

Additions in Bold; Deletions Strikethrough

#64.00 INTRODUCTION

Section 33(1) of the Act provides, in part:

The Board must determine the amount of average earnings and the earning capacity of a worker with reference to the worker's average earnings and earning capacity at the time of the worker's injury.

This section provides the general direction for determining a worker's average earnings.

The Act provides two general rules for determining average earnings and a number of exceptions for which average earnings is calculated differently. The exceptions relate to a casual worker, a person who purchased coverage under section 2(2) of the Act, a worker with no earnings on the date of injury, a worker who is an apprentice or learner, a regular worker who has been employed less than 12 months, and a worker with exceptional circumstances.

In determining a worker's average earnings, the Board must apply one of the general rules unless one of the exceptions in the Act applies to a worker. Where more than one exception applies to a worker, the Act provides that the Board must determine the section that best reflects the worker's circumstances and apply that section. In making this determination, "best" does not mean the highest rate possible, but rather, the rate that most closely reflects the actual loss incurred.

Set out below are the Board's policies with respect to the calculation of a worker's short-term average earnings; the application of a 10-week average earnings rate review; the calculation of a worker's long-term average earnings; and the composition of average earnings.

~~#66.00 — WAGE-LOSS RATES ON NEW CLAIMS~~

**#65.00 GENERAL RULE FOR DETERMINING SHORT-TERM
AVERAGE EARNINGS**

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

Subject to sections 33.5 to 33.7, the Board must determine, for the shorter of the following periods, the amount of average earnings of a worker based on the rate at which the worker was remunerated by each of the employers for whom he or she was employed at the time of injury:

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

~~Except in the cases set out in 10-34, Except for a casual worker, a person who purchased coverage under section 2(2) of the *Act* and a worker with no earnings at the time of injury, the general rule for determining short-term average earnings is to use the worker's rate of pay wage-loss payments made at the outset of a claim are based on the worker's rate of pay at the date of injury up to the maximum wage rate permitted by the *Act*. (1) Compensation based on this rate will normally continue until the end of the worker's temporary disability, or the 8-week rate review, (2), whichever comes first.~~

~~Irrespective of how wages are paid by the employer, they are converted by the Board to a weekly equivalent. After conversion to a weekly equivalent, a daily wage rate is calculated by dividing the weekly earnings rate by the number of days worked in the week. The daily compensation rate is 75% of this figure.~~

For workers who receive regular remuneration on a standard 5-day work week, the determination of date of injury earnings will be based on the worker's actual earnings on the day of injury.

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

~~#66.01~~**65.01** *Variable Shift Workers*

Where a worker is employed on a rotating shift cycle basis, the Board will determine the worker's date of injury earnings based on the worker's shift cycle.

In those cases where a variable shift worker:

- **has irregular shifts;**
- **has shifts with no repeating patterns;**
- **works a shift cycle involving more than five cycles;**
- **works differing shift hours per cycle;**
- **is paid shift differentials; or**
- **is scheduled for a shift cycle change**

the worker's short-term average earnings are based on the three month period immediately preceding the worker's date of injury.

Where the variable shift worker has been with the employer for less than three months, the worker's short-term average earnings are based on the worker's earnings from the worker's date of hire to the date of injury.

~~4. Short-Term Disabilities — Within One Shift Cycle~~

~~In general, in those cases where a worker's disability does not extend beyond one short cycle of shifts (usually with a maximum disability period of two weeks or a first and final payment), the wage-loss payment is calculated by entering the worker's actual loss into the Board's computerized automated wage-loss system which calculates 75% of the loss incurred. The application of the statutory maximum entitlement is determined by the computer by reference to the amounts paid over each calendar week.~~

~~2. Disabilities Extending Beyond One Shift Cycle~~

~~(a) Variable But Repeating Shifts~~

~~In those cases where variable but repeating shifts are worked, for example, a nine-day fortnight shift pattern, and the Adjudicator or Claims Officer anticipates the period of disability will not be short-term, rather than pay on the basis of the actual loss as described in 1. above, the automated wage-loss system will calculate the worker's payments. The calculations are based on the shift cycle starting date, the shift cycle pattern, and the worker's rate of pay at the time of injury (hourly rates are converted to daily or weekly amounts). An 8-week rate review, as described in #67.20, is carried out on these claims. Exceptions to this approach are made when the worker:~~

- ~~— works a shift cycle involving more than five cycles;~~
- ~~— works differing shift hours per cycle;~~
- ~~— is paid shift differentials;~~
- ~~— is scheduled for a shift cycle change.~~

~~(b) Irregular Shifts~~

~~In those cases where the worker has irregular shifts, shifts with no repeating patterns, or situations involving the four exceptions listed above, the wage rate is set using the rate setting guidelines for long-term earnings as described in #66.10, and the worker is paid on the basis of a seven-day week for the full period of temporary disability. No 8-week rate review is carried out in these cases.~~

~~#66.02 Claimant with Two Jobs~~

#65.02 Worker with Two Jobs

If a worker holds two jobs and is disabled from both by an injury arising out of and in the course of one of them, ~~wage-loss compensation~~ **date of injury earnings** will be based on the combined earnings of both jobs up to the statutory maximum. This applies whether or not the other job is covered by Part 1 of the Act **Act** or is self-employment. The total days worked in both jobs are merged to obtain the days worked per week. Both employers, if covered by Part 1 of the Act **Act**, may be reimbursed by the Board if they continue paying the disabled worker. (31)

~~When a worker is injured on a job for which personal optional protection has been purchased and~~ **Where a worker is engaged in two jobs, one of which is a job for which personal optional protection has been purchased, the income earned in the non-personal optional protection job will be combined with the amount of personal optional protection purchased for the other job, up to the statutory maximum, in order to determine average earnings.** ~~we are combining actual income earned in a second job, with the actual income earned in the job for which personal optional protection coverage has been purchased, the compensation rate on the claim cannot be less than the personal optional protection rate purchased. (See #66.20 also.)~~

#65.03 Fishers

The date of injury earnings for fishers whose remuneration is based on a share of the catch, the value of which may only be determined at a future date, will be based on the earnings over the 3-month period immediately preceding the date of injury. Where earnings information is not available for that 3-month period, the worker's average earnings may be based on the 12-month period immediately preceding the worker's date of injury. See also policy item #68.63 for information on a fisher's composition of average earnings where the fisher is self-employed and owns a vessel.

#65.0466.12 *Provisional Rate*

Wage-loss compensation may be based on a provisional rate if there is a delay in obtaining information as to the worker's actual earnings. The worker must be informed that this has been done. The amount of the provisional rate depends on the information available to the Board Officer. While being careful not to set a rate which is higher than the worker's actual earnings, the Board Officer should, as far as is possible, take into consideration the actual circumstances of the worker, for instance, age, occupation, seniority and union status. The Board Officer should also have regard to statements of earnings already on file or on other recent compensation claims.

