To: Jill Callan, Chair

From: Herb Morton, Vice Chair

Date: December 14, 2007

Re: Section 251 Referral – RSCM II Policy item #67.60
Exceptional Circumstances (Average Earnings)

This is a referral to the chair under section 251 of the *Workers Compensation Act* (Act). I consider policy item #67.60, "Exceptional Circumstances," of the *Rehabilitation Services and Claims Manual, Volume II* (RSCM II), to be so patently unreasonable that it is not capable of being supported by the Act and its regulations.

1. Introduction

The worker has appealed the April 11, 2007 Review Division decision (*Review Decision #R0075122*) to the Workers' Compensation Appeal Tribunal (WCAT). The worker's appeal concerns the long-term wage rate set on her claim. She objects to the inclusion of the time periods during which she was in receipt of workers' compensation benefits on prior claims.

The worker's appeal is proceeding on the basis of written submissions. In connection with this appeal, the worker was provided with disclosure of this claim and 11 of her prior claim files between 2000 and 2005. The employer was notified of the appeal but is not participating. The worker's union representative provided a written submission dated August 16, 2007, in which she argues:

> …to find otherwise is to determine that absence from the workplace due to compensable injuries is not exceptional, but usual. To so find tacitly dismisses the preventive mandate of Worksafe BC and thwarts the purpose of the entire compensation scheme.
>
> [all quotations in this memorandum reproduced as written, apart from changes noted]

2. Background

The worker was born in 1962. She is employed as a food packer for a food processing plant. She commenced working for her employer in July, 1987. On September 29, 2005, she slipped on some hydraulic oil which had leaked from a machine on to the floor. The worker remains in receipt of wage loss benefits (last payment to December 9, 2007).

By decision dated October 27, 2006, the case manager advised the worker regarding the calculation of her 10-week wage rate. The case manager advised the worker that her long-term wage rate was based on her earnings from the one year prior to her September 29, 2005 injury, without any deduction of the periods of disability during which she was in receipt of workers' compensation benefits for her prior work injuries. The case manager concluded that these absences during the preceding 12 months were not "atypical," within the meaning of the policy at RSCM II item #67.60 which governs the exercise of the Board's discretion under section 33.4 of the Act. The case manager noted:

> During the 12 months prior to injury (September 29, 2004 – September 28, 2005) 64 days of temporary total disability (TTD) wage loss benefits and 11 days of temporary partial disability (TPD) wage loss benefits were provided as follows:
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> | | | |
> |---|---|---|
> | GC05[…]5 | (February 11, 2005 – March 13, 2005) | - 21 days |
> | GC05[…]6 | (March 24 – May 17, 2005) (plus 11 days TPD benefits) | - 27 days |
> | GC05[…]2 | (September 2, 2005 – September 25, 2005) | - 16 days |
> | | | = 64 days |
>
> [claim numbers edited for confidentiality]

The case manager included information regarding the worker's history of workers' compensation claims. The case manager found that the worker received wage loss benefits under these claims for the following number of days per year (utilizing the 12 month time period ending September 29 of each year):

2003 to 2004	59 days
2002 to 2003	49 days
2001 to 2002	22 days
2000 to 2001	90 days

The case manager concluded:

> The above supports that you have had regular periods of disability and absence from work and therefore your absence in the one year prior to your most recent injury under claim [number] can not be considered, "…**a significant atypical and/or irregular disruption in the pattern of employment during that period of time**…" (emphasis added), as required by the current legislation.

The worker requested review by the Review Division. By decision of April 11, 2007, the review officer confirmed the case manager's decision. The review officer noted:

> In this case, I am satisfied that the worker has demonstrated a history of regular, full-time employment. She has been employed by the same employer on a full-time basis since 1987. The next consideration, according to policy item #67.60, is whether the worker's earnings in the 12 months immediately preceding the date of injury do not reflect her historical earnings because of a significant atypical and/or irregular disruption.

The review officer noted that the worker had submitted 25 workers' compensation claims since 1989. He concluded:

> … I am of a view that the worker's recent extended absences from work do not amount to exceptional circumstances such that the application of the general rule (and the use of the worker's 12 month pre-injury earnings to set the rate) would be inequitable.
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> Before an absence can be deducted, policy item #67.60 provides that it must be shown that the "worker's *earnings* in the 12 month period immediately preceding the date of the injury do not reflect [his or her] historical *earnings* because of a significant atypical and/or irregular disruption in the pattern of employment" (my emphasis). In the five years immediately preceding the date of injury, the worker missed, on average, 62 work days (roughly 12 work weeks) per year as a result of her prior compensable claims. As a result, the worker's earning capacity in each of those years was decreased, on average, by 62 days. In my mind, this is sufficient evidence of a longstanding employment earnings pattern, albeit one that resulted in lower earnings in each of the last five years. Therefore, the worker's employment earnings in the

> 12 months immediately preceding the date of injury (which were reduced by not working for approximately 15 weeks) likely did reflect her recent historical employment earnings pattern on the basis that she worked approximately 12 weeks less in each of the previous four years, resulting in a corresponding decrease in earnings in each of those years.
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> As a result, I find, pursuant to section 33.4 and policy item #67.60, that exceptional circumstances did not exist such that the application of section 33.1(2) would be inequitable. There are also no other exceptions under the *Act* which might apply to this worker's circumstances. Accordingly, I find that the Board has properly applied the general rule for the determination of long-term average earnings under section 33.1(2), and based the worker's long-term wage rate on her gross earnings in the 12 months immediately preceding the date of injury. I therefore deny the worker's request.

In his decision, the review officer also applied *Practice Directive #33C*, "Long-Term Average Earnings: Section 33.4 Exceptional Circumstances," October 1, 2005.

A brief summary of the circumstances regarding the worker's prior workers' compensation claims is attached as **Appendix A** (concerning the claim files which were disclosed in connection with this appeal).

3. Act and Policy

Section 33.1(2) of the Act provides:

> Subject to sections 33.2 to 33.7, if a worker's disability continues after the end of the period referred to in subsection (1) (a) and (b) that is shorter for the worker, the Board must, for the period starting after the end of that shorter period, **determine the amount of average earnings of the worker based on the worker's gross earnings, as determined by the Board, for the 12 month period immediately preceding the date of injury.**
>
> [emphasis added]

Section 33.4 of the Act provides:

> **33.4** (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.

