

COMPENSATION PRACTICE AND QUALITY DEPARTMENT

PRACTICE DIRECTIVE # C9-12

**TOPIC: Long-Term Average Earnings:
Section 33.4 – Exceptional Circumstances**

ISSUE DATE: May 1, 2008

Objective

The purpose of this practice directive (“PD”) is to provide guidance to WorkSafeBC officers on the interpretation and application of section 33.4 of the *Workers Compensation Act* (“Act”) and Policy item #67.60, *Exceptional Circumstances*, in the Rehabilitation Services & Claims Manual (“RSCM”), Volume II. This PD will describe some of the situations in which it may be more appropriate to establish the worker’s long-term average earnings using this exception, rather than on the general rule in section 33.1.

Law & Policy

Section 33.4 of the *Act* states:

- (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.

Policy item #67.60 states that exceptional circumstances are “extraordinary, unusual or irregular” and describes various circumstances that are generally accepted as being exceptional. It also states that the list is not exhaustive and the Board may consider other reasons to find that exceptional circumstances exist, if those reasons are consistent with the *Act* and the purpose of the policy.

This PD reflects the amendments to Policy item #67.60, effective May 1, 2008.

Application

This PD applies to all current provision decisions¹, including appellate decisions, made on or after May 1, 2008.

¹ decisions made under the *Act*, as amended by *Bill 49* (2002), and Volume II of the RSCM

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Adjudicative Guidelines

1. General Principles

Section 33.4 is a discretionary provision and will only be applied where, due to exceptional circumstances, use of the worker's earnings in the 12-month period prior to the injury is inequitable. Such an inequity is produced where the worker's circumstances in the year prior to the injury fail to provide any meaningful measure of their employment history. This will likely occur where there is some fundamental flaw with the worker's connection to work in the past year, such that earnings in that period cannot be relied upon as a useful or reasonable measure of the worker's average earnings or earning capacity.

As the policy indicates, an inequitable result is caused by circumstances that are "*exceptional, that is, extraordinary, unusual or irregular*".

The intent of exceptional circumstances is not to capture every change or fluctuation in the worker's 12 month work history prior to the injury. Policy states that, "*It is not unusual for workers to be briefly absent from work for non-compensable reasons. Such absences will not be considered exceptional circumstances.*" Minor variations in the worker's 12 month earnings are not sufficiently anomalous to render the general rule inapplicable.

Officers are reminded that the *Act* requires the use of section 33.1 in setting a worker's long-term average earnings, unless one of the exceptions clearly applies. Thus, section 33.4 should only be invoked where the worker's circumstances are truly exceptional, such that application of the general rule would be inequitable. The general rule will not be inequitable simply because the application of the exceptional circumstances policy would produce a higher long-term rate.

Policy provides a non-exhaustive list of circumstances that are generally accepted as being exceptional. The policy also provides that an officer may consider other reasons to find that exceptional circumstances exist, **if those reasons are consistent with the *Act* and the purpose of the policy.**

As per section 33.4(2) of the *Act*, exceptional circumstances do not apply to workers who fall within the following categories:

- Apprentice/Learner (s.33.2)
- Employed less than 12 months (s.33.3)
- Casual worker (s.33.5)
- Worker with Personal Optional Protection coverage (s.33.6)

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2. Prior Periods of Compensable Wage Loss

(i) Exceptional Circumstance

If, in the 12 month period prior to the injury, the worker was on a workers' compensation claim(s) and received wage loss compensation (or wage loss equivalent rehabilitation allowances/benefits) during this time, exceptional circumstances apply.

(ii) Average Earnings

When calculating the worker's long-term average earnings, officers should exclude the period(s) during which the worker received wage loss compensation (or wage loss equivalent rehabilitation allowances/benefits) from the total period over which earnings are averaged.

In some cases, it may be appropriate to base the worker's long-term average earnings on a period of time shorter than the 12 month period prior to the injury. For example, a worker may be working reduced hours in January and February because of a prior compensable injury. In March, he undergoes surgery for that compensable injury and returns to work full-time in November. At the end of December, he suffers another, unrelated compensable injury.

In this case, the use of earnings in the two months prior to the injury (November and December) may be preferable to using 12 month earnings with the time off for surgery (March to November) excluded as it would still capture earnings in the month of January and February, which were reduced because of the prior compensable injury.

Officers may also use a longer or shorter period of time and exclude the period(s) of time in which the worker received wage loss compensation (or wage loss equivalency allowances/benefits). This may occur where, for example, the worker had returned to work after 16 months of compensable temporary disability and had worked for 2 months prior to the injury. The officer has the discretion to use, for example, 2 year's earnings and exclude the 16 month period, if this would best reflect the worker's loss of earnings.