Where a Board Officer has made a decision to set a provisional rate, this is an interim rate. If, after payments have been made on a provisional basis, sufficient earnings information is received, the rate may be changed to reflect the additional earnings information received. If insufficient earnings information or no information is received after a reasonable time, the Board Officer will review the rate at least every four weeks until a decision is made to fix the rate. ~~The Board Officer may, any of these occasions, reduce the rate to the statutory minimum or below if it is felt that the evidence does not support the existing rate.~~ **In setting a provisional rate, regard will be had to the applicable statutory minimum. See policy item #93.26 regarding a worker's obligation to provide information.** (52) Where payments have been commenced on an interim basis, and the final wage loss rate is lower than the provisional rate previously set, no recovery of the payments will be made in the absence of an administrative error, fraud or misrepresentation by the worker, or where the decision under review was one not within the statutory authority of the Board. For a definition of an administrative error, refer to policy item #48.41.

~~#67.20~~ **8-Week Rate Review**

**#66.00 GENERAL RULE FOR DETERMINING LONG-TERM
AVERAGE EARNINGS**

Section 33.1(2) of the Act provides:

Subject to sections 33.2 to 33.7, if a worker's disability continues after the end of the period referred to in subsection (1) (a) and (b) that is shorter for the worker, the Board must, for the period starting after the end of that shorter period, determine the amount of average earnings of the worker based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of the injury.

~~An 8-week rate review is made where wage-loss payments based on the worker's rate of pay at the date of injury have continued for eight weeks. This review consists of an enquiry and determination of what earnings rate best represents the long-term earnings loss suffered by the worker by reason of the injury.~~

~~After a claim has lasted five weeks, the Claims Adjudicator~~**Board officer** considers whether it is likely to last for ~~eight~~ **ten** weeks and, if the ~~Adjudicator~~**Board officer** has not done so already, sets in motion any enquiries necessary for a possible ~~8-week rate review~~**10-week average earnings review**.

~~Where a permanent disability is anticipated, the Claims Adjudicator will consult with the Disability Awards Officer or Adjudicator in Disability Awards at the time of the 8-week rate review in order to provide consistency between the rate selection for wage-loss benefits and that set for Disability Awards purposes. The appropriate form recording the conclusion will be placed on the claim file.~~

~~Circumstances in an individual claim may require the selection of two different rates and where this occurs, the reasons are clearly recorded on the claim file. In cases of permanent total disability the wage rate must always be the same as the pension.~~

As part of the Board officer's enquiries, information will be obtained as to the worker's earnings for the 12-month period immediately preceding the date of injury. Information will also be obtained about the worker's tax status for the previous year.

If not supplied by the employer, earnings and tax status information for the required period of time prior to the injury must be provided by the worker. The information provided must be verified information from an independent source such as wage stubs, T-4's, or letters from the Income Tax Authorities or employers.

If, at the earlier of: the day after 10 cumulative weeks of benefits have been paid to the worker; or the effective date of a permanent disability award there is insufficient information on which to complete the 10-week rate review, a provisional rate may be set until sufficient information is received. (3)

In situations where a worker is being maintained on full salary by the employer, the ~~Claims Adjudicator~~ **Board officer** will still be required to carry out a rate review of this kind and, if a reduction is warranted, to make the necessary adjustment. If the worker's long-term earnings average out in excess of the rate set at the time of the injury and the figure being paid by the employer, it is conceivable that the worker could be in a less advantageous position than other workers with a similar earnings pattern. As such, a rate increase can be initiated and the difference between the new rate and what is being refunded to the employer made payable to the worker. This would not apply if the employer is paying the worker at the maximum applicable to the claim. If an employer ceases to make payments to a worker, the Board will begin to pay the worker directly.

~~As part of the Claims Adjudicator's enquiries, information will be obtained as to the worker's long-term earnings prior to the injury. Normally, earnings in the one-year period prior to the injury are obtained and used to reflect the worker's long-term wage loss and the pension rate. In some instances, however, the three-month figure prior to the injury may be used. Its use, however, is generally limited to those situations where there is a relatively fixed change in the worker's earning pattern which is deemed likely to continue into the future. In some instances, the Claims Adjudicator may decide to select the three-year earnings figure prior to the injury. These situations are normally limited to cases where there are extenuating circumstances in the one-year period prior to the injury and therefore the use of that one-year period would be incompatible with the worker's normal historical earnings pattern. This is sometimes occasioned by economic downturns which produce anomalies or irregularities in the earnings pattern of the worker in the year prior to the injury to the extent that they differ from the normal work history. In some exceptional circumstances, the Claims Adjudicator may decide to use the earnings in the five-year period prior to the injury. This, however, is of very limited application and would only apply to those exceptional circumstances where even the use of the three-year period would produce an inappropriate reflection of the worker's normal employment history. An example of this type of situation would be the case of a worker who for many years had been steadily employed with one company, which because of a downturn in the economy has either gone out of business or laid off some staff. Recognizing that many such long-term employees may have difficulty re-establishing themselves on a permanent basis in the labour force, but in recognition of the expectation that such workers will attempt to reinstate their earnings status on a similar basis to that in the past, the use of the average of earnings over the five years prior to the injury is felt to be appropriate at least for pension purposes. Its use for wage-loss purposes following the 8-week rate change will, however, depend on the~~

~~circumstances of the case which would examine the worker's employability potential during the period of recovery from the injury.~~

~~The rules set out in #66.11 are used to calculate these earnings.~~

~~The Claims Adjudicator will also consider the probability of the worker continuing in the injury occupation. For this purpose, the Adjudicator will contact the employer to enquire whether the worker could reasonably have been expected to continue in the job. The Adjudicator will also question the worker as to future intentions with regard to this job and examine the previous employment history. Any difference of opinion between the worker and employer must be investigated and the Adjudicator must then decide whether the continued employment of the claimant was probable.~~

~~Having completed the necessary enquiries, the Claims Adjudicator will determine the earnings rate of the worker which best represents the long term loss of earnings. Where this decision involves a change in the amount of compensation payable, the change will take effect at the beginning of the week following the first eight weeks payment of wage-loss benefits.~~

~~Where an 8-week rate review would result in a reduction in compensation of less than \$1.00 per day, no change will be made. However, all increases will be paid.~~

~~If at the beginning of the ninth week there is insufficient information on which to complete the 8-week rate review, a provisional rate will be set until sufficient information is received. (13)~~

~~Since a~~**No** refunds are made to the employer when workers covered under the *Government Employees Compensation Act* are maintained on full salary, ~~no~~ **810-** week rate review is carried out and no payments are made to the worker. If payments made by the employer are discontinued at any time beyond ~~eight~~ **ten** weeks of disability and a worker is still disabled, ~~an~~ **810-** week rate review is carried out at that time. Long-term earnings data is normally obtained where there is an indication that a permanent partial disability pension may be payable.

#67.00 EXCEPTIONS TO THE GENERAL RULES FOR DETERMINING AVERAGE EARNINGS

The *Act* provides a number of exceptions to the general rules in setting a worker's short-term and long-term average earnings. The Board's policies with respect to each of these exceptions are presented below. If a worker's circumstances do not fit within any of the exceptions, the applicable general rule for determining a worker's average earnings applies.

