "A" now, the worker must have been suffering from "A" at the outset. In that circumstance, there is obviously entitlement to compensation as from the date when first suffering from the disability.

There may be another case where it is agreed by all concerned that the degree of disability has not changed, and yet the Medical Review Panel has concluded that the worker is suffering from a disability more extensive than that which the Disability Awards Medical Advisor or External Service Provider found. In that case too, the ~~pension~~ **permanent disability award** adjustment must be retroactive.

In a third case, it may appear that a different condition diagnosed by the Medical Review Panel has resulted from a recent change and, in such a case, it would be proper to commence the disability award from the date of the certificate. In a fourth case, it might appear that there was some progressive deterioration and, in that case, a sliding scale may be appropriate so that the revised disability award is partially retroactive, but not to the full amount.

In other words, there can be no standard rule that a revised disability award should or should not be retroactive. The previous decisions on the claim must be reconsidered in the light of the certificate of the Panel, and new conclusions must be reached to whatever extent is necessary to give full effect to the certificate of the Panel.

### **#412.12** *Retroactive Awards*

Where a ~~pension~~ **permanent disability award** is ~~awarded~~ **granted** retroactively, the payments due prior to the date of the award will be paid in the form of a lump sum.

In calculating that sum, entitlement in respect of a portion of a month is determined by reference to the actual calendar days in a particular month. For example, if a worker is entitled to an award of \$1,000 per month, for the period March 17 to 31 (15 calendar days), the calculation is as follows:

$$\frac{\$1,000}{31 \text{ days}} \times 15 \text{ days} = \$483.87$$

A reduction in the lump sum is made in respect of periods of time during the period following the commencement of the ~~pension~~ **award** when the worker received wage-loss or rehabilitation benefits. However, no such reduction is made when the ~~pension~~ **award** is ~~awarded~~ **granted** in the form of a lump sum and the monthly equivalent is less than \$20.00 per month at the time of the commutation.

The payment of interest on the lump sum is dealt with in **policy item #50.00**.

### **#41.20** ~~Termination of Pension~~

~~Pensions are normally payable throughout the claimant's lifetime, but for various reasons may be terminated prior to that time. For example, the claimant's disability may disappear, (12) the rule set out in #40.20 may result in a loss of earnings pension being wholly or partially terminated at age 65, or the Board may exercise certain powers discussed in #48.00 and #49.00.~~

~~In situations where a claimant in receipt of a pension dies from causes unrelated to the disability, the pension will be paid for the full month in which the death~~

~~occurred. The past Board policy which came into effect on November 12, 1982 and required an apportionment of the pension in situations where there was no surviving dependants is rescinded. The effect of this policy will be that no overpayments will be considered to have arisen for the period from the date of the claimant's death up to the end of the month covered by the last pension payment.~~

~~If the worker dies prior to the implementation of the pension, the award is calculated and paid to the date of death. The situation where such a worker would have received a lump sum award is dealt with in #45.00.~~

## ~~#412.320 Pension Permanent Disability Award Adjustments~~

~~If a pension permanent disability award to a worker or a dependant is paid or increased on the basis of a review board finding, and the finding is later reversed by the Appeal Division under section 96(4) of the Act, the pension permanent disability award payments are terminated or adjusted as of the date of the Appeal Division's decision. In such cases, the capitalization is adjusted by the reversal of an amount equivalent to the unused portion of the capitalization or, in the case of a modification, the adjustment applies to the amount of the capitalization affected by the modification. The policy regarding relief of costs to employers in such circumstances is detailed in policy item #113.10.~~

## ~~#42.00 RECONSIDERATION OF PERMANENT DISABILITY AWARDS PENSION~~

~~Set out below are various situations which may lead to a review of the amount of a pension after its being established.~~

### ~~#42.10 P.P.D. with Review – Pension Reviews set out in the Act~~

~~Sections 22 and 23 of the Act are designed to provide income support for a worker who has suffered a permanent disability. These sections are intended to be used only where the recovery or change process has, to all intents and purposes, become medically constant and stable. Realistically, such a circumstance is not totally practical since ongoing change is a feature of human physiology; but, within reason, it is designed to come into play where healing is complete or where the deterioration in the condition of the claimant has ceased and no improvement can be reasonably foreseen. P.P.D.'s with review, i.e. permanent partial disability awards with a provision for review in the future have been used in the past where the change process was still underway and where, therefore, the medical condition of the claimant was still "temporary". That practice was not in accord with the Act and was discontinued.~~

~~This is not meant to suggest that permanent partial disability awards can never be reviewed. Should a medical examination reveal that there may be some minimal anticipated change in the claimant's condition, and that change will only occur over a lengthy period of time, it may well be advisable to project or estimate the prognosis and establish a permanent partial disability award forthwith. In such a case, it would be good common sense, and good medical practice, to have the claimant reviewed at a later date to assess the accuracy of the estimated prognosis which led to the pension award.~~

#### ~~#42.20 — Worsening or Improvement of Disability~~

~~If the disability on which an award is based worsens, the extent of the disability is reassessed and a new award is made based on the reassessment. Conversely, if a worker should unexpectedly recover from a disability classified as permanent, the pension would be subject to termination or downward adjustment.~~

#### ~~#42.30 — Review of Old Pensions under Section 24~~

~~Section 24(2) provides that "With respect to a claim for compensation to which this section applies, the board must, on application by the worker, reconsider the compensation benefits; and, if it decides that, in its opinion, the worker is not receiving adequate compensation having regard to the projected loss of income resulting from the disability, periodic payments must be established or raised accordingly."~~

#### ~~#42.31 — Claims to Which Section 24 Applies~~

~~Section 24(1) provides that "This section applies to the claims for compensation that the board may by regulation determine, provided that~~

~~(a) — the worker is still suffering from a compensable disability sustained more than 10 years before the application under subsection (2); and~~

~~(b) — a permanent disability award was made by the board based on a percentage of total disability of 12% or greater, or the case is of a kind in which the board uses a projected loss of earnings method in calculating compensation."~~

~~Regulations have been issued by the Board which are set out below:~~

~~1. The regulations come into effect on the 1st day of December, 1982.~~

~~2. The regulations with respect to the review of old disability pensions, promulgated by the Board on the 21st day of July, 1975, the 13th day of November, 1975, and the 19th day of August, 1976 (B.C. Regulations 524/75, 746/75 and 492/76) are hereby repealed.~~

3. ——— Unless the Board otherwise determines, Section 24 of the *Workers Compensation Act* applies to claims in which all of the following conditions are present:

(1) ——— The worker is still suffering from a compensable disability sustained more than ten years previous to the application under Section 24(2).

(2) ——— A permanent disability award was made by the Board based on a percentage of total disability of 12% or greater, a disability award was made for an injury involving the spinal column, or a disability award was made for an injury to a part of the body other than the spinal column on or after October 1, 1977. Where the worker is still suffering from two or more compensable disabilities, this condition is satisfied if permanent disability awards were made by the Board which in aggregate were based on a percentage of total disability of 12% or greater, provided that a minimum of 5% of total disability was attributed to an injury or injuries sustained more than ten years previous to the application under Section 24(2).”

Clause 3(1) of these regulations does not mean that it is a requirement that each claim considered under Section 24 must be more than 10 years old. Where a worker has suffered several injuries with permanent disability resulting in several claims, the whole of the compensable disabilities resulting from these claims may be considered, provided that at least one of the compensable disabilities was sustained more than 10 years previous to the application under S. 24(2), and that a minimum of 5% of total disability was attributed to an injury or injuries sustained more than 10 years previous to the application.

The requirement in Clause 3(2) that the percentage of disability exceed 12% is a separate and independent requirement from Clause 3(1). Thus, it is not necessary that the disability award should have been made more than 10 years previous to the application, or that it should have been calculated at 12% or greater at any particular time.

