

# COMPENSATION PRACTICE AND QUALITY DEPARTMENT

## PRACTICE DIRECTIVE # C9-9

TOPIC: Casual Pattern of Employment  
ISSUE DATE: January 1, 2006

### Objective

This practice directive provides guidance to WorkSafeBC officers in determining whether a worker's "pattern of employment at the time of injury is casual in nature."

### Law & Policy

Section 33.5 of the *Workers Compensation Act* (the "Act") provides an exception to both general rules for determining a worker's average earnings (i.e., short-term and long-term). 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.*

Policy item #67.10, *Casual Pattern of Employment*, of the *Rehabilitation Services and Claims Manual*, Vol. II ("RSCM"), provides the following rationale for section 33.5 of the Act:

*This provision is applied to those situations where, due to the unpredictable, sporadic and/or transitory pattern of the worker's employment, the initial rate general rule would not provide an appropriate representation of a worker's loss of earnings. In these situations, it is considered that earnings over the 12-month period immediately before the date of injury more appropriately reflect the worker's loss of earnings.*

Policy item #67.10 provides a number of factors to assist WorkSafeBC officers in identifying a 'casual pattern of employment.'

### Adjudicative Guidelines

Where section 33.5 of the Act is used to determine a worker's average earnings, there is no 10-week average earnings review. As a result, the average earnings determined at the outset of the claim are also the worker's long-term average earnings.

As discussed in Policy item #67.10, there is a two-step investigation to determine whether a worker's pattern of employment is casual in nature.

### **(A) Part 1 – Job at the Time of Injury (Attachment to Employment)**

The first step requires an examination of the worker's job at the time of injury. Section 33.5 of the *Act* is **not** applicable where, at the time of injury, it is determined that the worker:

- should have his/her average earnings determined according to the 'general rule' (section 33.1);
- was an apprentice or learner (section 33.2 exception);
- had purchased coverage under section 2(2) of the *Act* (section 33.6 exception, Personal Optional Protection); or,
- had no earnings (section 33.7 exception).

Where the job at the time of injury is permanent in nature, the worker's pattern of employment at the time of injury will not be considered casual.<sup>1</sup> In cases where the worker is employed on a temporary or seasonal basis, consideration should be given to the duration of the employment. Generally, if the worker's job at the time of injury was scheduled or anticipated to exceed three consecutive months, it is appropriate to determine the worker's average earnings using the general rule.

Where the worker's job at the time of injury is scheduled or anticipated to last less than three consecutive months (or where a termination date has not been specified by the employer), it may be considered "transitory" or short-term in nature. Although such a finding is an indication that the casual worker exception may be applicable, by itself it is not sufficient evidence to conclusively determine that the worker has a **pattern** of casual employment. As a result, adjudication should proceed to the second step of the investigation.

Likewise, where a worker is "on-call" with a single employer, but the available shifts for the worker are sporadic, occasional, or unpredictable, adjudication should proceed to the second step of the investigation to conclusively determine if the worker has a pattern of casual employment.

### **(B) Part 2 – Prior Work History (Pattern of Employment)**

The second step involves an examination of the worker's employment history prior to the job where the injury occurred ("accident job"). The objective is to determine whether the worker's pattern of employment may accurately be

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<sup>1</sup> This includes situations where a worker is initially hired on a probationary basis.

described as unpredictable, sporadic or transitory. Policy item #67.10 provides that a one-year period of inquiry would normally be sufficient.

A casual pattern of employment is demonstrated if the worker has a history of short-term jobs **and** significant absences from employment between jobs. In other words, a worker's pattern of employment is considered casual if, although periodically engaged in employment activities, the worker cannot demonstrate a relatively continuous attachment to the workforce.

If a worker is typically employed for short periods of time (i.e., each job lasts less than three consecutive months), and the duration of unemployment between each job typically exceeds the period of time the worker was employed, the worker's pattern of employment may be accurately described as casual.