Section 33.1(3), the *Act* provides that if 2 or more exceptions to the general rules for determining average earnings apply to a worker, the Board must determine and apply the section that best reflects the worker's circumstances. In making this determination, "best" does not mean the highest rate possible, but rather, the rate that most closely reflects the actual loss incurred. This situation could arise if, for example, a worker was an apprentice (section 33.2) who had been employed less than 12 months (section 33.3). In this situation, the Board would apply the section that most accurately reflects the worker's average earnings and earning capacity at the time of injury.

#66.1367.10 Casual Workers

Section 33.5 of the Act provides:

If a worker's pattern of employment at the time of the injury is casual in nature, the Board's determination of the amount of average earnings under section 33.1 from the date of the injury must be based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury.

This is an exception to both general rules for determining a worker's average earnings. For a casual worker, the Board officer must use the worker's gross earnings for the 12-month period immediately before the date of the injury to establish the worker's average earnings. There is no 10-week average earnings review. Thus, the worker's average earnings determined at the outset of the casual worker's claim are also the worker's long term average earnings.

A casual worker is a worker who has a short-term/sporadic attachment to employment. Generally the employment lasts less than three consecutive months. A worker who works "on call" for one or more employers may also be a casual worker.

~~The rate of pay of a casual worker at the date of injury is not normally the best representation of the actual loss of earnings. Because of the sporadic employment history of such workers, the Board considers that there is a need to look at the worker's earnings over a longer period of time. It has been the Board's practice to use the casual worker's earnings for the one-year period prior to the injury, but a shorter or longer time could be used if this best represented loss of earnings.~~

Stevedores are treated as casual workers. Normally they are paid on a seven-day week basis. However, the actual days worked per week may be used if there is a steady work pattern.

~~In determining the average earnings of a fisher who owns a fishing vessel, the depreciation for income tax purposes, i.e. "capital cost allowance", is deducted from the gross income as it is not considered to be earnings. See #71.41 for the formula used in calculating the capital cost allowance or depreciation figure. Interest accrued (whether or not paid) as the result of an indebtedness, in respect of a fishing vessel used and owned by a commercial fisher, is considered an operating cost. The accrued interest is deducted from the gross income. The purchase of food as an operating cost is not deducted from the gross income as it is considered a direct benefit to the fisher and is a measurable return from the activities of fishing. The purchase of fuel, fishing nets, etc., plus costs incurred in the maintenance of the vessel and its equipment are deducted from the gross income as operating costs.~~

~~Workers in the fishing industry who are not classified as commercial fishers, such as packing house workers, will usually be considered in the same fashion as other workers in the province unless the nature of their employment is clearly seasonal. Geoduck divers are treated as commercial fishers.~~

~~Tradespersons dispatched to construction jobs from a union hiring hall, for example, carpenters, pipefitters, etc., are not for that reason alone considered as casual workers. The same applies to truck drivers or other unionized workers who, though they generally are employed full time, have prior to the injury, experienced short temporary lay-offs due to general economic conditions.~~

Fishers are treated as workers engaged in casual employment. However, this rule cannot be rigidly applied without regard to the particular circumstances of the case. For instance, it is conceivable that a particular fisher could be employed 52 weeks a year, five days a week. The fisher would then have to be treated as a regular full-time worker rather than a casual worker. Similarly, it is possible that some types of fishers might be regarded as seasonal workers. Where a job is to last more than three months, the worker is generally regarded as a seasonal or full-time worker rather than a casual worker. Regulation 3 of the *Fishing Industry Regulations* addresses the calculation of earnings for compensation benefits.

~~#66.2067.20~~ **Personal Optional Protection**

Section 33.6 of the Act provides:

If an independent operator or employer, to whom the Board directs that this Part applies under section 2(2), has purchased coverage under this Act, the Board must determine the amount of average earnings under section 33.1 from the date of injury based on the gross earnings for which coverage is purchased.

This is an exception to both general rules for determining average earnings. The “average earnings” of a person entitled to personal optional protection under ~~Section 2(2) of the Act~~**Act (74)** are the earnings for which coverage has been purchased. There is no ~~8~~**10**-week **average earnings**rate review.

The maximum ~~and minimum~~ amount of earnings for which coverage can be purchased are set out below.

	Monthly Amount		With Proof of Earnings (Effective January 1/87)
	MAXIMUM	MINIMUM	
January 1, 1999 – December 31,	\$2,500.00	\$1,000.00	\$4,792.00
January 1, 2000 – December 31,	2,500.00	1,000.00	4,833.00
January 1, 2001 – December 31,	2,500.00	1,000.00	4,875.00
January 1, 2002 – December 31,	2,500.00	1,000.00	4,967.00

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

~~Effective January 1, 1987, w~~**Where an applicant is applying for personal optional protection in an amount which exceeds the maximum per month, proof of gross earnings must be provided. If verification of earnings is not provided, the Board automatically reduces coverage to the maximum per month. Proof of gross earnings must be in the form of a certified copy of the applicant’s previous year’s tax return or a declaration must be completed by a professional accountant (C.A., C.G.A., or C.M.A.), lawyer or notary public. This declaration must certify that the self-employed earnings of the applicant for the previous year were equal to or exceeded the coverage requested.**

Because of frequent changes in the maximum wage rate, where coverage at the maximum has been granted, the Board permits an application for personal optional protection at the “maximum wage rate” with coverage and assessment to be adjusted automatically from time to time.

Where a claim is made in respect of an injury, a disablement from an occupational disease, or a death from either cause occurring on or after January 1, 1978, the minimum amounts of compensation provided for in ~~Sections 22(2), 23(4), 29(2) and 30(2)~~ have no application to persons who have purchased personal optional protection. ~~(65) Compensation payment to such persons shall be based on a rate of 75% of the amount of earnings for which coverage has been purchased.~~ However, the minimum average earnings provided for in ~~Section 17(3)(g)~~ does apply. ~~(86)~~

The amount of personal optional protection purchased will be used to calculate a person's average net earnings. Compensation will be based on 90% of the person's average net earnings calculated as set out in policy item #71.00.

~~Where personal optional protection has been obtained for members of an employer's family under 19 years of age, the wage rate set is based upon the actual earnings of the family member in the same manner as for other workers without regard to the rate of personal optional protection purchased by the employer for the employer or his or her spouse.~~

~~If a worker is injured on the job for which personal optional protection has been purchased, and also claims a loss from some other employment, the actual loss of earnings from both jobs (up to the statutory maximum) is used for computing average earnings. The same rule applies if a worker injured in the course of an employment covered by the Act also loses earnings from an occupation for which personal optional protection has been purchased. When a worker is injured on a job for which she or he has purchased personal optional protection and we are combining actual income earned in a second job, with the actual income earned in the job for which personal optional protection coverage has been purchased, the compensation rate on the claim cannot be less than the personal optional protection rate purchased.~~

~~When assessing a permanent partial disability on a projected loss of earnings basis, the actual pre-injury earnings of persons who have purchased personal optional protection are compared with the actual earnings they might obtain after the injury in jobs which they are able to do. However, the maximum loss of earnings for which an award will be made will be the earnings figure for which coverage has been purchased. (9) In determining temporary partial disability entitlement under Section 30 of the *Workers Compensation Act*, no earnings losses incurred are considered where such losses are in excess of the amount of personal optional protection purchased.~~

~~In the case of a reopening of a claim over three years from the date of injury and the claimant had personal optional protection when initially injured:~~

1. ~~Where the worker has maintained personal optional protection coverage at the time of reopening, the Board will pay the claim on the basis of the current rate of optional coverage.~~
2. ~~Where the worker is still employed in a capacity requiring optional protection and has no active personal optional protection coverage at the time of reopening, the Adjudicator will use the initial personal optional protection rate plus the appropriate Consumer Price Index increases.~~
3. ~~Where the claimant is now employed in circumstances where there is compulsory coverage for workers, the rate on reopening will normally be the claimant's current earnings rate subject to an evaluation of the question of any impact of the original injury on these current earnings should they be lower than that ACTUALLY EARNED (not the personal optional protection rate) at the time of the injury. (10)~~

Compensation payable to persons entitled to personal optional protection is subject to the same ~~Consumer Price Index~~**cost of living** adjustments as compensation payable to other persons.