The requirement in Clause 3(2) that a non-spinal disability of less than 12% be one that was assessed on or after October 1, 1977, in conjunction with Clause 3(2), means that no application for such a disability can be made under Section 24 until October 1, 1987.

Notwithstanding that a worker suffering a permanent disability has received an award that has been wholly or partly commuted, or an award for a fixed term, the worker may apply under this section, but he shall be deemed to be still receiving the periodic payments that have been commuted, or the life equivalent of the periodic payments made for a fixed term. (13)

### ~~#42.32 ——— Calculation of Benefits under Section 24~~

Where a worker is under the age of 65 years, compensation is considered adequate for the purposes of this section if it equals 75% of the projected loss of earnings resulting from the disability. (14)

Section 24(4) provides that “Where a worker is 65 years of age or over, compensation is considered adequate for the purposes of this section if it equals 75% of the projected loss of retirement income resulting from the disability.”

~~Where a worker is under the age of 65 years, periodical payments established or raised under this section are subject to readjustment by reference to Subsection (4) upon the worker attaining the age of 65 years. (15)~~

~~The calculation of benefits is made in the manner the Board determines. (16)~~

~~Where a worker is under the age of 65 years, the Board must determine the projected loss of earnings resulting from the disability. This involves three steps:~~

~~1. \_\_\_\_\_ A forward projection of the earning capability of the worker as it existed prior to the disability.~~

~~2. \_\_\_\_\_ A projection of the present earning capability of the worker.~~

~~3. \_\_\_\_\_ A determination of the extent to which any difference between (1) and (2) is a result of the disability.~~

~~These calculations are made primarily by reference to evidence in the particular case, with two exceptions. A table of monthly average wage rates in B.C. (see Supplement No. 1, Appendix 5) is used to establish two of the variables; and an age factor is applied to those cases where the disability was suffered when the worker was under the age of 23. With regard to the former, a projection of the pre-disability earning capacity is made by comparing the claimant's actual pre-injury earnings, limited by the maximum in effect at the time of injury, with the monthly average wage rate in the table for that year and applying the same ratio to the average wage in the table for the year when the calculation is being made. In making this projection, no account is taken of promotions which the claimant might have obtained if he had not been injured.~~

~~Where a worker is 65 years of age or over, the Board must determine the projected loss of retirement income resulting from the disability. This involves a determination of:~~

~~1. \_\_\_\_\_ The retirement income that the worker would have been likely to be receiving if he or she had not sustained the disability.~~

~~2. \_\_\_\_\_ The retirement income the worker is receiving.~~

~~3. \_\_\_\_\_ A determination of the extent to which any difference between (1) and (2) results from the disability.~~

~~Here again, the determinations are made to some extent by reference to evidence in the particular case; but two standard formulae are used with regard to two important items.~~

~~The first relates to retirement income from savings. Many workers save part of the earnings accrued during their working lives, and these savings, or income from the savings, become part of retirement income. The Board must consider, therefore, the loss of this element of retirement income resulting from the disability. To determine loss of retirement income from savings, a standard formula is used, based on such evidence as the Board has been able to obtain from aggregated data relating to the savings habits of Canadian families.~~

~~The second item being considered by a standard formula is the loss of retirement income from earnings by people at and above the age of 65 years. The formula selected is to use a flat rate cash amount per month for each percentage of disability.~~

Where a worker's pension has been adjusted under Section 24 when under the age of 65 years and the worker has now reached that age, the readjustment is done in the following manner:

1. ~~When an adjustment is made to a pension for a worker who is under the age of 65, that adjustment will be diarized for review three months prior to the worker attaining the age of 65.~~

2. ~~When the matter comes up for review, the file will be considered in accordance with the procedures developed for calculating awards for workers aged 65 or over. For the purpose of this calculation, the original functional award in effect prior to any previous adjustment under Section 24, plus applicable cost of listing adjustment as described in #51.00, will be regarded as the permanent disability award in effect at age 65.~~

3. ~~The term adjustment payable to age 65 will automatically terminate when the worker reaches age 65. The adjustment calculated as per item (2) above will then come into effect. This new pension will be the higher of the original pension award plus cost of living adjustments as described in #51.00 or the adjusted permanent disability award determined in reference to the calculation for workers aged 65 or over.~~

~~The detailed calculation formulae are set out in Appendix 5 to this manual.~~

#### ~~#42.33 — *Maximum and Minimum Periodic Payments under Section 24*~~

~~Section 31 applies to the calculation of compensation under Section 24, but the calculation is not limited by reference to average earnings at the time of injury. (17)~~

~~The periodic payments awarded to a worker following a review under this section shall not exceed the maximum that the Board would award to a worker in an occupational category similar to the occupation of the applicant worker before the injury if she or he had, at the effective date of the review under this section, suffered a compensable disability similar to the compensable disability being suffered by the applicant worker. (18)~~

~~No decision under this section shall result in periodical payments to any worker being lower than they would if no application had ever been made under this section. (19)~~

#### ~~#42.34 — *Date when New Periodic Payments Commence under Section 24*~~

~~Where a worker whose disability occurred before January 1, 1965 applies under this section within one year of the earliest date on which becoming eligible to do so, an increase or establishment of benefits under Section 24 is effective from September 1, 1975 and, in all other cases, the effective date for the commencement of an increase or establishment of benefits under the section is the date on which the application is received at the Board. (20)~~

The following table sets out when claimants whose disabilities occurred prior to January 1, 1965 became eligible to apply under Section 24.

<b>Injury Occurred On or Before</b>	<b>Date of Commencement of Eligibility</b>
December 31, 1925	August 1, 1975
December 31, 1928	September 1, 1975
December 31, 1932	October 1, 1975
December 31, 1936	December 1, 1975
December 31, 1940	January 1, 1976
December 31, 1944	February 1, 1976
December 31, 1948	April 1, 1976
December 31, 1952	May 1, 1976
December 31, 1956	June 1, 1976
December 31, 1960	July 1, 1976
December 31, 1964	August 1, 1976

#### **#42.35** *Reapplication under Section 24*

A worker may reapply under this section for reconsideration of his compensation benefits after a further 10 years have elapsed since the last previous application under this section. (21)

#### **#42.40** **Reinstatement of Commuted Pensions under Section 26**

Section 26(1) of the Act provides that "Where periodical payments for permanent disability were awarded by the board prior to January 1, 1966, and where (a) the award was for a percentage of total disability of 12% or greater, and the whole of the periodical payments was commuted prior to that date;

(b) a portion of the periodical payments equivalent to 12% of total disability or greater was commuted prior to that date; or

(c) the award was for a percentage of total disability of 12% or greater and was of periodical payments for a fixed term,

and where the worker to whom the award had been made is still suffering from the disability, the board may, on the application of the worker, establish new periodic payments, which are to commence for the month in which the application is received at the board."

#### **#42.41** *Computation of Twelve Per Cent Disability*

In determining the percentage of total disability represented by a commutation of periodical payments, the monthly dollar amount of the commutation should be compared with the monthly dollar amount of the periodical payments before the

commutation, and multiplied by the percentage of total disability represented by the periodical payments before the commutation.

If the worker has had more than one commutation in respect of the same or different disabilities, the total value of the commutations and the disabilities is taken into account. In this case, all the commutations required to make the 12% must have occurred prior to January 1, 1966.

Consider the following example of a worker injured in 1936 who had two partial commutations, one in 1952 and one in 1955, who applied for reinstatement in September, 1974.

