WORK SAFE BC
WORKING TO MAKE A DIFFERENCE

COMPENSATION PRACTICE AND QUALITY DEPARTMENT

PRACTICE DIRECTIVE # C5-5	
TOPIC:	**Selective/Light Employment**
ISSUE DATE:	**January 25, 2011, Amended May 5, 2014**

Objective

This practice directive provides guidance to WorkSafeBC officers in determining a worker's entitlement to temporary disability benefits when an employer offers a temporary work alternative.

Law & Policy

Section 30 (1) of the *Workers Compensation Act* (the "*Act*") provides:

30 *(1) Subject to sections 34 (1) and 35 (1), (4) and (5), if a temporary partial disability results from a worker's injury, the Board must pay the worker compensation that is a periodic payment that equals 90% of the difference between*

(a) the worker's average net earnings before the injury, and

(b) whichever of the following amounts the Board considers better represents the worker's loss of earnings:

(i) the average net earnings that the worker is earning after the injury;

(ii) the average net earnings that the Board estimates the worker is capable of earning in a suitable occupation after the injury.

Policy item # 34.11, Selective/Light Employment in WorkSafeBC's Rehabilitation Services and Claims Manual ("RSCM") describes the principles underlying temporary alternative work and establishes the criteria that must be met in order for such arrangements to be considered suitable. The policy criteria are as follows:

- The worker must be capable of undertaking some form of suitable employment;
- The work must be safe and cannot harm or slow the worker's recovery. The work must also be within the worker's medical restrictions, physical limitations and abilities;

- The work must be productive; and
- Within reasonable limits, the worker must agree to the arrangement.

If one or more of the above criteria is not met, the proposed selective/light employment is not considered suitable, and the worker's wage loss benefits are not adjusted (not determined under section 30) to reflect the modified work offer at that time.

Adjudicative Guidelines

(A) What is Selective/Light Employment?

Selective/light employment is a temporary work alternative that is intended to promote gradual restoration to the worker's pre-injury level of employment.

Selective/light employment arrangements are meant to minimize the consequences of the compensable injury by aiding in recovery, and eliminating or reducing the worker's loss of income during the early stages of a temporary disability. Where a worker participates in selective/light employment, temporary disability benefits are determined under section 30 of the *Act*. If the worker refuses to participate and WorkSafeBC determines the refusal was unreasonable, benefits are similarly determined under section 30, and the WorkSafeBC officer may deem the worker capable of earning what the worker would have earned had he or she accepted the selective/light employment arrangement.

Selective/light employment arrangements are generally characterized by duties different from the pre-injury employment or by some modification of the pre-injury duties and/or hours of work. They may also involve a change in the work location or work environment. In some cases the alternate work location may be the worker's home.

Selective/light employment is typically offered at or soon after the date of injury, often prior to WorkSafeBC's involvement in the claim. The offer may be made verbally or in writing. The development of selective/light employment opportunities depends on the cooperation of all parties in the workplace and may involve consultation between the worker, the employer, the attending physician and the worker's union.

Distinct from selective/light employment offers are graduated return to work opportunities offered some time after the injury, and generally closer to recovery or the date of plateau. Where there is a refusal of modified duties at a later point in the claim (e.g. following discharge from a treatment program) RSCM Policy items # 35.21 (Suitable Occupation) and # 35.20 (Amount of Payment) should be considered.

(B) WorkSafeBC's Intervention in the Developing Selective/Light Employment Arrangements

Most selective/light employment arrangements are developed without the assistance of WorkSafeBC. However, where there is a disagreement regarding the suitability of the selective/light offer, policy requires WorkSafeBC to intervene. WorkSafeBC intervenes to determine if a particular offer of selective/light employment is suitable when:

- the worker and/or his or her physician disagrees with the employer's position that the work is safe;
- the worker and the employer are in disagreement over the terms of the return to work;
- there is a request by either the employer or the worker for WorkSafeBC to intervene; or
- WorkSafeBC considers that further inquiry is required.

WorkSafeBC's evaluation of the selective/light employment offer is based on, but not limited to, a detailed description of the employment offered including;

- the physical requirements of the employment offered, and
- detailed medical information regarding the worker's medical restrictions, physical limitations and abilities.

When WorkSafeBC is required to intervene the employer has to provide specific details of the selective/light employment offer to WorkSafeBC so that the officer can evaluate whether or not the policy criteria have been met. It is not sufficient for the employer to simply state that light duties are available. Enough detail must be provided to allow the WorkSafeBC officer to determine that the duties are suitable, safe, productive and in keeping with the worker's medical restrictions and physical limitations. A WorkSafeBC officer cannot determine that the selective/light employment arrangement is suitable where the arrangement is still under development and the officer does not have an understanding of what the alternate/modified duties are or whether they are safe for the worker to perform.