#66.3067.30 Workers with No Earnings

Section 33.7 of the *Act* provides:

If a worker had no earnings at the time of injury, the Board must determine the amount of average earnings of a worker under section 33.1 from the date of injury in a manner that the Board considers appropriate.

This is an exception to both general rules for determining average earnings. There is no 10-week average earnings review.

Persons working without pay are not generally considered as “workers” under the *Act*. However, there are some exceptional situations of this type which are covered and for which the *Act* or the Board has specified the earnings on which compensation is to be based. **These situations are described in policy items #67.31 - #67.34.**

#67.40 Apprentice or Learner

Section 33.2 of the *Act* provides:

If a worker at the time of injury is an apprentice in a trade, an occupation or a profession or is a person referred to in paragraph (b) of the definition of “worker”, the Board’s determination of the amount of average earnings under section 33.1(2) must be based on the gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury, of a qualified person employed at the starting rate in the same trade, occupation or profession

- (a) by the same employer, or
- (b) if no person is so employed, by an employer in the same region.

This is an exception to the general rule for determining long-term average earnings.

The Board considers that an “apprentice in a trade” is an apprentice as defined under the terms and conditions in the provincial *Industry Training and Apprenticeship Act* or equivalent statute. The *Industry Training and Apprenticeship Regulation* or equivalent provides a list of trades that require compulsory certification.

The Board considers that an “apprentice in an occupation or profession” is a worker who must complete an “apprenticeship” in order to obtain the license or professional designation required to work in the occupation.

Section 33.2 of the *Act* includes a worker referred to in paragraph (b) of the section 1 definition of “worker”. Paragraph (b) of the definition of “worker” provides that a worker includes:

a person who is a learner, although not under a contract or apprenticeship, who becomes subject to the hazards of an industry within the scope of Part 1 for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment.

The Board considers that a learner is a person who is undergoing training or probationary work that is preliminary to employment. The training or probationary work must be required by the employer and makes the person subject to the hazards of an industry covered by Part 1 of the *Act*. A person is not a learner when the person is under a contract or an apprenticeship.

To determine a worker's average earnings under section 33.2 of the Act, the Board will contact the injury employer to determine what a qualified person employed at the starting rate in the same trade, occupation or profession earns or would earn with the injury employer.

Where this information is not available, the Board will contact an employer similar to the injury employer, in the same region as the injury employer, to determine what a qualified person employed at the starting rate in the same trade, occupation or profession earns.

The Board is not limited to obtaining wage rate information from a single employer. As such, the Board may use relevant information from employers in the region on the average starting rate of various trades, occupations and professions. This information may be used to determine the average earnings of an apprentice or learner where relevant information is not available from the worker's employer.

#67.50 Workers Employed with their Employer for Less than 12 Months

Section 33.3 of the Act provides:

In the case of a worker employed, on other than a casual or temporary basis, by the employer for less than 12 months immediately preceding the date of the injury, the Board's determination of the amount of average earnings under section 33.1(2) must be based on the gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury, of a person of similar status employed in the same type and classification of employment

- (a) by the same employer, or**
- (b) if no person is so employed, by an employer in the same region.**

This is a mandatory exception to the general rule for determining long-term average earnings and applies a worker with permanent employment.

To determine a worker's average earnings under section 33.3 of the Act, the Board will contact the injury employer to determine what the average earnings are or would be of a person of similar status employed in the same type and classification of employment.

Where this information is not available, the Board will contact an employer similar to the injury employer, in the same region as the injury employer, to determine what the average earnings are of a person of similar status employed in the same type and classification of employment.

The Board is not limited to obtaining wage rate information from a single employer. As such, the Board may use relevant information from employers in the region on the average earnings of a person of similar status employed in the same type and classification of employment. This information may be used to determine the average earnings of a worker who has worked less than 12 months for the injury employer where relevant information is not available from the worker's employer.

#67.60 Exceptional Circumstances

Section 33.4 of the *Act* provides:

(1) If exceptional circumstances exist such that the Board considers that the application of section 33.1(2) would be inequitable, the Board's determination of the amount of average earnings of a worker may be based on an amount that the Board considers best reflects the worker's loss of earnings.

(2) Subsection (1) does not apply in the circumstances described in section 33.2, 33.3, 33.5 or 33.6.

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

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

This provision applies where a worker does not fall under any of the exceptions and using the general rule for determining a worker's long-term average earnings would be inequitable. The following circumstances warrant the application of section 33.4:

- the worker is a student on a designated path of study at a provincially recognized institution and was in temporary employment unrelated to his or her field of study (e.g. a part-time or seasonal job) at the time of the injury. As a result, the worker's average earnings in the 12-month period immediately preceding the date of injury do not equitably represent his or her loss of earnings. In this case, the Board will determine the worker's long-term average earnings with reference to the worker's probable yearly earning capacity.
- the worker is under the age of 25 and had attended a provincially recognized institution full-time in the two years immediately preceding the date of injury. Unless there is evidence to the contrary, the Board will assume that, due to the worker's young age, the employment at the time of injury was not of a permanent nature. As a result, the worker's average earnings in the 12-month period immediately preceding the date of injury do not equitably represent his or her loss of earnings. In this case, the Board will determine the worker's long-term average

earnings with reference to the worker's probable yearly earning capacity.

- **the worker has had an absence of more than six consecutive weeks in the 12-month period immediately preceding the date of injury and the absence was due to an illness, education leave, or maternity/paternity leave. Where the Board determines that the worker had a history of regular employment, the worker's average earnings in the 12-month period immediately preceding the date of injury will not equitably represent his or her loss of earnings. In determining the worker's long-term average earnings, the Board may deduct the period of an absence or use a longer period of the worker's employment history (e.g., 24-month period).**
- **the worker is self-employed and receives remuneration based, in part, on operating costs or expenses that must be deducted from the worker's gross business income to obtain the worker's average earnings (for example, revenue generating equipment, employee wages). The Board will consider the worker's earnings over a longer period of time if the information required to determine the worker's average earnings is not available in the 12-month period immediately preceding the date of injury.**

Exceptional circumstances that are not identified in this policy may only be considered for the application of section 33.4 with the approval of the President, or delegate.