The following is a series of contrasting examples:

- The worker's only employment each year is in a seasonal occupation (e.g., tree planting for less than 3 months over the summer). As a result, the worker's attachment to employment is considered "transitory" (i.e., not permanent and lasting only a short time) and the worker's pattern of employment may be characterized as casual.
- Where a worker fished during the summer months and then worked construction jobs throughout the rest of the year, demonstrating a relatively continuous attachment to employment, the worker's pattern of employment would **not** be considered casual - the 'General Rule' under section 33.1 of the *Act* would apply.
- The worker is injured while working in a temporary job that was of short duration (e.g., scheduled to last a total of 10 weeks). During the 12-month period immediately preceding the injury the worker had two other jobs. Each job was temporary in nature, lasting less than three consecutive months. The time interval between each job was significant. As a result, the worker's pattern of employment may be characterized as "transitory" and "sporadic" (i.e., not permanent, lasting a short time and appearing at intervals). Application of the casual worker exception would be appropriate.
- A worker had a period of regular employment lasting many years that ended 2 weeks before the injury. The worker is injured during his/her first week working at employment that is temporary in nature. Such a worker would **not** be viewed as having a casual pattern of employment.
- The worker is dispatched from a union hiring hall to many short-term jobs with different employers that in themselves might be considered temporary. However, the period of unemployment between each job is

insignificant – i.e., the worker is continually employed in such jobs, one after another. As a result, the worker's pattern of employment would **not** be considered casual.

### ***New Entrants into the Workforce***

Where the accident job represents the worker's initial entry into the workforce (as may be the case for a young worker, student, or recent immigrant), the absence of any other employment activity during the one-year period prior to the injury is not conclusive of a pattern of casual employment. Nor is the sole fact that the accident job is temporary in nature.

In the absence of any employment pattern prior to the accident employment, consideration should be given to whether the worker's attachment to the accident job was casual in nature. Some factors that would favour a casual attachment are as follows:

- The worker's hours with the accident job were uncertain or unpredictable.
- The worker's earnings from the accident job varied considerably between pay periods.
- The worker had the option of rejecting specific assignments from the accident job without penalty.

In the case of temporary employment, where it is determined that the worker's attachment to the job at the time of injury was not casual in nature, the general rule for determining short-term average earnings should provide an appropriate representation of the worker's loss of earnings.

Notably, when determining long-term average earnings, although the worker may have been employed less than 12 months, section 33.3 is not applicable where the accident employment is determined to be temporary.

### ***Significant Absence from Employment***

The normal one-year period of inquiry for determining whether a worker's pattern of employment is casual may not be sufficient in cases where the worker has experienced a significant absence from employment (e.g., due to continuing education, incarceration, social assistance, family care, or medical reasons, including a compensable disability).

Where the worker's accident job represents the worker's initial return to the workforce following a lengthy atypical absence, a longer period of inquiry (e.g., more than 12 months) may be appropriate to determine if worker's pattern of employment is casual in nature. Once again, the fact that the worker's accident

job is temporary in nature is not sufficient to conclude that the worker's pattern of employment is casual.

For example:

- A worker is injured at a job that was scheduled to last less than three months. Before the accident job, the worker was unemployed for 12 months providing full time care for her infant son. As a result, it is appropriate to review a longer period to determine whether the worker's pattern of employment is casual in nature (e.g., 24 months prior to the injury).

If, during the extended period of review, additional absences are evident, they would form part of the consideration for determining whether the worker's pattern of employment is causal in nature. It should be noted that the rationale for any specific period of unemployment is not relevant to determining if the worker's pattern of employment may be appropriately characterized as casual.

Notwithstanding that a period of review greater than 12 months is used, if the worker's pattern of employment is determined to be casual in nature, the worker's average earnings would be calculated with reference to the 12-month period immediately preceding the date of injury.

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<b>CROSS REFERENCES:</b>	See section 33.5 of the <i>Workers Compensation Act</i> , and <i>RSCM Vol. II, Policy item #67.10, Casual Pattern of Employment</i> .
<b>HISTORY:</b>	This item replaces Practice Directive #33B, <i>Casual Workers</i> .
<b>APPLICATION:</b>	This item is effective January 1, 2006 and applies to all decisions on or after that date.