The policy of the board of directors governing the exercise of discretion under section 33.4(1) of the Act is set out at RSCM II item #67.60. The portion of this policy which is relevant to the worker's appeal is as follows:

> Section 33.4 is a discretionary provision and an exception to the application of section 33.1(2) for determining a worker's long-term average earnings. As such, it will only be applied where the Board determines that, due to exceptional circumstances, the application of section 33.1(2) is inequitable.
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> The inequity is that the level of compensation calculated does not best reflect the worker's long-term loss of earnings. In making this determination, "best" does not mean the highest level of compensation possible, but rather, that the level of compensation reflects the actual loss incurred by the worker.
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> The following criteria shall be applied to determine if a worker's circumstances are exceptional:
>
> (a) Where the Board determines that the worker had a history of regular full time employment, and the worker's earnings in the 12-month period immediately preceding the date of the injury do not reflect the worker's historical earnings because of a significant atypical and/or irregular disruption in the pattern of employment during that period of time.
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> - This circumstance may arise, for example, if the worker has had an absence of more than six consecutive weeks in the 12-month period immediately preceding the date of injury and

> the absence was due to illness, educational or maternity/paternity reasons.
>
> In such cases, the Board may deduct the period of the absence or use a longer period of the worker's employment history (e.g., 24-month period) to determine long-term average earnings.

The policy contains two additional criteria as (b) and (c), which are not relevant to the worker's circumstances.

4. Prior Consideration of Policy

Section 250(1) of the Act provides that WCAT is not bound by legal precedent. However, the reasoning in prior decisions may provide helpful guidance. The reasoning in two prior decisions illustrates two different interpretations of the policy, as described below. Additional excerpts from other WCAT decisions concerning section 33.4 of the Act are attached as **Appendix B** to this memorandum.

In *WCAT Decision #2006-01508*, March 30, 2006, the WCAT panel considered the case of a worker who was injured in 2003. The WCAT panel noted the following background information:

> In a decision dated September 29, 2004, the review officer noted that the worker had two claims in the 12-month period immediately prior to the date of injury that resulted in the worker being disabled from employment, either totally or partially, from November 21, 2002 to February 1, 2003 and from May 28, 2003 to June 2, 2003. From his review of the claim file, it did not appear to the review officer that the CM had considered those absences as an exceptional circumstance, as contemplated under section 33.4 and item #67.60 of the RSCM II. The review officer therefore referred the Board's April 22, 2004 decision back to the Board for further investigation as to whether special circumstances pursuant to section 33.4 of the Act and item #67.60 of the RSCM II applied to the facts of this case. The Board was directed to provide the worker and the employer with a subsequent decision on the worker's long-term wage rate.
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> In implementation of the Review Division's September 29, 2004 decision, the CM reviewed the worker's claim history for the previous five years. **The CM determined that he had received wage loss**

> **benefits for 37 weeks in 1999, 52 weeks in 2000, 30 weeks in 2001, 15 weeks in 2002, approximately 16 weeks in 2003 and 48 weeks to date in 2004.** In a memo to the claim log dated, November 29, 2004, the CM set out her conclusions regarding the worker's long-term wage rate. Having reviewed the applicable law and policy, as well as the worker's 5-year claim history, the CM was not of the opinion that special circumstances existed. She noted that the worker's absences in the 12 months prior to the October 2003 compensable injury here at issue were not "atypical or irregular," and confirmed her opinion that the information used in determining the worker's long-term wage rate reflected the worker's long-term earnings pattern.
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> In a decision letter dated November 30, 2004, a Board CM advised the worker that there would be no change in the long-term wage rate set out in her April 22, 2004 letter. The CM was not of the opinion that the worker's absences from work in the 12 months preceding the date of injury were "atypical", nor should they be viewed as a "special circumstance." Those periods would not be deducted when calculating the worker's long term wage rate.
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> [emphasis added]

The WCAT panel reasoned:

> In this case, the worker has had a 25 year history of regular, full-time employment with the accident employer. It is his evidence, that he had not missed any time from that employment due to ill health or injuries until 1999. The claim file indicates a few injuries over the worker's 25 year employment history, but certainly not an excessive number, given the heavy nature of his work. **It was only after his left knee injury in February 1999 that he began losing significant time from work.** He was anxious to return to work, but suffered an injury to his shoulder – which the Board accepted as compensable – which prevented him from doing so. The worker attempted a graduated return to work in March 2000, but ongoing shoulder complaints required surgery, followed by a second surgery. The worker then suffered the 2003 injury which is the subject of the current appeal.
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> **The purpose of the worker's compensation system is to fairly compensate a worker for work-related injuries. It would be ironic in the extreme if workers having a second injury were to**

> **be penalized, *vis-à-vis* the long term average wage rate, for receiving benefits for a prior injury. The only reading of the words "assortment of significant previous disruptions" consistent with the goals of the compensation system is that the Board intended to capture non-compensable illnesses or injuries, or non-occupational activities which removed the worker from the work environment.**
>
> **I agree with the worker's representative that to penalize the worker, because of a work injury and its consequences, would be unfair and unjust, and would certainly not result in a long term average earnings rate which best reflect the worker's loss as a result of his compensable injury.**
>
> I find that the worker's situation constituted an exceptional circumstance, and his earnings in the year prior to the 2003 compensable injury were atypical. The Board is directed to recalculate the worker's long term average earnings based on the worker's earnings in the 12 months prior to his injury but deducting from that period those days when the worker was disabled from work due to his previous compensable injury.
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> [emphasis added]

WCAT Decision #2006-03578, September 18, 2006, applied a different analysis. This decision concerned a worker who had been working for the same employer since February 1994, and suffered a work injury in 2005. The worker argued that his taxable income in 2004 had been reduced by a considerable amount because he had been on wage loss benefits from May 3, 2004 to August 5, 2004, and from August 17, 2004 to November 4, 2004. In this latter decision, the WCAT panel reasoned:

> The practice directive reminds Board officers that the reason for the absence is not relevant, nor does the absence need to be similar in nature to those listed in the policy. An absence, for any reason, may be considered, so long as it represents an atypical/irregular disruption in a history of otherwise regular employment.
>
> Where the above criteria are met, Board officers may deduct the period of absence, unless a longer period of time is clearly more appropriate. Since the policy uses "or," this generally means that Board officers cannot deduct the absence and use a longer period of time.