#71.0068.00 COMPOSITION OF AVERAGE EARNINGS

A worker's average earnings is normally composed of wages or salary. ~~Set out below are some other items which may have to be included or excluded.~~

However, the Board recognizes that a worker may receive other types of payments. Board policy on the treatment of specific types of payments is set out in policy items #68.10 to #68.80.

~~#71.10~~**68.10** *Extraordinary or Irregular Wage Payments*

Such items as commission, piecework, bonus, tips and gratuities must be included in a worker's average earnings **where the Board can verify the information provided to the Board through independent sources.** ~~This may involve basing wage-loss payments from the outset of the claim on the worker's earnings over a longer period, usually one year, rather than on the rate of pay at the date of injury.~~ **Where wages paid to a worker are supplemented by an additional amount representing statutory holiday payments or vacation allowances, these additional amounts are included in setting the wage rate on a claim.**

~~#71.11~~**68.11** *Overtime*

Only regular overtime is **included in the calculation of a worker's average earnings.** ~~covered when compensation is based on the rate of pay at the date of injury. If there has been significant amounts of occasional or irregular overtime, wage loss at the outset of the claim will normally have to be based on the worker's earnings over a longer period rather than on the rate of pay at the date of injury.~~

~~#71.12~~**68.12** *Severance or Termination Pay*

~~The Board does not assess firms for payments made as a result of severance, whether by collective agreement or other obligations.~~

Severance or termination pay received by a worker is not included in the calculation of average earnings. ~~In situations where a severance payment is involved, in setting a long-term wage rate on a claim at the 8-week point of disability, an Adjudicator will only include assessed payments in computing annual earnings.~~

#71.20 Fringe Benefits

#68.20 Employment Benefits

#68.21 Benefit Plans

Section 33(3.1) of the *Act* provides:

The Board must not include the following in determining the amount of average earnings of a worker:

- (a) the employer's payments on behalf of the worker for**
 - (i) contributions payable under the *Canada Pension Plan*,**
 - (ii) premiums payable under the *Employment Insurance Act (Canada)*, and**
 - (iii) contributions to a retirement, pension, health and welfare, life insurance or another benefit plan for the worker or the worker's dependants....**

~~The Board does not include fringe-these employment benefits as a component of average earnings. Fringe benefits include but are not limited to, employer payment for or contributions to CPP, Employment Insurance, retirement, pension, health and welfare, life insurance, training, or other employee or dependent benefit plans.~~

~~Where wages paid to a worker are supplemented by an additional amount representing statutory holiday payments or vacation allowances, these additional amounts are included in setting the wage rate on a claim. This practice normally applies to construction workers. Recognition is also given to fixed allowances such as payments to carpenters who are paid a 40¢ per hour travel allowance. This is a taxable allowance and is not an actual cost reimbursement and as such is included in the wage rate.~~

#68.23 Special Expenses or Allowances

Section 33(3.1) of the *Act* provides, in part:

The Board must not include the following in determining the amount of average earnings of a worker:

(a) ...

(b) special expenses or allowances paid to the worker because of the nature of the worker's employment.

Although a worker may receive payments in respect of work-related expenses or allowances, these payments will not be included in the calculation of average earnings.

Examples of special expenses or allowances include:

- tool allowances paid to tradespersons;
- safety boot allowances provided to workers required to wear safety boots due to the nature of their work;
- clothing allowances for workers required to wear special apparel for their work;
- dry-cleaning allowances;
- vehicle allowances; and
- travel allowances.

#68.40 Employment Insurance Payments

Section 33(3.2) of the *Act* provides:

The Board may include, in determining the amount of average earnings of a worker, income from employment benefits payable to the worker under the *Employment Insurance Act (Canada)* during the period for which average earnings are determined only if, in the Board's opinion, the worker's employment during that period was in an occupation or industry that results in recurring seasonal or recurring temporary interruptions of employment.

This is a discretionary provision and will be applied only where there is verified evidence from an independent source that the worker received employment insurance benefits due to the worker's employment in an occupation or industry that results in recurring seasonal or temporary interruptions of employment.

The Board may collect the necessary data to compile a list of industries and occupations that result in recurring seasonal or temporary interruptions of employment. The list must give regard to regional considerations and may adopt information from sources such as British Columbia Statistics, Statistics Canada or Human Resources Development Canada.

#68.61 Labour Contractor Without Coverage under Section 2(2) – Short-Term Average Earnings

~~For short-term disability claims and the first eight weeks on long-term disability claims, the gross earnings will be determined in the normal way. The gross figure will be converted to net wages by applying one of two percentages. These are:~~ **This policy enables the Board to determine the labour component of a labour contractor's remuneration for short-term average earnings where the labour contractor does not have coverage under section 2(2) of the Act.**

A labour contractor's contract may include payment for any wages paid by the labour contractor to his/her employee(s) and/or equipment.

In calculating the labour component of a labour contractor's date of injury earnings, the amount of wages paid by the labour contractor to his/her employees is deducted from the gross contract value. In addition, where a contract involves the payment of monies for the supply of equipment, the monies paid with respect to equipment may be deducted from the gross contract value as follows:

Where medium equipment is supplied, the gross figure will be converted to gross wages by applying the following percentages:

- (a) Medium Equipment** – Equipment – 40%
- Wages – 60%

Examples: Motor vehicles used for pilot car or local delivery services, minor excavating equipment, e.g. two-wheel drive agriculture-type tractors, complete with backhoe attachments and/or front-end loader attachment.

Where heavy equipment is supplied, the gross figure will be converted to gross wages by applying the following percentages.

- (b) Heavy Equipment** – Equipment – 75%
- Wages – 25%

Examples: Logging trucks, skidders, bulldozers, line haul trucks.

#68.62 Labour Contractor Without Coverage under Section 2(2) – Long-Term Average Earnings

In determining a labour contractor’s long-term average earnings where the labour contractor’s earnings include revenue-generating equipment and the labour contractor does not have coverage under section 2(2) of the *Act*, the Board depreciates any revenue generating equipment in order to determine the labour component of the labour contractor’s remuneration.

Operating costs or expenses will be deducted from the gross business income to obtain the business net income (the worker’s average earnings).

When asked to provide earnings information, the claimant labour contractor will also be asked to list the purchase price of the vehicle, vessel or piece of equipment. ~~In setting the rate after eight weeks of disability on a claim (including a fisher’s claim) or in relation to a permanent disability pension, the gross earnings will also be determined in the normal way. In deducting operating costs or expenses from the gross figure to obtain net earnings,~~

†The capital cost allowance or depreciation figure listed on the claimant’s labour contractor’s data will not be used. In place of this figure, a percentage will be selected from the straight-line depreciation tables set out below which most closely represents the vehicle, vessel or piece of **revenue generating** equipment involved. This percentage will then be applied to the purchase price of the item and the resulting figure will, along with the other operating costs or expenses of **the business**, be deducted from the gross to compute the ~~net earnings figure~~ **worker’s average earnings**.