A.	True percentage of total disability awarded (as varied by age and wage factors)	61.20
B.	Monthly wage rate prior to injury	100.00
C.	Life value of pension per month	38.25
D.	Monthly amount of 1952 commutation	6.75
E.	1952 commutation as percentage of whole disability $(\frac{D \times A}{C}) \frac{6.75 \times 61.20}{38.25}$	10.80
F.	Remaining percentage of total disability (A - E)	50.40
G.	Balance of monthly pension (C - D)	31.50
H.	Recalculation of monthly pension following #39.61 $31.50 \times \frac{66 \frac{2}{3}}{62 \frac{1}{2}} \times \frac{2,000.00}{12 \times 100.00}$	56.00
I.	Monthly amount of 1955 commutation	2.00
J.	1955 commutation as percentage of whole disability $(\frac{I \times F}{H}) \frac{2.00 \times 50.40}{56.00}$	1.80
K.	Total percentage of disability commuted (E + J)	12.60

In past years, the Board varied the assessed percentage of disability according to the earnings and age of the worker. In calculating the percentage of disability commuted for the purposes of Section 26, the disability as varied by these factors is used.

#### **#42.42 Purpose of Section 26 Already Achieved**

Section 26(5) provides that “This section does not apply where the purpose of the section has been achieved as a result of an application under section 24 or in some other way.”

Therefore, Section 26 has no application to a situation where, in the events that have occurred, a worker has not lost the future benefit of any cost of living increases by reason of the commutation. As under Section 26, however, such a worker receives future cost of living increases based on what the periodical payments would have been had they not been commuted.

To take an example, suppose a worker was receiving a pension for permanent total disability, and in 1964 arranged with the Board a partial commutation of that pension equivalent to \$10.00 a month. If the remaining pension was increased pursuant to subsequent increases in the statutory minimum, it would, in November 1974, be \$341.01 less \$10.00 per month, i.e. \$331.01. The increases in the minimum have exceeded the cost of living increases, and in the result, the worker has not lost any cost of living increases by reason of the commutation. As cost of living adjustments are now made, the worker will continue to receive the cost of living percentage applied to \$341.01 so that the pension will continue to be the same as it would have been without the commutation, less the commuted \$10.00 per month.

#### *#42.43 — Term Pensions*

Where the award was for a fixed term that has not expired or been commuted, Section 26 applies upon the expiry of the term. (22) The worker must also wait the expiry of the term if he or she has to combine an expired or commuted pension with the term pension to satisfy the 12% requirement.

Occasionally, a term pension may be converted into a life pension if the worker is found to have an increased entitlement because of a deterioration in the pensionable condition. Section 26 is applicable as soon as the conversion takes place.

#### *#42.44 — Rate of New Periodic Payments*

Section 26(3) provides that “In order to calculate the rate of new periodic payments to be established under this section, the board must determine (a) — the monthly payments that would have been payable on January 1, 1966 if the award had been of periodic payments for life and there had been no commutation, or, where the commutation was partial, the additional rate of monthly payments that would have been payable on that date if there had been no commutation; and

— (b) — the additional amount of monthly payments that would have been payable for the month during which the application is received by way of increases on the amounts calculated under paragraph (a) if those amounts had continued to be due; namely, the total of all increases that would have been made from January 1, 1966 to and including the last day of the month preceding the date the application is received.”

The rate of the new periodical payments is the amount calculated under clause (b). (23)

Consider the following examples:

1. ~~Worker injured in 1938. Term award which expired in 1952.~~

~~Application under Section 26 in February, 1976.~~

~~A. True percentage of total disability awarded  
(as varied by age and wage factors) 18.58%~~

~~B. Monthly wage rate prior to injury \$80.00~~

~~C. Life value of permanent disability award per month (24)  
 $\frac{18.58}{100} (A) \times \frac{62-1/2}{100} \times 80.00 (B)$   
\$9.29~~

~~D. Monthly permanent disability award that would have been payable if there had been no term award under provision in #39.61 (Section 33(4))  
 $9.29 (C) \times \frac{66-2/3}{62-1/2} \times \frac{2,000.00}{12 \times 80.00 (B)}$   
\$20.64~~

~~E. Provision in #39.62 inapplicable as would result in permanent disability award less than under #39.61~~

~~F. C.P.I. from January 1, 1966 to January 1, 1976, on \$20.64 (D)  
76.3452% of \$20.64 \$15.75~~

~~G. New monthly periodical payments under Section 26 commencing February 1, 1966 \$15.75~~

2. ~~Claimant injured in December, 1944. Commuted part of permanent partial disability pension in 1950. Application under Section 26 in November, 1974.~~

~~A. True percentage of total disability awarded  
(as varied by age and wage factors) 40.97%~~

~~B. Monthly wage rate prior to injury \$150.00~~

~~C. Life value of pension per month  
 $\frac{40.97}{100} (A) \times \frac{66-2/3}{100} \times 150.00 (B)$   
\$40.97~~

~~D. Monthly amount commuted \$14.95~~

~~E. Percentage of total disability commuted  
 $14.95 (D) \times 40.97 (A)$~~

	40.97 (C)	14.95%
F.	Provision in #39.61 inapplicable as injury occurred after March 18, 1943	
G.	Additional monthly pension that would have been payable had there been no commutation under provision in #39.62 $14.95 (E) \times 130.00$ 100	\$19.44
H.	C.P.I. on additional monthly pension (G) from January 1, 1966 to July 1, 1974 49.85% of \$19.44	\$9.69
I.	Additional monthly periodical payments under Section 26 commencing November 1, 1974 (to be added to existing pension)	\$9.69

**#42.45 Cost of Living Adjustment After Reinstatement**

Cost of living adjustments after the establishment of the new periodical payments are based on the sum of the amounts calculated under clauses (a) and (b) in #42.44. (25) A formula for calculating these adjustments, which applies both in cases of total and partial commutation is set out below. Where the commutation was partial, so that part of the original pension is still subsisting, the residue of the original pension may be blended with the reinstated pension under Section 26. Where the commutation was total, the formula applies to the reinstated pension, and where the commutation was partial, it applies to the blend of the residue of the original pension with the reinstated pension.

The formula is:

1.	The amount of pension benefits being paid for the month preceding the cost of living adjustment	\$
PLUS		
2.	The monthly amount of pension that had been commuted	\$
		Subtotal \$
3.	The application of the indexing factor described in #51.00 to that subtotal	\$
		Second Subtotal \$
LESS		

~~\_\_\_\_\_ 4. \_\_\_\_\_ The monthly amount of pension that had been commuted \_\_\_\_\_ \$~~

~~\_\_\_\_\_ Total \$~~  
The resulting total is the monthly pension that will be applicable after the cost of living adjustment.

### ~~#42.46 \_\_\_\_\_ Commutation of New Periodic Payments~~

~~Generally, no commutation will be allowed in respect of the new periodical payments awarded under Section 26. However, the Board does have discretion to permit this in unusual cases.~~

## **#43.00 DISFIGUREMENT**

Section 23(5) of the *Act* provides:

“Where the worker has suffered a serious and permanent disfigurement which the board considers is capable of impairing the worker's earning capacity, a lump sum in compensation may be paid, although the amount the worker was earning before the injury has not been diminished.”

### **#43.10 Requirements for Award**

Section 23(5) establishes the following requirements:

1. The disfigurement must be “permanent”. A temporary disfigurement is not sufficient.
2. The disfigurement must be “serious”. No award will be made if the disfigurement is minimal.
3. The disfigurement must be one that the Board considers capable of impairing the worker’s earning capacity. This is normally assumed in cases of the head, neck and hands. In other cases, a decision must be made which has regard to the age and occupation of the worker, the visibility and extent of the disfigurement and any other relevant circumstances. Since section 23(5) states that the amount the worker is currently earning does not have to be diminished, this requirement is concerned with the worker’s long-term earning capacity.

Where there is disfigurement as well as a permanent disability, the worker may receive awards for both. Subject to the Board applying section 35(2) of the *Act* (see policy item #45.00), the award for the permanent disability is a pension

**periodic payment**, and the award for disfigurement a lump sum. These awards must be assessed separately.

Disfigurement is concerned with the appearance of the body, not loss of bodily function. Therefore, a loss of skin function, for example, soreness or itchiness or unusual sensitivity to light, heat or humidity, will be considered for a permanent disability rather than a disfigurement award. The granting of an award will depend on the normal criteria for permanent disability awards.