> The worker is a regular worker, and, subject to the exception provided for in section 33.4 of the Act, the worker's long-term average earnings are determined by his gross earnings in the 12 months preceding the date of his injury, from August 2, 2004 to August 1, 2005. During that period, the worker missed approximately 55 days from work which, based on a five day work-week, amounts to 11 weeks of work. However, as set out in the Review Division decision, the worker was also off work for significant amounts of time in four of the seven years prior to his injury, that is: 108 days (21.6 weeks) between August 2, 2003 and August 1, 2004; 53 days (10.6 weeks) between August 2, 2001 and August 1, 2002; 30 days (6 weeks) between August 2, 2000 and August 1, 2001; and, 46 days (9.2 weeks) between August 2, 1997 and August 1, 1998**. I accept that the worker would rather have been working than receiving wage loss benefits during these absences. However, I agree with the review officer's conclusion that the worker's history of employment confirms that he does not have a history of regular full-time employment. He was a full-time employee, but did not work full-time hours due to a series of compensable injuries**.
>
> I acknowledge the worker's position that, had he been receiving his wage rather than wage loss benefits he would have been entitled to make higher Canada Pension Plan contributions. However, the reason for a worker's absence from work does not determine whether exceptional circumstances exist. Rather, the worker's employment pattern and history must be examined to determine whether the absence is one that is significantly atypical or irregular. In the circumstances, I do not consider that the worker's circumstances were "exceptional" as required by the Act and published policy, nor do I consider that the facts establish that using the worker's earnings of $45,950.00 in the one year prior to his injury produced an inequitable result.
>
> [emphasis added]

In the present case, the review officer distinguished *WCAT Decision #2006-01508* on the basis of the following reasoning:

> The worker's history in the WCAT decision was one of uninterrupted employment over many years and, as a result of one significant injury, the worker experienced both a significant and

> atypical absence in the pattern of his employment. In the case before me, while the worker has demonstrated a history of uninterrupted employment (by having an ongoing employment relationship with the same employer for many years), she has been subject to an "assortment of significant previous disruptions", rather than one resulting from a singular injury. Therefore, the fact pattern is different from the facts in the WCAT decision in that respect, and the worker's circumstances more closely resemble the scenario outlined in the practice directive.

5. Analysis

Under the current provisions of the Act, a worker's long-term wage rate applies to both the wage loss benefits after ten weeks and to any permanent partial disability award which may be made.

Under the former provisions (the law and policy which applied prior to the June 30, 2002 changes resulting from the *Workers Compensation Amendment Act, 2002* (Bill 49)), policy concerning the setting of long term wage rates distinguished between prior periods of disability due to compensable and non-compensable causes. Policy in the *Rehabilitation Services and Claims Manual*, Volume I (RSCM I) provides, at item #66.11, "Computation of Long Term Earnings":

> **Generally speaking, the Board does deduct from the total period over which earnings are being averaged any periods during which the claimant was receiving wage-loss compensation or for which there is medical evidence of disability. It would normally be unfair that a claimant's average earnings should be reduced because of a work injury or other illness.** For example, suppose a worker had a 20-day absence due to sickness and an income of $37,000 in the year before the injury….
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> **However, this rule does not apply in a case where a claimant is frequently absent from work through illnesses or other non-compensable disabilities**. There is a substantial difference between absences due to an occasional illness which reduces a claimant's average earnings below their normal level and a normal work pattern which includes regular absences from work. In the latter case, the claimant's average earnings are most fairly calculated by not making any adjustment for the periods of

> absence. The procedure would also not apply in situations where a disabled worker, covered under compensation had been maintained on full salary by the employer during the period of disability. This is because the period of disability would not be reflected by a drop in income.
>
> [emphasis added]

It was clear from the wording of the former policy that frequent absences from work due to compensable disability would be deducted, but frequent absences from work for non-compensable reasons would not be deducted.

The treatment of prior periods of compensable disability is not expressly addressed in the current policy at RSCM II item #67.60. However, a comparison of the former policy with the current policy gives rise to the inference that there was a policy decision to delete the language recognizing a distinction between compensable and non-compensable periods of prior disability. This change was not expressly stated or acknowledged in the wording of the current policy. However, the effect of this change was flagged in *Practice Directive #33C*, which specifies:

> The policy provides examples of disruptions in the employment pattern that are considered atypical and/or irregular (illness, educational or maternity/paternity leave). However, Board officers are reminded that the reason for the absence is NOT relevant, nor does the absence need to be similar in nature to those listed in the policy. An absence, **for any reason**, may be considered, so long as it represents an atypical/irregular disruption in a history of otherwise regular employment.

As this change in treatment of prior compensable periods of disability is not apparent on the face of RSCM II item #67.60, it is not apparent whether the significance of this change was flagged for the consideration of the policy-makers. It represents a change in the treatment of prior periods of compensable disability. It does not appear that this change was one based on any expression of changed legislative intent. On the contrary, it appears aimed at limiting the exercise of the discretion which the legislature conferred under section 33.4 of the Act.

In *Pasiechnyk v. Saskatchewan* (W.C.B.), [1997] 2 S.C.R. 890, 149 D.L.R. (4th) 577, 8 W.W.R. 517, the Supreme Court of Canada reviewed the "history and purpose" of workers' compensation legislation and cited a decision which

identified the four fundamental principles on which this system was based. Mr. Justice Sopinka reasoned, in a majority decision:

> 27 Montgomery J. also commented on the purposes of workers compensation in Medwid v. Ontario (1988), 48 D.L.R. (4th) 272 (Ont. H.C.). He stated at p. 279 that the scheme is based on four fundamental principles:
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> (a) compensation paid to injured workers without regard to fault ;
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> (b) injured workers should enjoy security of payment;
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> (c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
>
> (d) compensation to injured workers provided quickly without court proceedings.
>
> I would note that these four principles are interconnected. For instance, security of payment is assured by the existence of an injury fund that is maintained through contributions from employers and administered by an independent commission, the Workers' Compensation Board. The principle of quick compensation without the need for court proceedings similarly depends upon the fund and the adjudication of claims by the Board. The principle of no-fault recovery assists the goal of speedy compensation by reducing the number [of] issues that must be adjudicated.…
>
> [emphasis added]

Section 107 of the current Act further identifies the purposes of the Act as including the promotion of occupational health and safety and the protection of workers and other persons present at workplaces from work related risks to their health and safety.