Equipment Type	Annual Rate
Road Construction	
Track-type – Lesser than 200 HP	11%
Tractor – Greater than 200 HP	6%
Motor Grader	7.5%
Excavator	11%
Track Loader	11%
Backhoe (R/T Tractor)	18.5%
Logging	
Track-type – Lesser than 200 HP	11%
Tractor – Greater than 200 HP	6%
Skidder	11%
Loader – Boom Type	7.5%
Loader – Front-end Type	11%
Log Truck and Trailer	8%

Transportation

Line Haul Tractor	10%
5-ton Truck	10%
1-ton Truck/Van	8%
Automobile	12.5%
Gravel Truck	17%

Fishing

All Vessels	7.5%
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#68.63 Fishers

In order to determine the labour component of a fisher's remuneration, where a fisher owns the fishing vessel used to generate income, the fishing vessel is depreciated.

When asked to provide earnings information, the fisher will also be asked to list the purchase price of the vessel. In deducting operating costs or expenses from the gross figure to obtain the worker's average earnings, the capital cost allowance or depreciation figure listed on the worker's data will not be used. In place of this figure, the straight-line depreciation percentage set out below will be used. This percentage will then be applied to the purchase price of the vessel and the resulting figure will, along with the other operating costs or expenses, be deducted from the gross business income to compute the worker's average earnings.

All Vessels

7.5%

Interest accrued (whether or not paid) as the result of an indebtedness, in respect of a fishing vessel used and owned by a commercial fisher, is considered an operating cost. The accrued interest is deducted from the gross income. The purchase of food as an operating cost is not deducted from the gross income as it is considered a direct benefit to the fisher and is measurable return from the activities of fishing. The purchase of fuel, fishing nets, etc., plus costs incurred in the maintenance of the vessel and its equipment are deducted from the gross income as operating costs. See also policy item #65.03.

~~#71-6068.80~~

Government Sponsored Work Programs

A variety of payment systems are currently in use for work programs, such as:

1. The simple continuation of Employment Insurance, Welfare or other benefits.
2. A “top-up” of Employment Insurance, Welfare or other benefits.
3. Full payment by the employer, subsidized either in whole or in part from Employment Insurance, Welfare or other government funds.

In cases of this type, **the composition of average earnings is made up of the total dollar amount being paid to the worker either by the employer or the sponsoring government agency or a combination of either.**

~~the rate for compensation purposes for the initial eight weeks of disability is calculated on the basis of the total dollar amount being paid to the claimant either by the employer or the sponsoring government agency or a combination of either. The procedures for computing the long-term earnings at the 8 week rate change or for pension purposes will follow the standard procedures established for all other claims.~~

~~This procedure applies to injuries incurred on or after September 24, 1986.~~

#70.00 AVERAGE EARNINGS ON REOPENED CLAIMS

#51.11 *Reopening Claims*

#70.10 Disability Occurring Within Three Years of Injury

Where a claim is reopened for temporary total or temporary partial disability within three years of the date of injury (or the equivalent date in the case of occupational diseases), the wage rate set on the claim at the time of the injury is the rate to be used. **In applying this policy, where the wage rate was set before June 30, 2002, the wage rate for a recurrence must be reset in accordance with the Act using wage information from the time of the injury plus applicable cost of living adjustments.**

This could be either the original rate or the ~~8-week rate change~~ **review** figure if such an adjustment has occurred.

Any ~~pension~~ **permanent disability award** awarded ~~granted~~ under the same claim is deducted from the amount of the payments. A ~~pension~~ **permanent disability award** that has been awarded ~~granted~~ on another claim is deducted only to the extent that the combined total of wage-loss and ~~pension~~ **benefits** ~~permanent disability periodic payments~~ exceeds the current maximum. ~~Consumer Price Index~~ **Cost of living** adjustments are made if applicable. ~~Section 32 has no application in these cases.~~

Where a **permanent** partial disability ~~pension~~ **award** is being paid on the same claim, the wage-loss payments are calculated as the difference between the total compensation benefits and the **permanent** partial disability ~~pension~~ **periodic payments** in the following manner: -

1. The annual ~~pension~~ **permanent disability payment amount** is calculated by multiplying the monthly figure by 12.
2. The annual ~~pension~~ **permanent disability payment amount** is divided by the working days per year to obtain a daily rate.

5-day week	= 261 days
5-1/2-day week	= 287 days
6-day week	= 313 days
7-day week	= 365 days

3. The daily ~~pension~~ **permanent disability payment amount** is deducted from the daily wage-loss payment. (~~2013~~)

Where required under the Act, if an ~~810-week~~ rate review has not already been carried out on the claim, it will be done by the ~~Claims Adjudicator~~ **Board officer** following the reopening **at the earlier of**: when the total wage loss paid

on the claim adds up to ~~eight~~**ten** weeks **or the effective date of a permanent disability award.**

~~The provision discussed in #67.10 may be applied, so that compensation is based on the claimant's earnings at the date of the reopening. Suppose, for example, a student with a part-time job is injured and the rate is set at the low rate of pay being earned at the time of injury. If this student should later graduate from school or university and enter the labour force on a permanent basis and be required to stop work for further treatment of the injury, wage loss payments would not necessarily be based on the rate of pay at the time of injury.~~

#70.20 Reopenings Over Three Years

Section 32 of the ~~Act~~**Act** provides as follows:

- (1) For the purpose of determining the amount of compensation payable where there is a recurrence of temporary total disability or temporary partial disability after a lapse of 3 years following the occurrence of the injury, the board may calculate the compensation as if the recurrence were the happening of the injury if it considers that by doing so the compensation payable would more nearly represent the percentage of actual loss of earnings suffered by the worker by reason of the recurrence of the injury.
- (2) Where a worker has been awarded compensation for permanent partial disability for the original injury and compensation for recurrence of temporary total disability under subsection (1) is calculated by reference to the average earnings of the worker at the date of the recurrence, the compensation must be without deduction of the compensation payable for the permanent partial disability; but the total compensation payable must not exceed the maximum payable under this Part at the date of the recurrence.
- (3) Where more than 3 years after an injury a permanent disability or an increased degree of permanent disability occurs, the compensation payable for the permanent disability or increased degree of permanent disability may be calculated by reference to the average earnings of the worker at the date of the occurrence of the permanent disability or increased degree of permanent disability.

Section 32 of the ~~Workers Compensation Act~~ gives the Board a discretion to determine compensation benefits on a reopening of a claim more than three years after an injury by reference to the worker's current earnings.

The guidelines set out below apply ~~effective October 27, 1986~~. They apply in situations where there is a recurrence of temporary disability or an occurrence of or increase in a permanent disability over three years after an injury or disablement from occupational disease.

In applying this policy, where the original wage rate was set before June 30, 2002, the wage rate must be reset in accordance with the Act using information from the time of the original injury plus applicable cost of living adjustments. A second wage rate calculation based on the worker's earnings at the time of the recurrence must be done in accordance with the Act. This enables the Board to determine which average earnings calculation best represents the worker's loss of earnings.

