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**2017/11/22-03**

**THE WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA**

**RESOLUTION OF THE BOARD OF DIRECTORS**

**RE: Measurement of Earnings Loss**

**WHEREAS:**

Pursuant to section 82 of the *Workers Compensation Act*, RSBC 1996, Chapter 492 and amendments thereto ("*Act*"), the Board of Directors ("BOD") must set and revise as necessary the policies of the BOD, including policies respecting compensation, assessment, rehabilitation, and occupational health and safety;

**AND WHEREAS:**

Subsections 23(3) and 23(3.1) of the *Act* provide that where a permanent partial disability results from a worker's injury and the Board determines the combined effect of the worker's occupation at the time of the injury and the worker's disability resulting from the injury is so exceptional that an amount determined under section 23(1) does not appropriately compensate the worker, the Board may pay the worker compensation that equals 90% of the difference between the average net earnings before the injury and either the average net earnings after the injury or the average net earnings the Board estimates the worker is capable of earning in a suitable occupation after the injury;

**AND WHEREAS:**

Policy item #40.13, *Measurement of Earnings Loss, of the Rehabilitation Services & Claims Manual*, Volume II ("*RS&CM*"), provides guidance on the calculation of a worker's loss of earnings award determined under section 23(3) of the *Act*;

**AND WHEREAS:**

Policy was identified as requiring review following concerns raised with aspects of the calculation of a worker's loss of earnings;

**Mailing Address**  
PO Box 5350 Stn Terminal  
Vancouver BC V6B 5L5

**Location**  
6951 Westminster Highway  
Richmond BC V7C 1C6

**Telephone** 604 276-3190  
Fax 604 276-3151  
worksafebc.com

**AND WHEREAS:**

The Policy, Regulation and Research Division completed stakeholder consultation on this issue and has advised the BOD on the results of the consultation;

**THE BOARD OF DIRECTORS RESOLVES THAT:**

1. Amendments to policy item #40.13, *Measurement of Earnings Loss*, of the *RS&CM*, attached as Appendix A of this resolution, are approved;
2. This resolution is effective April 1, 2018 and applies to all decisions made on or after April 1, 2018, including appellate decisions; and
3. This resolution constitutes a policy decision of the Board of Directors.

DATED at Richmond, British Columbia, November 22, 2017.

**By the Workers' Compensation Board**

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**JOHN BECKETT, CRSP, CPHR, MBA, ICD.D  
CHAIR, BOARD OF DIRECTORS**

## APPENDIX A

### *Rehabilitation Services & Claims Manual, Volume II*

ADDITIONS IN BOLD, DELETIONS STRUCKTHROUGH

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

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

The latter figures are obtained by ascertaining the earnings in the occupations which have been found to be suitable and reasonably available according to the criteria set out in policy item #40.12 and determining the earnings figure which will maximize the worker's long-term earnings potential.

A worker's post-injury wage loss will be based on estimated earnings rather than on actual earnings in the following cases:

- The worker is employable but does not have a job; or
- The worker has a job but is not maximizing his or her earning capacity up to the pre-injury rate; or
- The worker has, for personal reasons, withdrawn from the workforce; or
- The worker fails to co-operate with the rehabilitation process.

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

Although assessment of a permanent partial disability award will often be made some time after the original injury, it would not be fair to compare directly the actual pre-injury average earnings with the earnings the worker might now earn in the occupations

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available. The effect of inflation upon earnings levels would mean that the real loss would not be properly determined in that way.

The practice of the Board is to use the earnings in the occupations available after the injury, as they stood at the date of the injury, **where these are available and are a reliable and accurate reflection of the worker's post-injury earning capacity. For example, the Board may use actual earnings in post-injury occupations where earnings are the provincial minimum wage.** ~~It occasionally happens that~~

**When earnings in occupations at the time of the injury are not available, or are not a reliable and accurate reflection of the worker's post-injury earning capacity,** ~~If this occurs, it may be necessary to use the earnings in those occupations as they were at another date and bring the pre-injury earnings into line by applying cost of living adjustments as described in policy item #51.00.~~ **the Board will use current earnings in the occupations available after the injury, and adjust them back to the date of injury by the wage inflation adjustment factors applicable in those years. The wage inflation adjustment factor effective for a given year is the percentage change in that year's maximum wage rate from the year prior, but not less than zero.**

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

**EFFECTIVE DATE:** ~~November 1, 2002~~ **April 1, 2018**  
**HISTORY:** **April 1, 2018 – Policy revised to clarify when earnings are adjusted for inflation and to revise the factor used to account for inflation. Under this approach, the factor would be determined using the process for changing the maximum wage rate as set out in section 33(7) – (10) of the Act.**  
**APPLICATION:** ~~To decisions made on or after November 1, 2002 on claims adjudicated under the Act, as amended by the Workers Compensation Amendment Act, 2002~~ **Applies to all decisions made on or after April 1, 2018, including appellate decisions.**