Under the current provisions, section 33.4 of the Act confers a statutory discretion to determine the worker's average earnings (so as to be based on an amount that the Board considers best reflects the worker's loss of earnings), where exceptional circumstances exist such that the Board considers that it

would be inequitable to base this on the worker's earnings from the 12 months prior to injury.

The policy contains no additional wording to indicate that a decision-maker has authority to exercise the discretion under section 33.4 of the Act, except as contemplated by the three criteria set out as (a), (b) and (c) of item #67.60. Item #67.60 does not contain wording such as is contained in item #14.00, which states in relation to its criteria regarding the scope of employment:

> This list is by no means exhaustive. All of these factors can be considered in making a judgement, but no one of them can be used as an exclusive test.

The absence from item #67.60 of words such as "normally" or "generally," or other phraseology to support a reasoned exercise of discretion on the basis of factors other than the three criteria set out as (a), (b) and (c) suggests that the policy-makers intended to limit decision-makers, in the consideration of individual circumstances in relation to a possible exercise of discretion under section 33.4 of the Act, to the three criteria contained in policy at item #67.60.

The practice directive provided by the Board's administration, while not binding, would have the effect of further constraining the discretion of decision-makers under section 33.4 of the Act. Arguably, the practice directive could be disregarded as being inconsistent with the Act. A difficulty with this, however, is that the practice directive may be viewed as flagging for decision-makers the significance or intent of the deletion from policy of the wording which previously differentiated between compensable and non-compensable periods of disability in determining a worker's long term earnings.

The policy at RSCM II item #67.60 provides that section 33.4 is a discretionary provision and permits an exception to the application of section 33.1(2) for determining a worker's long-term average earnings. The policy states that as such, it will only be applied where the Board determines that, due to exceptional circumstances, the application of section 33.1(2) is inequitable. The policy sets out three criteria, stating that these criteria "shall be applied to determine if a worker's circumstances are exceptional." The first criterion concerns the situation where the Board determines that the worker had a history of regular full-time employment, and the worker's earnings in the 12-month period immediately preceding the date of the injury do not reflect the worker's historical earnings because of a significant atypical and/or irregular disruption in the pattern of employment during that period of time.

In this case, the worker had been employed for the same employer for approximately 18 years prior to her 2005 injury. I do not consider the worker's prior absences from work relevant to the initial question as to whether she had a history of regular full-time employment. I view this issue as concerning the nature of the worker's usual employment situation, which is separate from the consideration to be provided regarding a worker's prior absences from work for various reasons. I agree with the review officer's finding that the worker had a history of regular full-time employment.

Policy refers to a significant atypical and/or irregular disruption in the pattern of employment during the 12-month period immediately preceding the date of the injury. The use of the wording "and/or" in the phrase "atypical and/or irregular" signifies that fulfillment of either criterion may suffice.

The *Concise Oxford English Dictionary, Eleventh Edition* (Oxford Dictionary), defines "atypical" as "not typical." "Typical" is defined as:

> **1** having the distinctive qualities of a particular type. Characteristic of a particular person or thing. **2** symbolic: *the pit is typical of hell*.

"Irregular," as an adjective, is defined as:

> **1** not regular in shape, arrangement, or occurrence. **2** contrary to a rule, standard, or convention. Not belonging to regular army units. **3** Grammar (of a word) having inflections that do not conform to the usual rules.

Webster's New Twentieth Century Dictionary, second edition, defines "atypical" as "having no type; not typical; not characteristic, abnormal." It defines "irregular" as:

> Not regular; specifically, (a) not according to common form or rules; (b) not according to established principles or customs; deviating from usage; as, the *irregular* proceedings of a legislative body; (c) not even in occurrence or succession; as, an *irregular* pulse; (d) not according to the rules of art; immethodical; as, *irregular* verse; (e) not in conformity with legal or moral requirements; lawless; disorderly; as, *irregular* conduct or propensities; (f) not straight or even; as, an *irregular* line or course; (g) not uniform, as, irregular motion; (h) in grammar, deviating from the common form of inflections; as, an *irregular* verb; (i) in botany, not having the parts of the same size or form or arranged with symmetry; as, the

> petals of a labiate flower are *irregular*; (j) in military usage, not belonging to the regularly established army.

Policy provides the following illustration of what may constitute an exceptional circumstance:

> This circumstance may arise, for example, if the worker has had an absence of more than six consecutive weeks in the 12-month period immediately preceding the date of injury and the absence was due to illness, educational or maternity/paternity reasons.

The policy does not provide guidance as to what such events are measured against. For example, an absence from work of two months due to a serious illness would fit with the example provided. The policy itself does not provide further explanation as to when such an absence is no longer considered to constitute a significant atypical and/or irregular disruption in the pattern of employment. As noted above, policy is silent regarding the consideration to be given regarding absences from work due to prior work injuries or occupational diseases.

The Board's practice directive provides additional guidance. Such practice guidance serves a useful purpose in promoting consistency of decision-making within the workers' compensation system. However, practice directives do not have the status of policy and are not binding on WCAT.

The practice directive is quite specific, in proving additional direction in a fashion which is not contained in the policy. The practice directive specifies:

> Where a worker has experienced an assortment of significant previous disruptions (each in itself unusual), the exceptional circumstance policy would not apply. For example, if a worker had an educational leave in the past year, a lengthy illness in the second year, and a plant shutdown in the third year, the general long-term rule (using the 12-month average earnings in the period immediately preceding the injury) would be equitable. Deducting the absence would, in fact, produce an inequitable result. The exception would be maternity/paternity absences because most parents have two children on average. Recent interruptions for maternity/paternity are therefore an aberration in the working life of an otherwise fully employed worker.