1. **Temporary Disability Recurring Occurring After Three Years
Where the Claimant-Worker Is Employed**

(a) **Worker's Current Earnings Exceed
the Rate Originally Set On the Claim**

Where the worker's earnings at the time of the ~~occurrence~~**recurrence** of disability **exceed** the earnings rate originally set on the claim (or the ~~8-week~~ review rate, if applicable) plus ~~Consumer Price Index~~**cost of living** adjustments, ~~Section 32(1)~~ is normally applied so as to treat the recurrence of disability as the happening of the injury. Wage-loss compensation is based on the worker's earnings immediately prior to the recurrence and, where there is an existing permanent partial disability ~~pension~~ **award** granted in respect of the original injury, ~~Section 32(2)~~ applies. Therefore, the ~~pension~~**permanent disability periodic payment** is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. ~~(21-14)~~ **Where required under the Act, An-8 a 10-week rate review will be carried out if the disability following the reopening of the claim continues for that period. Any cost of living adjustments following the recurrence will be applied in accordance with section 25 of the Act. Consumer Price Index increases occurring in the six months following the recurrence will, by virtue of Section 25(2), not be applicable to the wage-loss payments being made.** ~~(22)~~

(b) **Worker Is Employed at the Same
Rate as Originally Set On the Claim**

Where the worker is employed at the **same rate** as originally set on the claim (or ~~8-week~~ review rate, if applicable), the previous rate will be used plus applicable ~~Consumer Price Index~~**cost of living** adjustments. The discretion contained in ~~Section 32(1)~~ will not be exercised.

(c) **Worker Is Employed at a Lower Rate
than Originally Set On the Claim**

Where the worker is employed at a **lower rate** than the rate originally set on the claim (or ~~8-week~~ review rate, if applicable) plus applicable ~~Consumer Price Index~~ ~~increases~~**cost of living adjustments**, a determination will be made as to the reason for the lower figure.

(i) **Reduced Earnings Due to Effects of the Injury or Disease Accepted On the Claim**

If it is determined that the reduced earnings level is due to the effects of the injury or disease accepted on the claim, the rate originally set on the claim (or ~~8-week~~ review rate, if applicable) plus applicable ~~Consumer Price Index~~**cost of living** adjustments will be used on the reopening. Care must be exercised in making this determination to ensure that consistency is maintained with prior decisions reached on the claim. If, for example, a prior decision has been reached that a ~~pension~~**permanent disability award** or higher ~~pension~~**award** which the ~~claimant~~**worker** asked for should not be awarded because the ~~claimant~~**worker** was capable of undertaking certain occupations, it will not now be possible to conclude that the ~~claimant's~~**worker's** not being employed in those occupations is due to the effects of the injury.

(ii) **Reduced Earnings Due to Personal Choice**

If it is determined that the lower earnings level is due to a matter of personal choice on the part of the ~~claimant,~~**worker**, such as, for example, a voluntary change in lifestyle, the reduced earnings figure will be used on reopening **to calculate the worker's wage rate.**

Section 32 will be applied and the rules set out in (a) above will apply in relation to the reduced figure. ~~If it is concluded that this voluntary or elective change in earnings status is indicative of the future, no 8-week rate change on the basis of prior earnings will be carried out should the disability following reopening extend to that point.~~

(iii) **Reduced Earnings Due to Employment Situation**

If it is determined that the reduced earnings at the time of the reopening are due to employment difficulties occasioned by economic circumstances, ~~S~~section 32 applies and the recurrence of disability is treated as the happening of the injury. Where there is an existing permanent partial disability ~~pension~~**award** granted in respect of the original injury, ~~S~~section 32(2) applies and the ~~pension~~**award** is not deducted from the wage-loss benefits except to the extent that the combined total exceeds the maximum wage rate in effect at the time of the recurrence. The current rate of earnings will be used. **When required by the Act, a 10-week rate review is carried out.** ~~for the first eight weeks at which point a review is carried out.~~ Since the ~~8~~**10-week**

review **generally** permits a consideration of the **12 months immediately preceding the date of injury**, ~~one year's, three or five years'~~ earnings prior to the injury, it will have the effect of adjusting for the long term any temporary aberrations in earnings capacity caused by economic fluctuations.

Any ~~Consumer Price Index increases~~ **cost of living adjustments** occurring in the ~~six~~**twelve** months following the recurrence will, by virtue of ~~S~~**section 25(32)**, not be applicable to the wage-loss payments being made.

2. **Temporary Disability Recurring After Three Years Where the Claimant-Worker Is Unemployed**

Where the worker is unemployed at the time of the reopening, a determination will be made of the reasons for this.

(a) **Where Unemployed Status Is Due to the Effects of the Injury or Disease**

If it is determined that the unemployed status prior to the recurrence is due to the effects of the injury or disease accepted on the claim, the wage rate originally set on the claim (or the ~~8-week~~ review rate, if applicable) plus applicable ~~Consumer Price Index~~ **cost of living** adjustments will be used. The discretion in ~~S~~**section 32** will not be exercised. As in 1(c)(i) above, care must be exercised to ensure that the determination is consistent with prior decisions on the claim.

(b) **Where Unemployed Status Is Not Due to Effects of the Injury or Disease**

If it is determined that the worker's unemployed status prior to the recurrence is not due to the effects of the injury or disease accepted on the claim, no wage-loss benefits are payable unless the disability following reopening will produce a potential for loss of income by removing the worker as a viable entity in the labour force. In the latter case, benefits will be paid on the basis of the wage rate originally set on the claim (or the ~~8-week~~ review rate, if applicable) plus applicable ~~Consumer Price Index~~ **cost of living** adjustments. In determining whether there is a "potential loss", the following are among the questions that might be considered.

- (i) Was the ~~claimant's~~ **worker's** unemployment a matter of personal choice?

- (ii) Does the ~~claimant's~~**worker's** lifestyle render it unlikely that he or she will, in practice, obtain employment? For example, if the ~~claimant~~**worker** has moved to a remote area where there are virtually no employment opportunities, this would indicate that there was no potential loss.
- (iii) Are there any other health conditions or personal problems that limit the possibility of employment?
- (iv) Was the worker being paid Employment Insurance benefits? Since the payment of such benefits requires a confirmation that the worker is fit for work, this would be an indicator that there was a potential loss.
- (v) Has the worker been making an active, ongoing, job search? Has the worker registered with the ~~Canada Employment and Immigration Commission?~~ **Human Resources and Development Commission?**
- (vi) Has the worker maintained union status, remained available for dispatch to jobs, been dispatched to jobs or declined offers of dispatch?
- (vii) Was the worker listed as seeking employment by the ~~Ministry of Social Services?~~ **Ministry of Human Resources?**

3. **Permanent Disability Occurring or Increasing More Than Three Years After Injury**

The rules set out above in relation to wage-loss benefits are, in general, equally applicable to permanent disability ~~pensions~~**awards**. These rules have the effect that in one situation no wage-loss benefits are paid, notably when the worker is unemployed otherwise than through the effects of the injury and it is determined that there is no potential loss of earnings. ~~A pension assessed on a physical impairment~~**A permanent disability award assessed on a loss of function** basis under ~~Section 23(1) of the Workers Compensation Act~~ should, however, be paid in that situation and (subject to any appropriate wage rate review being carried out) calculated on the basis of the wage rate originally set on the claim plus applicable ~~Consumer Price Index~~**cost of living** adjustments. ~~Pensions~~**Permanent disability awards** are distinguishable from wage-loss benefits since ~~the awards concern~~**they are concerned with** the long term **situation** as opposed to the current situation. **Refer to Chapter 6, Permanent Disability Awards, for a discussion regarding the methods of assessing permanent disability awards.** A permanent disability award is payable under ~~Section 23(1)~~ for significant impairments even though the worker has

returned to work with no loss of earnings and may not have a loss of earnings in the future. ~~The section directs that the pension is payable for life and appears to rest on an assumption that over the many years ahead some loss will on average be experienced.~~ **Even though it follows that, just because a person is unemployed at the time of a section 23(1) assessment, and does not now foreseeably have an actual loss of earnings, it does not mean that the person should not receive an award under Ssection 23(1).** However, the situation is different for projected loss of earnings awards under Ssection 23(3). Since that assessment 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.