The ultimate aim of disfigurement and permanent disability awards is to compensate for loss of earning capacity. The worker should not receive double compensation for the same loss. No disfigurement award is granted for something which is directly covered by a permanent disability award, for example, the deformity caused by the normal appearance of an amputated limb. A disfigurement award may be considered where the appearance of an impairment for which a permanent partial disability award has been granted is disfiguring to an exceptional degree.

If the worker receives an award of 100% ~~on a physical impairment basis~~ under section 23(1), or an award for total unemployability under section 23(3), there is no additional loss of earning capacity which can form the basis for a disfigurement award.

Where psychological disability results from disfigurement, consideration will be given to a permanent disability award under section 23(1) or 23(3) following the normal practices for such awards (see policy item #22.33).

## **#44.00 PROPORTIONATE ENTITLEMENT**

Section 5(5) of the *Act* provides: ~~that~~

“Where the personal injury or disease is superimposed on an already existing disability, compensation must be allowed only for the proportion of the disability following the personal injury or disease that may reasonably be attributed to the personal injury or disease. The measure of the disability attributable to the personal injury or disease must, unless it is otherwise shown, be the amount of the difference between the worker’s disability before and disability after the occurrence of the personal injury or disease.”

This subsection deals with cases where the compensability of the immediate injury and disability has been accepted by the Board. It does not concern itself with the initial adjudication as to the causation of the particular disability.

## **#44.10      Meaning of Already Existing Disability**

The mere fact that the worker suffered from some weakness, condition, disease, or vulnerability which partially caused the personal injury or disease is not sufficient to bring Proportionate Entitlement into operation. The pre-existing condition must have amounted to a disability prior to the occurrence of the injury or disease.

Three situations are distinguished:

1.      In cases where it has been decided that the precipitating event or activity, and its immediate consequences, were so severe that the full disability presently suffered by the claimant would have resulted in any event, regardless of any pre-existing disability, section 5(5) should not be applied.
2.      In cases where the precipitating event or activity, and its immediate consequences, were of a moderate or minor significance, and where there is only x-ray evidence and nothing else showing a moderate or advanced pre-existing condition or disease, Proportionate Entitlement should not be applied. These cases should not be classified as a disability where there are no indications of a previously reduced capacity to work and/or where there are no indications that prior ongoing medical treatment had been requested and rendered for that apparent disability. In determining whether there has been ongoing treatment, regard will be had to the frequency of past treatments and how long before the injury they occurred.
3.      Where the precipitating event or activity, and its immediate consequences, were of moderate or minor significance, but x-ray or other medical evidence shows a moderate to advanced pre-existing condition or disease, and there is also evidence of a previously reduced capacity to work and/or evidence of a request for and rendering of medical attention for that disability, section 5(5) should be applied.

~~These rules apply to all permanent partial disability awards assessed on or after March 15, 1978.~~

Section 5(5) only applies where an injury is “superimposed” on an already existing disability. The injury and the existing disability must be in the same part of the body.

The fact that the claimant has an award from another agency for a pre-existing disability does not affect this Board’s practise. The Board makes its own

assessment of the pre-existing disability and is not bound by the percentage awarded by the other agency.

#### **#44.30 Permanent Disability**

Where a worker already has a pre-existing disability, and suffers a work injury resulting in an aggravation of the disability, wage-loss compensation is paid for the period of any temporary total disability. If the aggravation was temporary only and the worker recovers from the aggravation so that she or he is restored to the position of the pre-existing disability, there is then no residual disability resulting from the work injury, and therefore no further compensation. However, where a pre-existing disability is permanently aggravated by the work injury, and the worker's condition has stabilized, the Board must then consider how much is the compensable aggravation.

Assuming that a pre-existing impairment has been established, section 5(5) requires that compensation shall be allowed only for such proportion of the worker's "disability" as may reasonably be attributable to the personal injury or disease. "Disability" ~~again~~ means loss of body function or physical impairment.

The measure of the disability attributable to the personal injury or disease shall, unless it is otherwise shown, be the amount of the difference between the worker's disability before and disability after the occurrence of the personal injury or disease. (2710)

The Board's practice in relation to section 5(5) has no relevance to conditions which arise after the injury. It is only concerned with pre-existing problems. The Board's practice is that it will apportion its responsibility in respect of a disability attributable to causes other than the work injury arising after the injury.

Consider the example of a worker whose average **net** earnings are \$1,000 per month and who, following a work injury, has a 10% disability. If the whole of that disability is attributable to the injury, the monthly ~~pension awarded on a physical impairment~~ **permanent disability award granted under section 23(1)** basis is ~~75%~~ **90%** of 10% of \$1,000, i.e. ~~\$75.00~~ **\$90.00** a month. If, however, 3% out of the total impairment existed prior to the injury, section 5(5) requires that compensation only be awarded in respect of the 7% caused by the injury. The worker would therefore receive ~~75%~~ **90%** of 7% of \$1,000 per month, i.e. ~~\$52.50~~ **\$63.00**.

#### **#44.31 *Application of Proportionate Entitlement to the Dual System***

In every case where there was a pre-existing disability, the Board has to decide whether the loss of earnings experienced by the worker after the injury is wholly

the result of the compensable disability or partly the result of the pre-existing disability. If it decides that the whole loss is the result of the compensable disability, no reduction in the ~~pension~~ **award** is made under section 5(5). If it decides that a portion of the loss is attributable to the pre-existing disability, a ~~pension~~ **permanent disability award** is only ~~awarded~~ **granted** for the portion attributable to the compensable disability.

The Board feels that this is fair to workers in that it allows for the fact that their pre-injury earnings may already have been reduced by the pre-existing disability. On the other hand, it ensures that the Board does not become responsible for loss of earnings which are really attributable to the delayed or progressive effect of non-compensable pre-existing disabilities. The Board recognizes that it is often difficult in practice to properly allocate the causes of a loss of earnings where there is pre-existing disability, but do not feel that it is any more difficult than other decisions that have to be made under the *Act*, or that this difficulty justifies a different interpretation of section 5(5).

~~Consider, for example, a worker with a pre-existing disability determined to be 40% of total disability, who, following a back injury, has a disability of 60% of total disability. Assume the average **not** earnings of the worker prior to the injury were \$1,000.00 per month and he or she has suffered a total loss of earnings following the injury which is partly attributable to a pre-existing disability.~~

<del>_____</del> A. <del>_____</del> Physical Impairment Method	
<del>_____</del>	<del>_____</del> Amount that would be payable for a total disability <del>(75</del> <b>90</b> <del>% x \$1,000.00)</del> <del>_____</del> <del>\$750</del> <b>900</b> <del>.00</del>
<del>_____</del>	<del>_____</del> Partial disability pension <del>award</del> after application of Proportionate Entitlement <del>(60% - 40% = 20% x \$750</del> <b>900</b> <del>.00)</del> <del>_____</del> <del>\$150</del> <b>180</b> <del>.00</del>
<del>_____</del> B. <del>_____</del> Projected Loss of Earnings Method	
<del>_____</del>	<del>_____</del> Projected loss of earnings <del>_____</del> <del>\$1,000.00</del>
<del>_____</del>	<del>_____</del> <del>75</del> <b>90</b> <del>% of projected loss of earnings</del> <del>_____</del> <del>\$750</del> <b>900</b> <del>.00</del>
<del>_____</del>	<del>_____</del> Partial disability pension <del>award</del> after application of Proportionate Entitlement <del>(20% x 100 = 33-1/3% x \$750</del> <b>900</b> <del>.00)</del> <del>_____</del> <del>\$250</del> <b>300</b> <del>.00</del>
<del>_____</del>	<del>_____</del> <del>60%</del> <del>_____</del> <del>\$250</del> <b>300</b> <del>.00</del>

#### ~~#44.40~~ ~~Disabilities Arising Prior to April 6, 1968~~

Prior to 1968, the relevant provision of the Act, Section 7(5), read as follows:

~~“Where the personal injury consists of injury or disease in part due to the employment and in part due to causes other than the employment or where the personal injury aggravates, accelerates, or activates a disease or condition existing prior to the injury, compensation shall be allowed for such proportion of the disability as may reasonably be attributed to the personal injury sustained.”~~

~~This subsection, of course, continues to apply to all disabilities arising prior to April 6, 1968, when the new subsection was proclaimed.~~

## **#45.00 LUMP SUMS AND COMMUTATIONS**

Section 35(2) of the Act provides: that

“The ~~b~~Board may in its discretion

- (a) commute all or part of **the future amounts that are to be set aside for payment of a retirement benefit and** the periodic payments due or payable to the worker to one or more lump sum payments, to be applied as directed by the ~~b~~Board; and
- (b) divide into periodic payments compensation payable in a lump sum.”