> The policy provides examples of disruptions in the employment pattern that are considered atypical and/or irregular (illness, educational or maternity/paternity leave). However, Board officers are reminded that the reason for the absence is NOT relevant, nor does the absence need to be similar in nature to those listed in the policy. An absence, **for any reason**, may be considered, so long as it represents an atypical/irregular disruption in a history of otherwise regular employment.
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> [emphasis in original]

With respect to the various WCAT decisions cited above, and in **Appendix B**, I read them as being consistent in deducting a lengthy period of absence from work due to a prior compensable injury where this represented an unusual occurrence. These decisions include *WCAT Decisions #2004-05046*, *#2004-06871*, *#2005-01361*, *#2005-04452-RB*, *#2006-02330* and *#2006-03307*. However, there appear to be two lines of reasoning in situations where the worker had a history of prior periods of compensable disability. The reasoning in *WCAT Decisions #2006-00864* and *#2006-01508* tends to support a finding that prior absences from work for compensable reasons should not be viewed as amounting to a typical or regular pattern in the worker's employment, regardless of frequency. Accordingly, a period of compensable disability during the one year prior to injury should be deducted, notwithstanding a history of prior workers' compensation claims and related periods of disability. The reasoning in *WCAT Decision #2004-06636*, *#2006-03689*, and *#2006-03578* supports a contrary approach. These latter decisions follow the approach set out in the Board's practice directive, which stipulates that the reason for a worker's absence from work is not to be taken into account.

I find compelling the reasoning provided in *WCAT Decision #2006-01508*, in which the panel concluded that "It would be ironic in the extreme if workers having a second injury were to be penalized, *vis-à-vis* the long term average wage rate, for receiving benefits for a prior injury." The panel found that the only reading of the words "assortment of significant previous disruptions" consistent with the goals of the compensation system is that the Board intended to capture non-compensable illnesses or injuries, or non-occupational activities which removed the worker from the work environment.

I have difficulty with the notion that periods of disability due to work injuries should be accepted as a regular feature in the working life of an otherwise fully-employed worker, rather than as an aberration. To my mind, it contravenes the fundamental purposes of the Act to accept that such periods of disability due to work injuries amount to a regular feature of the employment (and to use this as

the basis for concluding that the worker's average earnings for any recent injury should be diminished based on his or her receipt of workers' compensation benefits for prior injuries). Such a concept does not fit easily with the goals of providing compensation for injured workers, and of preventing injuries in the workplace. To the extent a pattern of work injuries and disabilities is identified, this would seem to flag a need for attention to the health and safety practices of the workplace, rather than being used as a basis for concluding that the worker's long term earnings are thereby diminished.

In terms of dealings with patterns of absence from the workplace, it is noteworthy that the legislature amended the Act to address the question as to whether employment insurance benefits may be included in the calculation of a worker's average earnings. Section 33(3.2) provides:

> 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.

Accordingly, workers who are employed in an occupation or industry that results in recurring seasonal or recurring temporary interruptions of employment, may have their employment insurance benefits included in the calculation of their average earnings. However, a worker employed in an occupation or industry who is subject to recurring periods of compensable disability (due to injuries or disease resulting from the employment), does not have their workers' compensation benefits included in the calculation of their average earnings. The inclusion of the periods of compensable disability, but exclusion of workers' compensation benefits, in the calculation of the worker's average earnings, mean that workers in this latter category will be worse off than workers in the former category. There is an evident unfairness in providing poorer treatment to workers who have suffered periods of compensable disability, as compared with workers who have only been subject to recurring seasonal or recurring temporary interruptions of employment. In my view, this differing and inequitable treatment points strongly to the Board's current approach being inconsistent with the purposes of the Act.

As this situation does not flow from any express provision in the policy at #67.60, it is not clear whether this was simply an unintended consequence of the new policy or whether it was intended to operate in this fashion. In any event, I

consider that the effect of the policy runs contrary to the purposes of the Act, concerning the provision of fair compensation to injured workers, and the goal of preventing injuries and disease (i.e. rather than passively accepting that periods of compensable disability may be a part of the pattern of employment of some workers). While a subtle point which is difficult to articulate, it appears contrary to the basic purposes of the Act to treat this worker's receipt of workers' compensation benefits in the past as a basis for diminishing her entitlement to such benefits on her current or future claims.

While not precisely on point, this situation is reminiscent of the circumstances addressed in *Testa v. WCB (BC)*, [1987] B.C.J. No. 94, 10 B.C.L.R. (2d) 263. The British Columbia Supreme Court reasoned:

> By concluding as it did that the rate applicable was that of 1984, when it knew there were virtually no earnings, made the interpretation patently unreasonable. The task s. 33 addresses is to come up with a method of calculation that is equitable for this claimant. Blindly adopting a policy of one year's previous earnings, regardless of the circumstances and the unusual facts of the case at bar, the Workers' Compensation Board has, in effect, created an inequity.

The Court set aside the decision of the Board as being patently unreasonable. This decision was appealed to the Court of Appeal, (1989) 36 B.C.L.R. (2d) 129, 58 D.L.R. (4th) 676. The Court of Appeal further reasoned:

> In my opinion, the finding of the WCB that the claimant did not suffer any loss as a result of his 1984 injury is unreasonable, both in law and in fact.
>
> Section 33(1) provides a broad basis for determining the average earnings and earning capacity of a claimant. There are a number of ways in which the WCB may decide this question. One method has been adopted by the WCB as a general policy. The application of that one method where it has no application, and the disregard of other methods is an unreasonable application of the statute. It is no answer to say that the WCB had a discretion to exercise. To blindly follow a policy laid down in advance is to disable the tribunal from lawfully exercising a discretion. The law is summed up in this passage from Wade Administrative Law, 4th ed. at p. 317:

> An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance. It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case; each one must be considered on its own merits and decided as the public interest requires at the time.

> The result of the patently unreasonable application of s. 33(1), and the unreasonable finding of fact which flowed from it has been to deprive the claimant of the benefits he is entitled to under the statute. In my view, the judge reviewing the matter was completely justified in setting aside the determination of the WCB.

To the extent the current policy at #67.60 provides for the inclusion of periods of compensable disability in the calculation of a worker's long term average earnings, simply because these periods of disability do not constitute a significant atypical and/or irregular disruption in the pattern of employment, appears inconsistent with the purposes of the Act and creates an inequity in the treatment of workers who have suffered periods of compensable disability.