3. Significant Atypical and/or Irregular Disruption in the Pattern of Employment

(i) Exceptional Circumstance

If the worker had a regular pattern of employment, but earnings in the 12 month period prior to the injury do not reflect the worker's historical earnings because of

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a significant atypical and/or irregular disruption in the pattern of employment during that time, exceptional circumstances apply.

An example of a significant atypical and/or irregular disruption, provided in the policy, is where the worker had an absence of more than six consecutive weeks in the 12 month period prior to the injury and the absence was due to a non-compensable illness or injury, education or maternity/paternity reasons.

“Regular Pattern of Employment”

A worker does not have to demonstrate a history of full-time employment for exceptional circumstances to apply. The requirement in policy is that the worker had a “regular pattern of employment”. Therefore, exceptional circumstances may apply to workers who were working part-time or seasonally at the time of injury, so long as they demonstrate a regular history or regular pattern of such employment, and so long as they are not a casual worker.

“Atypical and/or Irregular Disruption”

An atypical and/or irregular disruption is an uncharacteristic occurrence or event affecting the worker’s otherwise regular and consistent employment history. The disruption represents an aberration in the worker’s established pattern of employment.

The policy provides examples of disruptions that are considered atypical and/or irregular: non-compensable illness or injury, educational or maternity/paternity reasons. Board officers are reminded that a disruption *for any other reason* may also be considered, so long as it represents an atypical and/or irregular disruption in a history of regular employment.

”Significant”

“Significant” relates to the impact of the disruption on the level of earnings captured by the 12 month period prior to the injury. As stipulated in policy, not all absences are considered exceptional circumstances. However, an absence of more than six consecutive weeks in the 12 month period prior to the injury should be credited because the policy specifically states that this is an example of when exceptional circumstances may arise.

The six consecutive weeks referred to in policy is only an example and should not be relied on exclusively as the test for whether exceptional circumstances may apply. The principle behind this exceptional circumstance is that the impact of the disruption on the worker’s 12 month earnings prior to the injury is significant, such that they no longer reflect the worker’s historical earnings.

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As such, absences that are less than 6 weeks may nonetheless be significant where the worker works part-time or seasonally, or where the absence is during a very busy time of year (e.g., Christmas), if the worker has historically worked during this period.

(ii) Average Earnings

To arrive at the long-term average earnings figure that best reflect the worker's loss of earnings, officers may:

- Exclude the significant atypical and/or irregular disruption from the calculation of the worker's long-term average earnings,
- Base the worker's long-term average earnings on a longer period of time (e.g., 24 months) or on a shorter period of time, or
- Base the worker's long-term average earnings on a longer or shorter period of time and exclude the significant atypical and/or irregular disruption.

4. Diminished Future Career Options Due to the Injury

(i) Exceptional Circumstance

Where the officer is satisfied that earnings in the 12 month period prior to the injury do not address the worker's diminished future career options due to the nature and degree of the injury, exceptional circumstances apply.

The policy states that exceptional circumstances may arise, for example, where the worker is a student or a young worker under the age of 25.

(a) Student

Policy provides that exceptional circumstances may apply where the worker:

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

"Designated Path of Study"

If the student is enrolled in a degree, diploma-granting or other similar program on a full-time basis, he or she is considered to be on a designated path of study.

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A person who attends a school program on less than a full-time basis may also be on a designated path of study, so long as his/her attendance at school is “predominant”. For example, if a person takes less than a full course load because they work part-time on campus or because they intend to complete the

program in a longer period of time (e.g. 5 years instead of 4), they may still be predominantly a student.

This is to be contrasted with workers with a permanent attachment to employment who attend school or enroll in programs for personal interest, general self or career improvement or to upgrade one specific skill (e.g., computer efficiency). Such workers would not normally be considered students, as contemplated by the policy.

“Provincially Recognized Training or Educational Institution”

A provincially recognized training or educational institution includes:

- public and private secondary schools (“high school”),
- public and private post-secondary institutions.

For further information on public and private post-secondary institutions, visit the Ministry of Advanced Education website at <http://www.gov.bc.ca/aved/>.

“Diminished Future Career Options Because of the Nature and Degree of the Injury”

In order to determine whether the worker’s future career options have been impacted, officers should consider the kind of injury the worker has sustained (nature of the injury) and how serious it is or is likely to be (degree of the injury).

Consideration should also be given to whether the nature and degree of the injury prevents the worker from continuing with his or her studies and/or becoming fully employed in their chosen field of study. Some injuries, although permanent, may not necessarily diminish the student’s future career options.