In case of death or permanent total disability or in case of permanent partial disability where the impairment of earning capacity exceeds ten per centum of the worker’s earning capacity at the time of the injury, no commutation of periodic payments can be made under ~~S~~subsection (2) except upon the application of and at an amount agreed to by the dependant or worker entitled to such payments. (2811)

### **#45.10 Pension Permanent Disability Periodic Payment Categories/Lump Sum Awards**

#### **Category A.**

Where

1. a compensable disability has been assessed at not more than 10% of total disability,
2. the ~~pension~~ **permanent disability periodic payment** is not more than \$100.00 per month, and
3. the commuted value is not more than \$40,000.00,

a lump sum will be awarded in lieu of a monthly ~~pension~~ **permanent disability periodic payment and the additional future amounts to be set aside by the Board for the payment of a retirement benefit under section 23.2 of the Act.**

**Category B.**

In any case not within Category A, where

1. the ~~pension~~ **permanent disability periodic payment** is not more than \$125.00 per month, and
2. the commuted value is not more than \$60,000.00,

the worker will usually be offered a choice of a monthly ~~pension~~ **permanent disability periodic payment** or a lump sum.

**Category C.**

1. if the ~~pension~~ **permanent disability periodic payment** is more than \$125.00 per month, or
2. the capitalized value exceeds \$60,000.00,

the award will consist of a monthly ~~pension~~ **permanent disability periodic payment and the additional future amounts to be set aside by the Board for the payment of a retirement benefit** and a commutation will only be considered under the circumstances outlined below.

Where a worker has more than one **permanent disability pension award**, the above figures apply to the combined total.

Where a commutation request is made after the ~~award~~ **granting** of a ~~pension~~ **permanent disability award**, the monetary levels at the date of the request are used rather than the levels at the date of the award.

A review of the monetary levels in Categories A, B and C will be undertaken annually. Any changes to the amounts will normally take place on the first day of the month following the month of the review.

~~The figures set out above are those in force since July 1, 1989. The amounts in effect at other times are set out below.~~

	<del>1. Monthly <b>permanent disability periodic payment</b> pension</del>					
	<del>Nov. 8, 1974</del>	<del>Jan. 1, 1977</del>	<del>July 1, 1977</del>	<del>Jan. 1, 1978</del>	<del>Jan. 1, 1980</del>	<del>Jan. 1, 1984</del>
	<del>Dec. 31, 1976</del>	<del>June 30, 1977</del>	<del>Dec. 31, 1977</del>	<del>Dec. 31, 1979</del>	<del>Dec. 31, 1983</del>	<del>June 30, 1989</del>
Category A	<del>\$10.00</del>	<del>\$15.00</del>	<del>\$15.61</del>	<del>\$16.31</del>	<del>\$20.00</del>	<del>\$50.00</del>

Category B	\$10.00	\$15.00	\$15.61	\$16.31	\$20.00	\$75.00
Category C	\$25.00	\$35.00	\$36.43	\$38.07	\$45.00	\$75.00

2.

Capital reserve

	<del>Nov. 8, 1974</del>	<del>Jan. 1, 1977</del>	<del>Jan. 1, 1980</del>	<del>Jan. 1, 1984</del>
	<del>Dec. 31, 1976</del>	<del>Dec. 31, 1979</del>	<del>Dec. 31, 1983</del>	<del>June 30, 1989</del>

Category A \$6,000.00 \$ 8,400.00 \$11,000.00 \$20,000.00

Category B \$7,500.00 \$10,500.00 \$13,700.00 \$30,000.00

Category C \$7,500.00 \$10,500.00 \$13,700.00 \$30,000.00

## #45.20 Criteria for Allowing or Disallowing a Commutation

The same criteria apply, whether or not the Board has recovered all or part of the capital reserve in a third party action.

~~A request for a commutation of a pension which falls within Category A or B will generally be approved unless the applicant is incapable of managing his or her affairs. This will only apply to pensions existing on January 1, 1984, which, because of lower monetary limits, did not previously fall within those categories. Claimants~~ **Workers granted awards awarded pensions after that date in those categories that fall within Category A will automatically be given a lump sum award while workers granted awards that fall within Category B will be given** ~~will automatically be given a lump sum or the option to choose a lump sum.~~

The general rule is that no commutation will be granted for cases in Category C.

There are, however, certain situations where a commutation may be desirable. The purpose of the guidelines set out below is to define those situations where it is in the worker's long term interests to receive a commutation and to state the terms and conditions on which such commutations are granted.

In considering a commutation, the following will apply:

1. A commutation must be for a specific purpose.
2. A commutation will, in general, only be allowed for purposes that are calculated to enhance the income position of the worker.
3. The applicant must have a stable source of income other than the disability ~~pension~~ **award**.
4. A commutation will not be allowed where the applicant is a person whom the Board considers incapable of managing his or her own

affairs or who has a demonstrated incapacity for money management.

5. No commutation will be allowed in the case of an **award pension** calculated ~~on a projected loss of earnings basis~~ under **section 23(3)**.
6. Where there is an application by a widow or widower to commute an **award pension** which is paid in whole or part for the children regard may have to be had to the separate interests of the children.
7. The Board's previous practice was that no commutation would be allowed where the disability involved the spine, was unsettled or otherwise involved a significant risk of deterioration. It was considered that this practice was too restrictive. A commutation may be in the worker's long term interests notwithstanding there is a condition of that nature if the other requirements are met. However, while a potential deterioration in the worker's condition will not automatically bar a request, it is a relevant factor to be considered. It might, for instance, lead to a conclusion that the worker's existing income from other sources would not be stable from a long-term point of view.

Similarly, the fact that a disability may improve in the future will not automatically bar a request for a commutation, even though the commutation will prevent the Board from reducing the ~~pension~~ **permanent disability award** when the improvement occurs. The possibility of such an improvement may, however, be taken into account if it is significant. It may influence the term and amount of commutation granted.

8. A short expectation of life or a worker's wish to benefit the dependants following his or her death is not a ground on which the Board can permit a commutation.

## **#45.30 Types of Commutations Permitted**

**Where a total or partial commutation of a permanent disability award is granted, the corresponding portion of the future amounts that are to be set aside for payment of a retirement benefit will also be commuted.**

**For partial commutations, any remaining future amounts to be set aside on the future reduced permanent disability periodic payments, will continue to be set aside by the Board for payment to the worker on reaching retirement age.**

**Any amounts that have already been set aside by the Board in the retirement reserve will be held in the reserve until the worker reaches retirement age. These amounts will not be commuted. Please refer to Chapter 18, Retirement Benefits, for further information regarding the provision of this benefit.**

There are basically four types of commutations that the Board may permit:

1. A partial commutation by way of a term of years resulting in a total suspension of ~~pension~~ **both the permanent disability periodic payments and the corresponding additional future amounts to be set aside by the Board for the payment of a retirement benefit** for a fixed period, ~~after~~**After** which, the ~~pension~~ **permanent disability periodic payments**, and the additional future amounts to be set aside by the Board, resumes with full payments.
2. A partial commutation by way of a reduced level of ~~pension~~ **permanent disability periodic payments and a reduced level of the corresponding additional future amounts set aside by the Board for the payment of a retirement benefit** for a term of years, **After** which, the full periodic payments as well as the amounts to be set aside by the Board resume.
3. A partial commutation resulting in a reduced level of ~~pension for life~~ **permanent disability periodic payments and the corresponding additional future amounts set aside by the Board for the payment of a retirement benefit, until the worker reaches 65 years of age.**
4. A total commutation of the whole ~~pension~~ **permanent disability award and the additional future amounts set aside by the Board for the payment of a retirement benefit.**

A commutation for a term of years will be made only for units of whole years.