4. Prior Occasion When Section 32 Was Applied

Where, on a previous reopening of the claim, Ssection 32 or its predecessor has been used to base compensation on the current earnings, any rate resulting from the application of that section is ignored for the purposes of a later reopening. 5-

Where, according to the guidelines set out above, compensation would normally be based on the worker's pre-injury earnings, but it is found impossible or impractical to obtain those earnings, Ssection 32(1) or (3) may be applied, unless this will result in a rate of compensation significantly less than that to which the pre-injury earnings would probably have entitled the worker. ~~In the latter case, a reasonable estimate should be made of the worker's probable pre-injury earnings.~~

5. Re-openings for Persons with Personal Optional Protection

In the case of a reopening over three years from the date of injury:

- **Where the person has maintained personal optional protection coverage at the time of reopening, the Board will determine the person's average earnings based on the current rate of coverage.**
- **Where the person no longer has personal optional protection, the Board will determine average earnings based on the initial personal optional protection rate plus the appropriate cost of living adjustments.**

- **Where the person is now employed in circumstances where there is compulsory coverage for worker so that the person is considered to be a worker under the Act, the rate on reopening will be based on the worker's current average earnings. An evaluation is required as to the impact of the original injury on the worker's current average earnings where the worker's average earnings are lower than the amount of personal optional protection the worker had at the time of the injury.**

For the distinction between a "recurrence of . . . disability" within the meaning of Section 32 and a new injury, reference should be made to **policy item #107.10**.

#16.60 Serious and Wilful Misconduct

Section 5(3) provides that “Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.”

By the terms of ~~S~~section 5(3), the injury must be attributable “solely” to the worker’s misconduct. Thus, for example, where the worker was impaired by reason of alcohol or other substances, investigation will have to be carried out to evaluate the extent of the impairment and its degree of responsibility in producing the injury in order to establish whether this requirement is met. See **policy item #16.10** for further details.

The section only applies where the misconduct was serious and “wilful”. In determining whether misconduct is wilful it must be considered whether the claimant had pre-knowledge or voluntarily elected to break a rule. In other words, the claimant must be aware of a rule and knowingly elect to break it. The section does not bar a claim if the injury results in death or serious or permanent disablement. The word “serious” is used in a physical rather than an economic sense. Therefore, if for example a worker has suffered a sprained wrist or finger which causes only two or three weeks loss of wages, this may not be considered as a serious disablement even though the loss of earnings may cause a serious financial problem. However, if a disability is prolonged, it may be regarded as serious even though the initial injury appears minor.

Until September 27, 2002, ~~W~~where a claim involving serious and wilful misconduct is accepted, the cost of compensation paid after the first 13 weeks of disability is excluded from the employer’s experience rating (see **policy item #115.30). Effective September 28, 2002, where a claim involving serious and wilful misconduct is accepted, the cost of compensation paid after the first 10 weeks of disability is excluded from the employer’s experience rating (see **policy item #115.30**).**

Before ~~S~~section 5(3) can be considered, it must have been determined under ~~S~~section 5(1) that the injury arose out of and in the course of the employment. The actions or conduct of the worker may induce the Board to conclude that the injury does not meet that requirement. If such a conclusion is reached, the claim will be denied even though the worker has suffered death or serious or permanent disablement.

#88.43 *Injury in the Course of Training-on-the-Job*

The Board considers it essential to encourage employers to provide training and employment opportunities for injured workers. One way of doing this is to exclude from the employer's experience rating (see **policy item #115.30**) the costs of certain employment injuries and aggravations occurring in the course of a training-on-the-job program.

There are two different training-on-the-job situations to be considered:

1. The employer is not paying the worker; the Board is paying full benefits.

The position is as in **policy item #88.54**. This means that all costs resulting from the aggravation of the injury are excluded from experience rating, whatever the nature of the injury.

2. The employer is paying a partial wage to the worker who is also receiving payments from the Board; or the Board is reimbursing the employer part of the worker's salary.

If there is an aggravation of the old injury, or the old injury contributes significantly to the occurrence of the new injury, all the resulting costs are excluded from experience rating, whatever the nature of the injury.

If the old injury made no significant contribution to the new injury, the Board will exclude from experience rating a proportion of the costs of the new claim equal to the percentage of the worker's wages being paid or reimbursed by the Board.

The above policy applies whether the employer at the time is a new employer or the worker's original employer.

Until September 27, 2002, in addition to relief for the individual employer for experience rating, the employer's sector or rate group may be eligible for relief under **section 39(1)(e)** (see **policy item #114.40A**) where the disability lasts more than 13 weeks.

Effective September 28, 2002, in addition to relief for the individual employer for experience rating, the employer's sector or rate group may be eligible for relief under **section 39(1)(e)** (see **policy item #114.40B**) where the disability lasts more than 10 weeks.

#88.54 *Injury in the Course of Training*

A worker undergoing a course of rehabilitation training sponsored by the Board does so in the circumstances described below:

1. The trainee may be attending a school of training specifically operated as such and for which course of training the Board pays a fee to the school, while at the same time paying the trainee the allowance prescribed by Board regulations.
2. A trainee may, by arrangement, be receiving training in an industrial or business establishment, receiving no remuneration from the employer in the establishment, but only receiving the allowance prescribed by Board regulations. At the same time, the Board may be paying something by way of a training fee to the employer in the establishment.

In the above circumstances, the Board takes the position that the trainee is not a “worker” employed by the participating employer in the course of rehabilitation training. Should the trainee receive further injury in the course of training, the Board regards such further injury as a continuation of the original disability. The two main objectives are:

1. that the injured trainee shall receive compensation benefits under the ~~Act~~ **Act**, and
2. that an employer who cooperates and assists the Board in rehabilitating an injured worker shall not be penalized for so doing.

In case of an aggravation or new injury to a trainee, the Board will normally exclude the costs from the employer’s experience rating (see **policy item #115.30**). In addition, **until September 27, 2002**, the employer’s sector or rate group may be eligible for relief under ~~Section~~ **section 39(1)(e)** (see **policy item #114.40A**) where the disability lasts more than 13 weeks. **Effective, September 28, 2002, the employer’s sector or rate group may be eligible for relief under section 39(1)(e) (see policy item #114.40B) where the disability lasts more than 10 weeks.**

The above policy applies whether the employer at the time is a new employer or the worker’s original employer.