(C) Determining Whether or not the Selective/light Employment Offer is Safe and Within the Capabilities of the Worker

Although not limited to these questions, in determining whether a particular offer of selective/light employment is safe and unlikely to delay recovery, the WorkSafeBC officer may consider the following factors;

- Would the safety of the worker or any co-workers be compromised by the worker completing the selective/light tasks offered by the employer?
- What types of activities are contraindicated by the worker's injury?
- Does the selective/light employment arrangement allow the ability to 'self-pace' where this is medically required or recommended? (e.g. – the worker can take rest breaks or stretch breaks as needed)
- Is the worker's medication use compatible with the completion of the work tasks?
- Are there any non-compensable medical conditions that impact the worker's ability to complete the work tasks?

A Nurse Advisor can assist in investigating and providing an opinion concerning the suitability of the selective/light employment offer. However, the application of the policy is the decision of the WorkSafeBC officer.

In situations where the Medical Advisor and/or Nurse Advisor are of the opinion that the selective/light employment is within the worker's capabilities but the worker's physician has provided a contrary opinion, the medical advisor and/or nurse advisor should contact the worker's physician to confirm that the worker's physician's understanding of the worker's capabilities and the requirements of the selective/light employment is the same as those of WorkSafeBC. The worker's physician's opinion must be considered as part of the decision-making process.

If the WorkSafeBC officer determines that the proposed selective/light employment arrangement is not suitable, the officer notifies the employer and explains why the offer is not suitable. The officer or Nurse Advisor may also work with the employer to improve the offer.

(D) Determining Whether or not the Work is Productive

Although selective/light employment arrangements often involve duties different from the pre-injury employment, in most cases it will be apparent that the selective/light arrangement is productive and provides a benefit to the employer. When there is concern that the selective/light employment arrangement may not be properly characterized as productive work, WorkSafeBC considers not only the physical requirements of the work but also the purpose of those activities.
In determining whether the work is "productive" as required by the policy, the WorkSafeBC officer considers factors such as;

- How the work will benefit the employer,
- Whether the task is normally done by a non-injured worker,
- Whether the work is something that at another time the employer would pay someone to do, and
- If training-related, whether it is the type of training that the employer would pay the worker to undertake at another time.

A suitable selective/light employment arrangement can be neither token nor demeaning. Such tasks are considered detrimental to the worker's rehabilitation. Token employment involves tasks that represent no more than symbolic effort and are limited in their practical effect.

Whether or not a particular work task is demeaning is a subjective determination. Therefore, such a determination should be considered within the larger context of the worker's usual roles and responsibilities with that employer. The WorkSafeBC officer should consider whether the offer is a sincere effort to provide the worker with an appropriate selective/light employment arrangement or whether it is intended to be punitive or degrading. If the WorkSafeBC officer decides that the selective/light employment offer is token, demeaning or not productive, then the arrangement is not suitable and the officer notifies the employer and explains why the offer is not suitable.

On its own, a meeting between the worker and employer to develop a selective/light employment offer or to explore suitable options, does not generally satisfy RSCM Policy item # 34.11 as no offer has been made at that time. Such a meeting, while important in arranging suitable employment, would not itself be considered productive work for the purposes of determining entitlement under section 30.

However, if the employer is able to arrange selective/light employment that commences on the same day as the meeting, the policy requirements have been met. For example, a worker trips at work and lands awkwardly resulting in a shoulder sprain/strain. He attends his family doctor the day of the accident as requested by his employer and comes in to work the following day with an opinion from his physician about what work activities should be avoided. The worker and employer meet to talk about suitable duties and the employer offers appropriate work that is available that same working day. The employer pays the worker for the entire day. In this case, the worker's benefit entitlement is determined under section 30 and no wage loss benefits are payable for the day. This would also be the case if the worker spends time that day doing orientation and necessary training prior to commencing the selective/light duties the following day. Where a worker requires orientation or training to be able to complete the selective/light duties, such training/orientation is generally considered productive work.

(E) Determining Whether or not the Worker's Refusal is Reasonable

When a worker refuses to accept a selective/light work offer, the WorkSafeBC officer is required to consider the reasons for the refusal and determine whether they are reasonable. Policy requires the officer to compare the worker's medical capabilities (including medical restrictions and physical limitations) to the physical requirements of the selective/light work being offered. Nurse Advisors can assist by providing a clinical opinion on whether the current functional capabilities match the job demands of the work being offered.

In determining whether the worker's refusal is reasonable the WorkSafeBC officer should also consider whether the worker was appropriately informed about the offer. It is not sufficient for the employer to only tell the worker that light duties are available. Enough detail must be provided to allow the worker to conclude that the duties are safe

for him or her to perform and are in keeping with his or her abilities. The details of the offer may be provided verbally or in writing.

(i) Refusal Based on Treating Physician's Opinion

When a worker refuses an offer of selective/light employment based on a recommendation of his or her treating physician, such a refusal is often considered reasonable. Most patients place considerable faith in their physicians and therefore, acting in accordance with the opinion or recommendation of one's physician would be reasonable in most cases, provided the physician is aware of the duties being offered.

However, this factor alone is not determinative of whether or not the worker's refusal is reasonable.

In cases where there is an opinion from the treating physician stating that the worker is unfit for any work and the worker refuses the selective/light employment on that basis, the WorkSafeBC officer may find the refusal to be unreasonable. The physician may not have been aware of the specific details of the selective/light employment arrangement when they recommended the worker not yet return to work.