To ensure that a commutation is used for the purpose for which it is sought, the Board may make a commutation cheque payable to a worker and to another.

#### **#45.41**      *Paying Off Debts*

The Board is concerned that lenders might be encouraged to grant excessive extensions of credit to **workers in receipt of pensioners permanent disability awards** if they became aware that commutations could easily be obtained to pay off debts. Section 15 of the *Act* seeks to protect workers from creditors by making ~~pension~~ **permanent disability periodic** payments non-assignable. The Board will not undermine this intention by freely allowing commutations for the

purpose of debt reduction. Therefore, a commutation is more likely to be allowed for paying off debts that were incurred prior to the injury.

A person incurring heavy debt may have serious long-term problems which will not be resolved simply by a commutation to pay debts. These problems may lead to incurring further debt even if the existing debt is paid. The person will then be in an even more serious position than before because there will now be no pension **permanent disability periodic payments**. It may, in such cases, be more appropriate to refer the ~~pensioner~~ **worker** for financial counselling rather than to attempt to resolve the situation by a commutation of ~~pension~~ **permanent disability periodic** payments. Nevertheless, a commutation to pay off debts may be advisable and in the best interests of the worker if it will avoid high interest obligations. Commutation applications for this purpose will be carefully scrutinized for other alternatives before being allowed.

#### **#45.44**      *Education*

Unless the proposed educational program will promote the worker's career, a commutation for this purpose would not normally enhance the worker's income position and consequently would not satisfy the above general guidelines. There may, however, be some therapeutic benefit in allowing ~~pensioners~~ **workers** to improve their education when the improvement cannot be provided through normal rehabilitation programs. The requirement for the applicant to have a stable source of income may be waived where the Board is satisfied that the training or educational program will increase the prospects of employment and therefore enhance the income position over the long term. Where the program will not increase the employment prospects, but will have a significant therapeutic benefit, the Board may waive the requirement that the commutation be for a purpose that enhances the worker's income position. In such a case, it will not waive the requirement that the worker have a stable source of income.

#### **#45.50**      **Decision-Making Procedures**

The ~~Adjudicator~~ **Board officer** in Disability Awards is responsible for investigating an application for a commutation and making a decision on the application. The ~~Adjudicator~~ **Board officer** may obtain a report from the **Board officer in Vocational Rehabilitation Consultant Services** involved in the claim before making a decision.

Where a commutation application is under consideration, the value of the proposed commutation can be made available so that the worker may properly evaluate the options open.

If the value of a commutation under Category C in policy item #45.10 exceeds the limit set in Category B, the ~~Adjudicator~~ **Board officer** must obtain approval of

the Vice-President, Compensation Services Division before granting the request. Where an application is received that does not fall within the guidelines and it is thought that there should be some departure, the application must also be referred to the Vice-President for consideration.

An employer is not normally advised of the granting of a commutation. An exception is made where the employer is the Federal Government. It is advised of the amount and type of the commutation.

## **#45.60 Amount Paid on Commutations**

When a ~~pension~~ **permanent disability award** reserve and a **retirement reserve** ~~are~~ is established or a liability is calculated for a ~~pension~~ **an award and a retirement benefit**, the monthly ~~pension~~ **payment amount and the periodic future amounts to be set aside by the Board for the payment of a retirement benefit, are** is converted to a lump sum by applying an actuarial net discount rate. This actuarial net discount rate is set by the Board and represents the anticipated difference between long term future investment returns and long term future inflation.

Similarly, when a ~~pension~~ **permanent disability award** commutation is granted, the monthly ~~pension~~ **permanent disability award amount and the periodic amounts set aside by the Board for a retirement benefit is are** converted to a lump sum by applying a commutation net discount rate. For ~~pensions~~ **permanent disability awards and the future amounts to be set aside by the Board for the payment of a retirement benefit** that are automatically commuted by the Board without a request from the worker, the commutation net discount rate used will be equal to the actuarial net discount rate. For ~~pensions~~ **permanent disability awards and the future amounts to be set aside by the Board for the payment of a retirement benefit** that are commuted by the Board at the worker's request, the commutation net discount rate used will be equal to the actuarial net discount rate increased by .5 percentage points.

## **#45.61 Implementation of Decision**

Where, as a result of the application of the policies outlined in policy items #45.10 to #45.60, the ~~Adjudicator~~ **Board officer** in Disability Awards ~~or Disability Awards Officer~~ decides on a lump sum or commutation, it is paid forthwith.

If a review board finding results in a lump-sum payment (Category A or B of policy item #45.10) or they find that a commutation (Category C of policy item #45.10) should be paid, the lump sum or commutation will not be processed unless, and until, the 30-day period for appealing the finding to the Appeal Division has expired. If an appeal is submitted within this time period, or a referral of the review board finding is made to the Appeal Division under section

96(4) of the *Act*, no lump sum or commutation will be processed until the proceedings before the Appeal Division have been concluded. Any finding of the review board which would normally result in a lump-sum payment will be paid as a periodic payment pending the decision of the Appeal Division.

The lump sum or commutation may be paid during the 30-day period for appealing the finding to the Appeal Division, if:

1. the worker has requested it, **and**
2. the employer confirms in writing that they do not intend to appeal to the Appeal Division, **and**
3. no referral under section 96(4) will be made.

The same procedures apply, in the case of medical decisions, to the 90-day period between an Appeal Division decision and a Medical Review Panel appeal.

Whenever a lump-sum payment or commutation is calculated following the expiration of the appeal time and/or the appeal process, the calculation will be based on the date on which it is processed.

## **#46.00 REVIEW OF OLD PENSIONS UNDER SECTION 24**

**Section 24(2) of the *Act* provides:**

**With respect to a claim for compensation to which this section applies, the Board must, on application by the worker, reconsider the compensation benefits; and, if it decides that, in its opinion, the worker is not receiving adequate compensation having regard to the projected loss of income resulting from the disability, periodic payments must be established or raised accordingly.**

### **#46.01 *Claims to Which Section 24 Applies***

**Section 24(1) provides that**

**This section applies to the claims for compensation that the Board may by regulation determine, provided that**

- (a) **the worker is still suffering from a compensable disability sustained more than 10 years before the application under subsection (2); and**
- (b) **a permanent disability award was made by the Board based on a percentage of total disability of 12% or**

greater, or the case is of a kind in which the Board uses a projected loss of earnings method in calculating compensation.

Regulations have been issued by the Board which are set out below:

1. The regulations come into effect on the 1st day of December, 1982.
2. The regulations with respect to the review of old disability pensions, promulgated by the Board on the 21st day of July, 1975, the 13th day of November, 1975, and the 19th day of August, 1976 (B.C. Regulations 524/75, 746/75 and 492/76) are hereby repealed.
3. Unless the Board otherwise determines, section 24 of the Act applies to claims in which all of the following conditions are present:
  - (1) The worker is still suffering from a compensable disability sustained more than ten years previous to the application under section 24(2).
  - (2) A permanent disability award was made by the Board based on a percentage of total disability of 12% or greater, a disability award was made for an injury involving the spinal column, or a disability award was made for an injury to a part of the body other than the spinal column on or after October 1, 1977. Where the worker is still suffering from two or more compensable disabilities, this condition is satisfied if permanent disability awards were made by the Board which in aggregate were based on a percentage of total disability of 12% or greater, provided that a minimum of 5% of total disability was attributed to an injury or injuries sustained more than ten years previous to the application under section 24(2).

