

Practice Directive #35

Employment Insurance Payments

Date: June 30, 2002

BACKGROUND

On June 30, 2002, section 33 of the *Workers Compensation Act* (the “Act”), relating to the calculation of average earnings, was amended by Bill 49, the *Workers Compensation Amendment Act, 2002*. As a result, the Panel of Administrators approved amendments to the Board's policies concerning average earnings and the inclusion of Employment Insurance (“EI”) payments in certain situations.

PURPOSE

This practice directive provides an overview of the legislative and policy changes relating to the inclusion of EI payments in the composition of average earnings.

This Practice Directive does not provide guidance for determining a worker's average net earnings. Please see Practice Directive #32, *Net System of Compensation* and Practice Directive #33, *Composition of Average Earnings – Initial and Long-Term Wage Rates*.

EFFECTIVE DATES AND TRANSITION RULES

Please see Practice Directive #38, *Effective Dates, Recurrences and Transition Rules*.

LAW

Section 33(3.2) of the *Act* states, in part, that:

...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.

POLICY

Prior to June 30, 2002, Board policy precluded the inclusion of EI payments when calculating a worker's average earnings.

Rehabilitation Services and Claims Manual (“RSCM”) Volume II, Policy item #68.40, *Employment Insurance Payments*, provides that, 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 recurring interruptions of employment, those payments may be included in calculating a worker's earnings.

A. EI CANNOT BE CONSIDERED FOR THE FOLLOWING CATEGORIES:

- Persons who have purchased Personal Optional Protection ("POP") (section 33.6)
- Apprentices or Learners (section 33.2)
- Persons employed less than 12 months (section 33.3)

B. EI CAN BE CONSIDERED FOR THE FOLLOWING CATEGORIES:

1. Initial Wage Rate Categories

EI payments may be considered when setting the initial wage rate where a worker is categorized as casual. Also, where the worker is a non-earner and has secondary employment there is discretion to determine average earnings and therefore, include EI. (For the non-earner and casual worker, there is no average earnings review at 10 weeks).

2. Long-Term Wage Rate Categories

EI payments may be considered when setting the long-term wage rate where a worker is categorized as a regular worker (greater than 12 months with accident employer).

C. ELIGIBILITY

If the worker is in one of the above categories ("B"), EI may be added to the composition of average earnings. Only if the worker is employed in a:

- a) seasonal industry;
- b) seasonal occupation; or
- c) industry or occupation that results in temporary recurring interruptions of employment.

D. HISTORY/PATTERN OF RECURRING INTERRUPTIONS

If the worker meets the above minimum requirement, it does not follow that EI is included in every case. Board officers should note the use of the word "may" in the legislation. Therefore, in order to include EI in the calculation of average earnings, the worker must also demonstrate a history/pattern of the above ("a", "b" or "c") interruptions before the Board will actually include the EI in average earnings. The worker must offer evidence – i.e., a written statement that he/she has been in the occupation or industry for at least two years (although not necessarily with the accident employer). The Board will confirm the worker's evidence by looking at copies of the statement of benefits from HRDC for the two years preceding the date of injury.

ADJUDICATIVE GUIDELINES / INFORMATION

1. With respect to determining whether an industry or occupation is seasonal (see “a” and “b” under “Eligibility”), policy provides for lists of applicable industries and occupations that result in recurring seasonal interruptions of employment. These lists will be available on BoardNet on the Policy & Practice homepage and will be amended periodically by the Board’s Statistical Services Department.
2. A Board officer will determine on a case by case basis if a worker’s employment is in an industry that results in recurring temporary interruptions of employment. (see “c” under “Eligibility”.) Recurring temporary interruptions in employment show a repeating pattern but are not seasonal in nature. For example, workers employed in the field of education who are laid off and receive EI benefits on a regular annual basis.
3. If all the eligibility criteria described above are met, EI payments will be added to gross average earnings, subject to the statutory maximum. Any EI payments received within the 12 months preceding the date of injury may be used to calculate average earnings. This means that payments can be included even if they are for two or more separate periods of unemployment.
4. Information regarding EI for casual workers or non-earners is requested at the outset of a claim. Information relating to EI payments for regular workers is requested by the Board officer at 5 weeks of short-term disability.
5. The EI statement of benefits from HRDC does not indicate why a worker was laid off. It does, however, indicate whether or not a worker was receiving EI due to medical disability. If a worker was receiving EI due to medical disability, the payments should not be included in the composition of the worker’s earnings for the purposes of section 33(3.2).