There will be some cases where a layperson can reasonably determine that the work is safe and within the capabilities of the worker, despite the fact that the physician had said the worker was unfit for any work. For example, a worker with a minor ankle strain can safely perform work tasks that do not involve standing or walking and allow the worker to elevate his or her injured ankle. If the worker refuses such an offer based solely on the fact that his or her treating physician advised them to remain off work until the next medical appointment, such a refusal would not be considered reasonable.

Where there is an offer of selective/light employment but the treating physician has indicated that the worker is not fit for any type of work and that does not seem to be the case, the Medical Advisor or Nurse Advisor should contact the treating physician to discuss the worker's abilities.

(ii) Refusal Based on Other Factors

To determine if the refusal is reasonable, WorkSafeBC officers can consider factors other than the worker's physical suitability to the selective/light arrangement. For example, transportation or childcare issues may be relevant. As part of the selective/light employment offer, the employer should provide details concerning the work location and schedule if they differ from the worker's normal employment arrangement.

(iii) Unreasonable Refusal

RSCM Policy item # 34.11 cites two examples where a worker's actions may be considered an unreasonable refusal. One is where a worker fails to provide the selective/light duties to the attending physician. The other example is where a worker refuses the selective/light offer even after it has been approved by his or her physician.

Where a worker fails to attend a return to work meeting or in some way intentionally obstructs or delays the development of the selective/light employment offer, such actions are likely to be considered an unreasonable refusal. In determining whether a worker intentionally obstructed or delayed the development of the selective/light employment offer, the WorkSafeBC officer may want to consider the following;

- Did the employer provide any documentation detailing the selective/light employment offer that the worker was instructed to take to his or her physician?
- Was the worker aware that he or she was to take the information to his or her physician and did he or she comply?
- Had the worker previously participated in selective/light employment arrangements with this employer?
- Are modified duties regularly discussed at safety or staff meetings?
- Did the worker have prior knowledge of the employer's modified duties program?
- Did the worker ignore reasonable efforts by the employer to set up a selective/light employment opportunity?

The policy recognizes that a successful selective/light employment arrangement depends on the cooperation of all the parties in the workplace. This is true both in the development of such an arrangement, and during the on-going management of and participation in the arrangement. The employer is expected to adhere to the agreed upon work duties and the worker is expected to cooperate and participate in a way that is consistent with the selective/light employment offer and the goals of that offer. Inappropriate behaviour by the worker during a selective/light employment arrangement may be interpreted as a refusal to participate and the worker's entitlement to section 30 benefits will be determined accordingly. Conversely, if the worker refuses to continue participating in the selective/light arrangement because of changes made in the work duties, the WorkSafeBC officer should consider the worker's reasons for the refusal at the time and determine whether the refusal to continue the arrangement is reasonable.

Where it is determined that the worker's refusal is unreasonable, the WorkSafeBC officer notifies the worker and explains why the refusal is considered unreasonable. Benefit entitlement is then determined under section 30 of the *Act* and adjusted effective the date the selective/light employment was considered suitable and available, as determined by the WorkSafeBC officer.

(F) Determining the Effective Date when Applying Policy #34.11

RSCM Policy item # 34.11 provides that *"benefit entitlement will be adjusted effective the date the selective/light employment was suitable and available, as determined by the Board."* This means that the policy criteria must be met and the selective/light employment offer deemed suitable before benefits are adjusted. In cases where benefits are adjusted, the effective date is the date the policy criteria was met and the

suitable selective/light employment arrangement was made available by the employer, rather than the date the WorkSafeBC officer is considering the matter.

The WorkSafeBC officer may conclude that the light duties were available, suitable and the worker's refusal was unreasonable, and that all this occurred before the claim was established with WorkSafeBC. There is no requirement that the worker be made aware of the criteria of RSCM Policy item # 34.11 and the consequences for refusal prior to the effective date of the section 30 adjustment. Policy item #34.11 can be applied to situations that have occurred in the past. Unlike suspension of benefits, workers do not need to be warned that their benefits may be affected if they choose not to accept a suitable selective/light employment offer. If the worker was presented with a suitable selective/light employment opportunity and unreasonably declined to participate, the WorkSafeBC officer can adjust the worker's benefit entitlement for the period in question to reflect the earnings the worker was deemed capable of earning.

In other cases the WorkSafeBC officer may conclude that the worker's refusal at the time the selective/light employment was first offered was reasonable. However, at a later time when the worker has had the benefit of further discussion and clarification with his or her physician and the WorkSafeBC officer, the worker's continuing refusal may no longer be considered reasonable. In such cases, the section 30 adjustment would be effective the date the worker's refusal was no longer considered reasonable.

CROSS REFERENCES:	N/A
HISTORY:	This Information Sheet was developed to provide guidance on policy item # 34.11, *Selective/Light Employment*. Additional information was added on May 5, 2014 to clarify the application of Policy #34.11 when the employer and worker meet to develop a selective/light duties plan and the employer is able to offer appropriate duties that commence later that same day.
APPLICATION:	The adjudicative guidelines are relevant to all decisions made on and after January 25, 2011.