Clause 3(1) of these regulations does not mean that it is a requirement that each claim considered under section 24 must be more than 10 years old. Where a worker has suffered several injuries with permanent disability resulting in several claims, the whole of the compensable disabilities resulting from these claims may be considered, provided that at least one of the compensable disabilities was sustained more than 10 years previous to the application under section 24(2), and that a minimum of 5% of total disability was attributed to an injury or injuries sustained more than 10 years previous to the application.

The requirement in Clause 3(2) that the percentage of disability exceed 12% is a separate and independent requirement from Clause 3(1). Thus, it is not necessary that the disability award should have been made more than 10 years previous to the application, or that it should have been calculated at 12% or greater at any particular time.

The requirement in Clause 3(2) that a non-spinal disability of less than 12% be one that was assessed on or after October 1, 1977, in conjunction with Clause 3(2), means that no application for such a disability can be made under section 24 until October 1, 1987.

Notwithstanding that a worker suffering a permanent disability has received an award that has been wholly or partly commuted, or an award for a fixed term, the worker may apply under this section, but he shall be deemed to be still receiving the periodic payments that have been commuted, or the life equivalent of the periodic payments made for a fixed term. (12)

#### **#46.02      *Calculation of Benefits under Section 24***

Where a worker is under the age of 65 years, compensation is considered adequate for the purposes of this section if it equals 75% of the projected loss of earnings resulting from the disability. (13)

Section 24(4) provides that “Where a worker is 65 years of age or over, compensation is considered adequate for the purposes of this section if it equals 75% of the projected loss of retirement income resulting from the disability.”

Where a worker is under the age of 65 years, periodical payments established or raised under this section are subject to readjustment by reference to subsection (4) upon the worker attaining the age of 65 years. (14)

The calculation of benefits is made in the manner the Board determines. (15)

Where a worker is under the age of 65 years, the Board must determine the projected loss of earnings resulting from the disability. This involves three steps:

1.      A forward projection of the earning capability of the worker as it existed prior to the disability.
2.      A projection of the present earning capability of the worker.

3. A determination of the extent to which any difference between (1) and (2) is a result of the disability.

These calculations are made primarily by reference to evidence in the particular case, with two exceptions. A table of monthly average wage rates in B.C. (see Supplement No. 1, Appendix 5) is used to establish two of the variables; and an age factor is applied to those cases where the disability was suffered when the worker was under the age of 23. With regard to the former, a projection of the pre-disability earning capacity is made by comparing the claimant's actual pre-injury earnings, limited by the maximum in effect at the time of injury, with the monthly average wage rate in the table for that year and applying the same ratio to the average wage in the table for the year when the calculation is being made. In making this projection, no account is taken of promotions which the claimant might have obtained if he had not been injured.

Where a worker is 65 years of age or over, the Board must determine the projected loss of retirement income resulting from the disability. This involves a determination of:

1. The retirement income that the worker would have been likely to be receiving if he or she had not sustained the disability.
2. The retirement income the worker is receiving.
3. A determination of the extent to which any difference between (1) and (2) results from the disability.

Here again, the determinations are made to some extent by reference to evidence in the particular case; but two standard formulae are used with regard to two important items.

The first relates to retirement income from savings. Many workers save part of the earnings accrued during their working lives, and these savings, or income from the savings, become part of retirement income. The Board must consider, therefore, the loss of this element of retirement income resulting from the disability. To determine loss of retirement income from savings, a standard formula is used, based on such evidence as the Board has been able to obtain from aggregated data relating to the savings habits of Canadian families.

The second item being considered by a standard formula is the loss of retirement income from earnings by people at and above the age of 65 years. The formula selected is to use a flat rate cash amount per month for each percentage of disability.

Where a worker's pension has been adjusted under section 24 when under the age of 65 years and the worker has now reached that age, the readjustment is done in the following manner:

1. When an adjustment is made to a pension for a worker who is under the age of 65, that adjustment will be diarized for review three months prior to the worker attaining the age of 65.
2. When the matter comes up for review, the file will be considered in accordance with the procedures developed for calculating awards for workers aged 65 or over. For the purpose of this calculation, the original functional award in effect prior to any previous adjustment under section 24, plus applicable cost of listing adjustment as described in policy item #51.00, will be regarded as the permanent disability award in effect at age 65.
3. The term adjustment payable to age 65 will automatically terminate when the worker reaches age 65. The adjustment calculated as per item (2) above will then come into effect. This new pension will be the higher of the original pension award plus cost of living adjustments as described in policy item #51.00 or the adjusted permanent disability award determined in reference to the calculation for workers aged 65 or over.

The detailed calculation formulae are set out in Appendix 5 to this manual.

### **#46.03      *Maximum and Minimum Periodic Payments under Section 24***

Section 31 applies to the calculation of compensation under section 24, but the calculation is not limited by reference to average earnings at the time of injury. (16)

The periodic payments awarded to a worker following a review under this section shall not exceed the maximum that the Board would award to a worker in an occupational category similar to the occupation of the applicant worker before the injury if she or he had, at the effective date of the review under this section, suffered a compensable disability similar to the compensable disability being suffered by the applicant worker. (17)

No decision under this section shall result in periodical payments to any worker being lower than they would if no application had ever been made under this section. (18)

#### **#46.04      *Date when New Periodic Payments Commence under Section 24***

Where a worker whose disability occurred before January 1, 1965 applies under this section within one year of the earliest date on which becoming eligible to do so, an increase or establishment of benefits under section 24 is effective from September 1, 1975 and, in all other cases, the effective date for the commencement of an increase or establishment of benefits under the section is the date on which the application is received at the Board. (19)

The following table sets out when claimants whose disabilities occurred prior to January 1, 1965 became eligible to apply under section 24.

<b>Injury Occurred On or Before</b>	<b>Date of Commencement of Eligibility</b>
December 31, 1925	August 1, 1975
December 31, 1928	September 1, 1975
December 31, 1932	October 1, 1975
December 31, 1936	December 1, 1975
December 31, 1940	January 1, 1976
December 31, 1944	February 1, 1976
December 31, 1948	April 1, 1976
December 31, 1952	May 1, 1976
December 31, 1956	June 1, 1976
December 31, 1960	July 1, 1976
December 31, 1964	August 1, 1976

#### **#46.05      *Reapplication under Section 24***

A worker may reapply under this section for reconsideration of his compensation benefits after a further 10 years have elapsed since the last previous application under this section. (20)

#### **#46.10      *Reinstatement of Commuted Pensions under Section 26***

Section 26(1) of the Act provides that “Where periodical payments for permanent disability were awarded by the Board prior to January 1, 1966, and where

- (a) the award was for a percentage of total disability of 12% or greater, and the whole of the periodical payments was commuted prior to that date;

- (b) a portion of the periodical payments equivalent to 12% of total disability or greater was commuted prior to that date; or
- (c) the award was for a percentage of total disability of 12% or greater and was of periodical payments for a fixed term, and where the worker to whom the award had been made is still suffering from the disability, the Board may, on the application of the worker, establish new periodic payments, which are to commence for the month in which the application is received at the Board.”

### **#46.11      *Computation of Twelve Per Cent Disability***

In determining the percentage of total disability represented by a commutation of periodical payments, the monthly dollar amount of the commutation should be compared with the monthly dollar amount of the periodical payments before the commutation, and multiplied by the percentage of total disability represented by the periodical payments before the commutation.

If the worker has had more than one commutation in respect of the same or different disabilities, the total value of the commutations and the disabilities is taken into account. In this case, all the commutations required to make the 12% must have occurred prior to January 1, 1966.

Consider the following example of a worker injured in 1936 who had two partial commutations, one in 1952 and one in 1955, who applied for reinstatement in September, 1974.