I considered whether I might conclude that the worker's periods of disability, during which she was in receipt of workers' compensation benefits during the 12-month period preceding her date of injury, amounted to a significant irregular disruption in her pattern of employment. I questioned whether, notwithstanding the number of prior work injuries suffered by the worker, such injuries would not amount to a regular feature of her employment (i.e. even if they typified, or were characteristic of, her employment history). I note, in this regard, that the policy contains no reference to a prior work injury among the list of examples provided.

I considered finding that the occurrence of a work injury or occupational disease cannot become a regular part of a worker's employment, notwithstanding a history of intermittent periods of disability for this reason. An obvious flaw in this reasoning, however, is that I am unable to arrive at a meaningful definition of the term "irregular" which would serve to distinguish, for example, between the situation of work-caused disabilities, and those due to injuries in non-compensable motor vehicle accidents. Accordingly, I am drawn to the conclusion that the policy is indeed patently unreasonable, in not distinguishing between compensable and non-compensable causes of disability.

A history of work injuries should not reduce a worker's entitlement to compensation in the future. Otherwise, workers who work in hazardous work environments or occupations (or who suffer an injury or occupational disease which is subject to recurrence) are potentially penalized through suffering the effects of such injuries or diseases, and by having their entitlement to workers' compensation benefits diminished in the future. I consider it patently unreasonable, and contrary to the purposes of the Act, to use the fact that a worker has previously received workers' compensation benefits as a basis for reducing the worker's entitlement to benefits on future claims. To treat the occurrence of past injuries as indicative of a likelihood of future injuries is reminiscent of a past era in which the occurrence of workplace injuries and diseases was viewed as an inevitable cost of production.

I am inclined to agree with the review officer that the worker's prior periods of compensable disability do not constitute a significant atypical and/or irregular disruption in her pattern of employment (i.e. in the sense that they occurred with some regularity). Accordingly, I consider that a referral of the policy is necessary, as the wording of the policy cannot readily be interpreted to avoid a patently unreasonable conclusion.

WCAT Decision #2003-01800-AD, "Lawfulness of Policy - Use of Class Average," 19 WCR 179, found that the wording of the policy permitted sufficient flexibility in its application (by its use of the words "usually" and "may") that it was not patently unreasonable under the Act. However, *WCAT Decision #2007-03809*, December 6, 2007, found that the definition of skills in item #40.00, properly interpreted, excludes consideration of the ability of a worker to perform the physical requirements of the occupation from the definition of skills. In that decision, you declined to follow the analysis provided in prior WCAT decisions which found that although in most cases heavy physical labour is not a skill in the sense that it is a learned application of knowledge and abilities, it is a necessary skill for a trades helper or labourer. I infer from this that caution should be exercised in "over-interpreting" a policy for the purposes of avoiding a patently unreasonable conclusion. If it is necessary to add qualifications or limitations to the policy to avoid a patently unreasonable result, this would seem to warrant a referral of the policy under section 251 of the Act.

6. Conclusion

In summary, I consider policy item #67.60, "Exceptional Circumstances," of the *Rehabilitation Services and Claims Manual, Volume II*, to be so patently unreasonable that it is not capable of being supported by the Act and its regulations pursuant to section 251(1) of the Act. The policy limits decision-makers, in exercising a discretion under section 33.4 of the Act, to only three criteria. The policy does not distinguish between compensable and non-compensable causes of a disability, in terms of the consideration to be given as to whether the worker suffered a significant "atypical and/or irregular disruption" in his or her pattern of employment in the 12-month period immediately preceding the date of the injury.

In my view, it would be contrary to the purposes and intent of the Act, regarding compensation to workers and the prevention of injuries and occupational diseases, to treat a history of periods of compensable disability as amounting to a regular feature of a worker's employment so as to warrant the setting of a lower long-term wage rate (i.e. by calculating the worker's long-term wage rate based on her earnings from the one year prior to her injury, while including the periods of disability during which she was in receipt of workers' compensation benefits for her prior work injuries and excluding the monies paid to the worker under her prior claims). It is patently unreasonable to treat the worker's receipt of workers' compensation benefits in the past as a basis for diminishing her entitlement to such benefits on her current or future claims.

Herb Morton
Vice Chair

HM:gw

Appendix A

The factual circumstances regarding the worker's prior workers' compensation claims are summarized below (concerning the claim files which were disclosed in connection with this appeal). The total number of days of wage loss benefits for temporary partial or total disability is shown in brackets (as recorded by the Board's automated wage loss system).

The worker's July 19, 2000 back injury (215 days) was described by her employer as follows:

> Worker was reclamping 2 sections of pipes/hoses at the packaging station. The first section was a pipe extending from a diaphram pump. The second section was attached to a small length of pipe/hose that was then attached to a freestanding metal detector. The metal detector is described as a freestanding unit on castors. There is a pressurized piston column that allows for vertical height adjustment. This unit can have a high center of gravity when raised to the maximum height. Worker pulled on loose pipe/hose to bring the two clamping surfaces together. The effective direction of the pulling force was perpendicular to the connections to the metal detector, which caused the metal detector to tip over. The metal detector struck the worker in the right lower side of her back, while she was standing against the main conveyor belt (worker was facing away from the metal detector). The Quality Assurance Manager was standing about 5 meters away and was able to quickly support and the move the metal detector away from the worker.

The employer described the worker's November 17, 2000 injury (5 days) as follows:

> Worker was cleaning pit (kettle area) with wash hose. Worker was walking backwards along platform in the pit area, when she slipped off the edge of the platform. Worker caught herself on the handrail as her feet slipped down towards the pit. Height of pit is approx. 2-3 feet high.
>
> [emphasis in original, capitalization removed]

The employer described the worker's October 31, 2001 injury (2 days) as follows:

> She had dismounted from a forklift and was walking back towards the main aisle when she slipped and fell to the ground…. The worker reported to the FAA [first aid attendant] that she has slipped on some orange peel syrup on the ground. The area off the main aisleway slopes towards the drain, and syrup that has been washed down into glace room 1 will run towards the drain….
>
> Housekeeping issues and slip hazards will be reviewed with the product staff.

The worker's February 18, 2002 injury (2 days) occurred when she moved a table out of her work area. When she let the table go, a pipe sticking out of the table hit the top of her left hand.