There may be situations in which, despite a permanent functional impairment (“PFI”), the general rule may, in fact, be equitable. For example, a student who was on the path of study to become a teacher may receive a PFI for the loss of the tip of a finger on their non-dominant hand. Despite that the worker has sustained a permanent injury, he or she may still be able to continue on the path of study and become a teacher. The worker would not have diminished future career options in this case and exceptional circumstances would not apply. However, if the same injury was sustained by a student who was studying to become a musician, the general rule may, in fact, be inequitable.

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If, at the time the long-term rate is being set, the nature and degree of the injury is not yet fully known, or a determination of its impacts on the worker's future career options cannot be assessed, a provisional rate should be set. See RSCM Vol. II, Policy item #65.04, *Provisional Rate*, for further details.

There may be times when it only becomes apparent after the long-term rate is set that the nature and degree of the worker's injury has diminished his or her future career options. If this becomes known and a new long-term rate can be set before 75 days, Board officers may reconsider the earlier long-term rate decision. However, if the long-term wage rate decision cannot be reconsidered, the worker's only recourse is to request a review from the Review Division (including an extension of time, if necessary).

(b) Young Worker

Policy further provides that exceptional circumstances may also arise where the worker:

- is under the age of 25, and
- has completed a designated course of study at a provincially recognized training or educational institution in the two years immediately preceding the date of injury, and
- due to the worker's young age, the employment at the time of the injury may not be representative of the worker's career path, as provided for by the worker's recent course of study.

Officers should refer to "students" (above) for a discussion of what constitutes a "provincially recognized training or educational institution".

If a worker has completed a designated course of study at a provincially recognized training or educational institution in the 2 years immediately preceding the date of injury AND they are under the age of 25, policy requires a consideration of whether the worker's young age has prevented them from establishing themselves on the career path suggested by their schooling, and thus from maximizing their earning potential. If so, exceptional circumstances apply as earnings in the year prior to the injury do not best reflect the worker's loss of earnings.

In these cases, policy recognizes that the worker intended to establish themselves on a career path different than the one in which they were injured and that, due to the shortness of time in the workforce, they have yet to do so.

However, a worker's young age may not have prevented them from pursuing their chosen career path in every case. If there is evidence to establish that the

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young worker is not pursuing a career path as suggested by their recent education or training, or is, in fact, currently on their intended career path, use of earnings in the 12 months prior to the injury may be equitable.

For example, if a young worker graduated with a science degree a year prior to the injury, but was injured on a construction site, and there is evidence that they intended to establish themselves in the construction industry instead of pursuing a career path in science, use of the general rule may be equitable. Similarly,

evidence may show that a young worker, upon graduating from high school, had successfully established himself in the black cod fishing industry, as this was the career path they intended. In these cases, the fact that the worker is “young” has not prevented them from pursuing their career path and, as such, earnings from their time of injury employment are representative of their long-term loss of earnings.

(ii) Average Earnings

Where the “diminished future career options due to the injury” exceptional circumstance applies, long-term average earnings will be based on:

- For students: the regional class average of a qualified person in an occupation directly related to the student’s field of study,
- For young workers: the regional class average of a qualified person in an occupation related to the young worker’s previous field of study.

“Occupation Related to Field (or Previous Field) of Study”

For some students who are in highly specialized fields of study (e.g. medicine, law, nursing), it may be relatively easy to determine an “occupation” related to the field of study (i.e., doctor, lawyer, nurse). However, for other students in general fields of study (e.g. Bachelor of Arts, or a high school diploma), it may be more difficult to determine what a directly related occupation is or would be.

Likewise, a young worker may have recently completed a designated course at a provincially recognized training or educational institution, which is of such a general nature that it does not identify a field of study (e.g., high school diploma). It may be difficult to determine an occupation related to the young worker’s previous field of study in these circumstances.

Where a student’s field, or a young worker’s previous field, of study does not readily identify a related occupation, the officer should consider factors such as:

- the worker’s present job
- other training
- co-op, internship, or similar work experience

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- previous academic achievements
 - whether the worker had recently enrolled, or provided evidence of impending enrolment, in a particular field of study
 - whether high school/post-secondary transcripts reveal subjects and areas of interest and/or aptitude
 - whether grades were high enough to gain admission to desired program(s)
 - extra curricular or volunteer activities
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- interest or aptitude testing, and specific career or occupational testing
 - career counseling assessment from a professional or credible source (e.g., school guidance counselor)

This is not an exhaustive list, and other relevant information should be collected and considered.