A.	True percentage of total disability awarded (as varied by age and wage factors)	61.20
B.	Monthly wage rate prior to injury	100.00
C.	Life value of pension per month	38.25
D.	Monthly amount of 1952 commutation	6.75
E.	1952 commutation as percentage of whole disability $\frac{D}{C} \times A$ $\frac{6.75}{38.25} \times 61.20$	10.80
F.	Remaining percentage of total disability (A-E)	50.40

G.	Balance of monthly pension (C-D)	31.50
H.	Recalculation of monthly pension following policy item #39.61 $31.50 \times \frac{66-2/3}{62-1/2} \times \frac{2,000.00}{12 \times 100.00}$	56.00
I.	Monthly amount of 1955 commutation	2.00
J.	1955 commutation as percentage of whole disability $\frac{(I \times F)}{H} = \frac{2.00}{56.00} \times 50.40$	1.80
K.	Total percentage of disability commuted (E + J)	12.60

In past years, the Board varied the assessed percentage of disability according to the earnings and age of the worker. In calculating the percentage of disability commuted for the purposes of section 26, the disability as varied by these factors is used.

#### **#46.12 Purpose of Section 26 Already Achieved**

Section 26(5) provides that “This section does not apply where the purpose of the section has been achieved as a result of an application under section 24 or in some other way.”

Therefore, section 26 has no application to a situation where, in the events that have occurred, a worker has not lost the future benefit of any cost of living increases by reason of the commutation. As under section 26, however, such a worker receives future cost of living increases based on what the periodical payments would have been had they not been commuted.

To take an example, suppose a worker was receiving a pension for permanent total disability, and in 1964 arranged with the Board a partial commutation of that pension equivalent to \$10.00 a month. If the remaining pension was increased pursuant to subsequent increases in the statutory minimum, it would, in November 1974, be \$341.01 less \$10.00 per month, i.e. \$331.01. The increases in the minimum have exceeded the cost of living increases, and in the result, the worker has not lost any cost of living increases by reason of the commutation. As cost of living adjustments are now made, the worker will continue to receive the cost of living percentage applied to \$341.01 so that the pension will continue to be the same as it would have been without the commutation, less the commuted \$10.00 per month.

### **#46.13      *Term Pensions***

Where the award was for a fixed term that has not expired or been commuted, section 26 applies upon the expiry of the term. (21) The worker must also wait for the expiry of the term if he or she has to combine an expired or commuted pension with the term pension to satisfy the 12% requirement.

Occasionally, a term pension may be converted into a life pension if the worker is found to have an increased entitlement because of a deterioration in the pensionable condition. Section 26 is applicable as soon as the conversion takes place.

### **#46.14      *Rate of New Periodic Payments***

Section 26(3) provides that “In order to calculate the rate of new periodic payments to be established under this section, the Board must determine

- (a) the monthly payments that would have been payable on January 1, 1966 if the award had been of periodic payments for life and there had been no commutation, or, where the commutation was partial, the additional rate of monthly payments that would have been payable on that date if there had been no commutation; and
- (b) the additional amount of monthly payments that would have been payable for the month during which the application is received by way of increases on the amounts calculated under paragraph (a) if those amounts had continued to be due; namely, the total of all increases that would have been made from January 1, 1966 to and including the last day of the month preceding the date the application is received.”

The rate of the new periodical payments is the amount calculated under clause (b). (22)

Consider the following examples:

- 1. Worker injured in 1938. Term award which expired in 1952. Application under section 26 in February, 1976.
  - A. True percentage of total disability awarded (as varied by age and wage factors) 18.58%
  - B. Monthly wage rate prior to injury \$80.00

- C. Life value of permanent disability award per month (23)  
 $\frac{18.58}{100} (A) \times \frac{62-1/2}{100} \times 80.00 (B)$  \$9.29
- D. Monthly permanent disability award that would have been payable if there had been no term award under provision in policy item #39.61 (section 33(4))  
 $9.29 (C) \times \frac{66-2/3}{62-1/2} \times \frac{2,000.00}{12 \times 80.00} (B)$  \$20.64
- E. Provision in #39.62 inapplicable as would result in permanent disability award less than under policy item #39.61
- F. C.P.I. from January 1, 1966 to January 1, 1976, on \$20.64 (D)  
76.3452% of \$20.64 \$15.75
- G. New monthly periodical payments under section 26 commencing February 1, 1966 \$15.75
2. Claimant injured in December, 1944. Commuted part of permanent partial disability pension in 1950. Application under section 26 in November, 1974.
- A. True percentage of total disability awarded (as varied by age and wage factors) 40.97%
- B. Monthly wage rate prior to injury \$150.00
- C. Life value of pension per month  
 $\frac{40.97}{100} (A) \times \frac{66-2/3}{100} \times 150.00 (B)$  \$40.97
- D. Monthly amount commuted \$14.95
- E. Percentage of total disability commuted  
 $\frac{14.95}{40.97} (D) \times 40.97 (A)$  14.95%
- F. Provision in policy item #39.61 inapplicable as injury occurred after March 18, 1943

G.	Additional monthly pension that would have been payable had there been no commutation under provision in policy item #39.62 <u>14.95</u> (E) x 130.00 100	\$19.44
H.	C.P.I. on additional monthly pension (G) from January 1, 1966 to July 1, 1974 49.85% of \$19.44	\$9.69
I.	Additional monthly periodical payments under section 26 commencing November 1, 1974 (to be added to existing pension)	\$9.69

### **#46.15      *Cost of Living Adjustment After Reinstatement***

Cost of living adjustments after the establishment of the new periodical payments are based on the sum of the amounts calculated under clauses (a) and (b) in policy item #46.14. (24) A formula for calculating these adjustments, which applies both in cases of total and partial commutation is set out below.

Where the commutation was partial, so that part of the original award is still subsisting, the residue of the original award may be blended with the reinstated award under section 26. Where the commutation was total, the formula applies to the reinstated award, and where the commutation was partial, it applies to the blend of the residue of the original award with the reinstated award.

The formula is:

1.	The amount of pension benefits being paid for the month preceding the cost of living adjustment	\$
	<b>PLUS</b>	
2.	The monthly amount of pension that had been commuted	\$
	<b>Subtotal</b>	\$
3.	The application of the indexing factor described in policy item #51.00 to that subtotal	\$
	<b>Second Subtotal</b>	\$

**LESS**

<b>4.</b>	<b>The monthly amount of pension that had been commuted</b>	<b>\$</b>
	<b>Total</b>	<b>\$</b>

The resulting total is the monthly pension that will be applicable after the cost of living adjustment.

**#46.16      *Commutation of New Periodic Payments***

Generally, no commutation will be allowed in respect of the new periodical payments awarded under section 26. However, the Board does have discretion to permit this in unusual cases.

## NOTES

- (1) See policy item #65.04
- ~~(2)~~ ~~See policy item #51.13~~
- (32) See policy item #40.00
- (43) S.23(2)
- (54) Permanent Disability Evaluation Schedule Appendix 4
- (65) See policy item #25.10
- ~~(7)~~ ~~Decision No. 157~~
- (86) S.23(4); See policy item #34.20
- (97) See policy item #37.21
- (108) S.33(4)
- (9) Earnings and Employment Trends, Jan/Feb 2001, BC Stats,  
Ministry of Finance and Corporate Relations, Province of  
British Columbia**
- ~~(11)~~ ~~See policy item #67.20~~
- ~~(12)~~ ~~See policy item #42.20~~
- (2710) S.5(5)
- (2811) S.35(3)
- (132) S.24(7)
- (143) S.24(3)
- (154) S.24(5)
- (165) S.24(6)
- (176) S.24(8)
- (187) S.24(9)
- (198) S.24(12)
- (2019) S.24(11)
- (210) S.24(10)
- (221) S.26(2)
- (232) S.26(4)
- (243) The 62-1/2% shown in the equation is the percentage of average earnings used in 1938 for calculating compensation, the equivalent of the present 75%
- (254) S.26(4)