The worker's July 18, 2002 injury (14 days) occurred when she slipped on syrup and fell in the glace mix line aisle. The employer's report to the Board noted: "Product spillage and syrup spills can occur, and immediate cleanup is required for this area. Workers understand that good housekeeping and immediate cleanup of product and syrup spills are required to minimize slip hazards."

The worker's September 9, 2002 injury (42 days) occurred when she slipped on syrup. She stretched her arms to stop her fall, and hurt her left fifth finger when it got caught on the side of a bin.

The worker's August 7, 2003 claim (12 days) was accepted as involving a right wrist strain, as a result of pulling forcefully on a hoe in order to spread out a fruit mix.

On April 6, 2004 (73 days), the worker suffered a right ring finger amputation when a piece of machinery (a metal detector) activated and caught her finger.

On February 10, 2005 (21 days), the worker was transporting a load of empty plastic drums on a skid by forklift. The drums fell off. The worker was getting down from the lift truck when she tripped on the edge of the skid, and fell on her right shoulder.

On March 18, 2005 (38 days), the worker was standing on a platform to flatten fruit with a hoe. A co-worker came to dump a load of fruit with a forklift, and the worker was struck on the head by a forklift attachment.

On September 1, 2005 (16 days), the worker slipped and fell in a wet stairwell.

Appendix B

(Additional excerpts from WCAT Decisions concerning the policy at RSCM II item #67.60).

- *WCAT Decision #2004-05046*, September 28, 2004

  Board policy provides for some discretion in the calculation of a worker's average earnings in exceptional circumstances. I further agree with the Board and Review Division decisions to remove the period of time that the worker received disability payments in relation to his left shoulder injury. The wage loss payments do not constitute earnings, and therefore the time loss due to the prior injury was appropriately removed from the calculation period.

- *WCAT-2004-06636*, December 16, 2004

  The example set out in item #67.20 is not binding, as is reinforced in Practice Directive #33C. However, in choosing the six-week period, the Board has signaled that an absence from work for up to six weeks will not generally be considered unusual, rare or uncommon, whereas an absence of longer than that for employees with long-term attachments to employment is likely to be. In the absence of any evidence that this is not reflective of the normal pattern of work for such employees, I am unable to conclude that item #67.60 is irrational or without foundation. **Further, the policy does not differentiate between what might generally be considered voluntary absences (education leave), absences that might generally be considered involuntary (due to compensable injuries and non-compensable illness), and absences that could be considered either voluntary or involuntary depending on the circumstances (due to a need or choice to care for an elderly relative, spouse, or child, paternity leave, and so on). The Act does not require the Board to differentiate between time loss that could have been avoided and that which could not. I am satisfied that, in view of the myriad of reasons why employees lose or take time off from full-time employment, it would not be practical for the Board to do so. I do not agree with the worker's representative that the Act and policy has the effect of "punishing" workers for having had compensable time off work. Rather, in my view, by allowing for exceptions where**

there has been a significant atypical and/or irregular disruption in the worker's pattern of employment, a reasonable balance is achieved between the objective of treating workers in like circumstances in a similar way and the objective of ensuring that the long-term wage rate is reflective of an individual worker's pattern of employment.

I accept that the worker has a history of full-time employment. Further, based on the income tax documents provided by the worker, I accept that, prior to the 2002 injury, the worker had an historical pattern of earning somewhat more each year than the $47,896.27 earned during the 12-month period immediately prior to the date of injury. However, this evidence also shows that the worker's earnings fluctuated from year to year and, thus, that some period of absence during a year was not exceptional for this worker. Based on the earnings information provided, I am unable to conclude that an absence of 22 days from the workplace over the course of one year was an exceptional circumstance in the sense that it was a significant atypical or irregular disruption in the worker's pattern of employment.

[emphasis added]

- *WCAT Decision #2004-06871*, December 31, 2004

  I find the evidence supports a conclusion that the worker was regularly employed on a full-time basis, and that his absence from work in May and June 2003 due to a compensable injury was atypical, or not part of his regular employment pattern.

  Although Practice Directive #33C is not binding, and came into effect after the decision under appeal, I find the reasoning outlined persuasive in this case. The worker missed 41 consecutive days of employment due to a compensable injury. The use of the word "example" in policy #67.60 implies it is possible to exercise discretion regarding what circumstances will be considered exceptional enough to result in a significant absence such that not crediting a worker for the period of time results in an inequity. I find that 41 days is sufficiently close to the six-week marker identified, and well in excess of the four-week bottom limit, to warrant crediting the worker for this period of time out of the workforce.

  I allow the worker's appeal.

- *WCAT Decision #2005-01361*, March 17, 2005

  I agree with the review officer that the Board properly applied the Act and policy item #67.60 to the worker's case.

  The worker did have a period of absence of more than six consecutive weeks in the 12-month period immediately preceding the date of injury, due to her previous compensation claim. On that basis, the Board applied policy item #67.60, exercising the discretion allowed by section 33.4(1) of the Act because using the worker's one-year earnings without deduction of the period of absence would be inequitable. In such cases, the Board may deduct the period of the absence or use a longer period of the worker's employment history (e.g., 24-month period) to determine long-term average earnings.

- *WCAT Decision #2005-02252*, April 29, 2005

  It is not entirely clear from the language used in item #67.60 of the RSCM II whether the criteria identified in the policy are intended as the only ones that can be considered in determining whether there are exceptional circumstances such that an application of section 33.1(2) should be considered inequitable. However, I am satisfied that the fact that the worker believed that her long-term wage rate would be set taking into account her individual tax status, rather than in accordance with a formula that is applied equally to all workers, is not such a circumstance.

- *WCAT Decision #2005-04452-RB*, August 25, 2005

  With a period of 32 days of disability due to an injury, the worker falls within the four to six-week period indicated in the practice directive. I note that he was employed by his wife's company and had many years experience in the industry. His most recent time-loss claim for injury was three years prior to April 2002.

  I believe it is reasonable to conclude that, but for the compensable injury in April 2002, the worker would have been employed and earning wages. I note the reported one-year earnings on the April 2002 claim were $46,771.12, and a similar figure was reported for 2001. It would appear that the loss of just over one month's wages

as a result of the April 2002 injury had a significant result on his one-year average earnings in October 2002.