5. Deductions from Gross Income to Derive the Labour Component

(i) Exceptional Circumstance

Where deductions must be made from the worker's gross income to derive the labour component of the worker's average earnings, exceptional circumstances may apply.

This will most likely be the case where the worker is self-employed and deductions for operating costs and/or business expenses are deducted from gross income to obtain the labour component of the worker's average earnings. In most cases, the worker's taxation year-end does not coincide with the date of injury.

The exceptional circumstances policy does not apply to self-employed workers who have not been employed 12 months. They fall into the provisions of section 33.3.

(ii) Average Earnings

Average earnings may be based on a longer period of time, rather than on the 12 month period prior to the injury.

6. Other Reasons that are Considered "Consistent with the Act and the Purpose of the Policy"

As discussed, the list provided in policy is not exhaustive and officers may consider other reasons to find that exceptional circumstances exist, if those reasons are consistent with the *Act* and the purpose of the policy. Below are two additional scenarios that may qualify as exceptional circumstances, as use of the general rule may be inequitable in these cases.

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(i) Insufficient Earnings Record

Where the worker's earnings record is not sufficient to allow for a determination of what best represents the worker's average earnings and earning capacity, exceptional circumstances may apply. This would only be the case where the worker was employed on a temporary basis at the time of injury, since permanently employed workers would fall under section 33.3, employed less than 12 months.

This exceptional circumstance may arise, for example, where the worker is a **recent entrant or re-entrant** to the labour force, such as a person who was recently incarcerated or who has recovered from a lengthy period of non-compensable disability. These workers likely have not established enough of an earnings history to allow for a determination of what best represents their average earnings and earning capacity.

This exceptional circumstance may also apply to a **new immigrant** whose prior employment records either cannot be obtained or do not accurately represent the worker's loss. The worker may, for example, have earnings that cannot be independently verified by their previous out-of-country employer. Alternatively, the worker may have out-of-country earnings that do not accurately reflect his or her current average earnings and earning capacity because the worker's employment history was established in a country marked by economic disparity.

This exceptional circumstance should not be confused with workers who have a casual attachment to employment. A distinction must be made between workers who have demonstrated a casual pattern of employment and those who have not been in the workforce long enough to establish a reliable employment history. Only workers who fall into the latter scenario would be eligible for exceptional circumstances consideration.

(a) Average Earnings

Where exceptional circumstances apply because the worker's earnings record is not sufficient to reflect their loss of earnings, average earnings may be based on the class average for that worker's time of injury occupation. In these cases, Board officers should not rely on the "full-time" workers class average.

Rather, the worker's average earnings should be based on the "all" workers class average, as it is unlikely that the full-time class average would best reflect the historical earnings of a recent entrant/re-entrant or a new immigrant who has not been hired on a permanent basis.

(ii) Fixed Changes

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Exceptional circumstances may apply where the worker has experienced a fixed change in their employment in the 12 months prior to the injury, which will likely continue into the future.

This circumstance may arise, for example, where a worker received a significant pay increase due to a promotion into a permanent position in the 12 months prior to the injury.

Where consideration is being given to whether an increase in earnings constitutes exceptional circumstances, Officers must ensure that the increase is due to a fixed change. Where the worker is performing their usual duties and

receives a modest increase due to, for example, inflation, exceptional circumstances would not apply, as this would not constitute a significant increase due to a fixed change.

Exceptional circumstances are not meant to capture every change or increase in the worker's 12 month earnings. Rather, exceptional circumstances apply where the worker's 12 month earnings are rendered meaningless due to an extraordinary event, such as a fixed change. A small pay increase without a fixed change does not by itself constitute an exceptional or extraordinary event and, as such, the general rule would still be equitable in these cases.

Exceptional circumstances may also arise where the worker received a pay decrease, due to a permanent change in job responsibilities or in working hours (e.g., from working full-time to part-time). In these cases, using the general rule would be inequitable and would overcompensate the worker. As indicated in policy, what "best reflects" the worker's long-term loss of earnings is not necessarily what produces the highest level of compensation, but rather what most accurately represents the loss of earnings incurred by the worker.

(a) Average Earnings

Where the worker has experienced a fixed change, average earnings may be determined using only the earnings in the period of time following the fixed change.

CROSS REFERENCES:

See also Practice Directive #C9-4, *Initial and Long-Term Average Earnings*

HISTORY:

This PD rescinds and replaces Practice Directive #33C, *Long-Term Average Earnings: Section 33.4 Exceptional Circumstances*, first issued on June 30, 2002 and most recently amended effective October 1, 2005

APPLICATION:

This PD applies to all current provision decisions, including appellate decisions, made on or after May 1, 2008.