Although the period of time loss is only slightly beyond the limit of one-month set out in the practice directive, it is in excess of four weeks. I am satisfied, based on his statements and his annual earnings figures, that the worker was employed on a regular, full-time basis. There was no indication he had significant periods of unemployment during which he collected Employment Insurance benefits, or was unpaid.

For the reasons cited above, I find that the worker's loss of income for 32 days in April 2002 was an atypical and significant disruption in his earning pattern, and he was entitled to have this period deducted from his wage rate calculations.

- *WCAT Decision #2006-00864*, February 23, 2006

  This worker is currently one day short of the six consecutive week criteria and following implementation of the review officer decision, will exceed the six consecutive weeks. **Although the worker's employment history indicates work absences of six to ten weeks in the preceding years, I find the absences in the one year prior to injury were a significant atypical and/or irregular disruption in the pattern of her employment. Although not set out in legislation or policy as being a significant criteria, I note some of the worker's absences were due to compensable conditions.**

  I therefore find that the employment history in the one year prior to injury was such that the criteria of exceptional circumstances should be applied in this case, and the worker's average earnings should be based on an amount which best reflects the worker's loss of earnings. I return the file to the Board to determine a fair wage rate in the circumstances, and also in light of the review officer decision yet to be implemented.

  [emphasis added]

- *WCAT Decision #2006-02330*, May 30, 2006

  The worker sought to have the Board (and the Review Division) recognize that his earnings in the 12 months before this injury had

been affected by another compensable injury and an uncharacteristic layoff.

The review officer decided that the layoff did not fit within the types of examples used in the policy. She also concluded that the worker did not "have a history of regular full-time employment" because he had had compensable injury claims in each of the five years prior to this injury in 2003.

I have considered this appeal in the context not only of the policy but the discussion in Practice Directive #33C which is not binding but does provide useful guidance and insight into how the Board interprets its own policy. The practice directive focuses on the words "atypical and significant" and makes the point that an absence in the 12-month period must "represent an aberration" in the regular pattern and this disruption must "represent a significant financial impact on the 12-month average earnings". It is for this reason that the policy refers to an absence of more than six weeks' duration.

I do not accept that the worker's claims history provides useful evidence that he did not have a history of regular full-time employment. It is true that the worker had significant time loss from work due to injury in 2002/2003 of 159 days. He also had a lengthy disability in 2001. But in the three years before that, he only had a couple of days of time loss for those injuries. There are some places of employment which are riskier and more dangerous to work in than others. To use frequency of claims without any further context, is wrong. According to the claim file, although the worker had significant disabilities in 2001 and 2002, he had two days of wage loss in 2000, three days in 1999 and a health care claim in 1998. In my view, there is nothing in this record that can be used to justify a conclusion that the worker is not a regular full-time employee. These numbers only say that the worker lost next to no time from work due to compensable injuries between 1998 and 2000 and had the misfortune to have two more significant injuries in 2001 and 2002. The injury in 2002 which falls into the 12 months prior to the 2003 claim was of significant duration and this was a regular disruption in the pattern of employment and had the effect of significantly diminishing his earnings.

. . .

In short, I conclude that the worker's compensable disability within the 12 months must be deducted from that period of earnings.

- *WCAT Decision #2006-03307*, August 25, 2006

  Having determined that the worker did not have a short-term or sporadic attachment to employment, that his history included at least one substantial period of employment with one employer for well over three months each year (sometimes extending for virtually an entire year), that his pattern of employment was not casual in nature, that his historical earnings pattern prior to his 2003 compensable injury involved earnings substantially higher than the amount earned in the 12 months preceding the 2005 injury (an average of $58,646.25 from 1999 to 2002 compared to $23,099.33), and that the worker was off work from February 25 to July 26, 2005 due to temporary disability under the 2003 claim, I conclude that the worker's circumstances are exceptional as contemplated by policy item #67.60 and section 33.4 of the Act. I find that it would be inequitable to determine his long-term average earnings using the general rule in section 33.1(2).

  In find that the best reflection of the worker's loss of earnings as a result of February 25, 2005 injury is achieved by deducting the period of absence from work due to the compensable temporary disability under the 2003 claim from the 12-month period preceding the February 25, 2005 injury.

- *WCAT Decision #2006-03689*, September 27, 2006

  The following employment circumstances were considered by the Board. The worker was off work between January 30, 2001 to June 21, 2001, during which time he was receiving wage loss benefits from the Board. From June 22, 2001 through November 13, 2001, the worker was receiving vocational rehabilitation benefits from the Board. From December 24, 2001 to January 21, 2002, the worker was again off work, this time on sick leave. From September 28, 2002 to October 27, 2002, the worker was again off work with work-related symptoms, as he was between November 12, 2003 and April 2, 2004. From May 24 to October 11, 2004, the worker was again off work, this time as a result of a motor vehicle accident.

The case manager also considered the worker's employment history back to 1998, the time of the worker's initial injury. She found that the worker had been off work for 293 days.

I agree with the conclusion of the case manager and the review officer that the worker's history of employment confirms that he does not have a history of regular, full-time employment. He was a full-time employee, but did not work full-time hours due to a series of accidents, injuries, and compensable conditions. I note that Board policy provides that the reason for a worker's absence from work does not determine whether exceptional circumstances exist. Rather, the worker's employment pattern and history must be examined to determine whether the absences are significantly atypical or irregular. In the circumstances, I do not consider that the worker's circumstances were "exceptional" as required by the Act and published policy.

I have also considered whether the facts establish that using the worker's earnings in the 12-month period immediately prior to the reopening, $3,469.38, would have a significant financial impact, and would produce an inequitable result. In looking at the year prior to the opening alone, it appears to do so. However, in looking at the worker's employment history from 1998, as the case manager did here, it is apparent that the worker's pattern of employment has not been one of full-time regular employment. In that sense, using the year prior to the reopening of the worker's claim as the basis for determining the worker's entitlement is not inequitable; rather, it reflects the worker's employment history since 1998.

I find that the worker's long-term wage rate was correctly based on the worker's earnings in the year prior to the date of the reopening of the worker's claim. The Board's August 11, 2005 decision is confirmed.