

Client Services Policy Manual

Policy Number: **EL-01**
Subject: **Earnings Loss: Benefit Calculation**
Chapter: **Earnings Loss**

Policy Statement

Compensation is payable from the first day of lost earnings beyond the day of injury. The pre-injury employer pays all earnings which would have been earned with the pre-injury employer on the day of the injury.

The Workplace Health, Safety and Compensation Act, 2022, (the Act) requires that average weekly earnings shall be calculated on the basis of:

- the amount earned in the twelve months immediately preceding the beginning of the loss of earnings as a result of the injury; or
- the rate of daily, weekly, monthly or other regular remuneration that the worker was receiving at the beginning of the loss of earnings as a result of the injury.

WorkplaceNL must determine the period(s) which most equitably reflects the worker's loss of earning capacity as a result of the injury.

It is also stated, "Where in a case it seems more equitable, WorkplaceNL may award compensation, having regard to the earnings of the worker at the time of the injury."

An equitable earnings loss benefit rate is one which is fair and reasonable considering all the circumstances of a particular case. It is very important that each case is judged on its own merit when determining an equitable earnings-loss benefit rate, since many cases will not conform to usual circumstances. Careful attention must be taken to ensure an ongoing, objective assessment of the loss of earning capacity due to the compensable injury.

WorkplaceNL may consider the following when determining the equitable earnings-loss benefit rate for a worker:

- employment history or pattern; and
- nature of hire or employment status with the pre-injury employer (e.g., full-time, part-time, casual, permanent, actual working hours, duration, contractual).

There are generally two types of earnings loss benefits – Temporary Earnings Loss (TEL) and Extended Earning Loss benefits (EEL). TEL benefits are paid to an injured worker experiencing a loss of earnings resulting from the work injury, while they recover. These benefits are temporary and continue to be paid while the workplace parties explore appropriate options to restore pre-injury earnings. Extended Earnings Loss (EEL) benefits

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are paid to injured workers once a decision has been made that they have reached maximum medical improvement but have been unable to fully restore their pre-injury earnings because of permanent limitations from the work injury.

Short-term Rate

Short-term earnings-loss benefit rates are based on information the employer provides to WorkplaceNL. They are usually based on the average weekly earnings for the four pay periods immediately preceding the loss of earnings as a result of injury. The actual time period(s) considered may vary, as WorkplaceNL must determine the period(s) that most equitably represents the worker's loss of earning capacity as a result of the injury. Short-term rates may consider the worker's rate of daily, weekly, monthly or other regular remuneration at the beginning of the loss of earnings. Immediate rate adjustments will occur with retroactive effect where the worker demonstrates that their earnings prior to the loss of earnings justifies a higher short-term rate.

Long-term Rate (after 13 weeks)

A long-term earnings-loss benefit rate must be identified when disability continues beyond 13 weeks. After 13 weeks, earnings-loss benefit rates are usually calculated on the basis of the worker's earnings in the 12 months prior to the period of disability. WorkplaceNL will consider a different period if the 12-month period does not equitably represent the worker's loss of earning capacity as a result of the injury.

When requested, a worker must consent to the release of Revenue Canada documentation so that WorkplaceNL can verify average annual earnings. Failure to provide this consent will result in earnings-loss benefits being suspended, after WorkplaceNL has provided sufficient warning to the worker.

The earnings-loss rate established after 13 weeks is also used to calculate earnings-loss entitlement should the worker become entitled to EEL benefits.

Earnings-loss Benefit Levels

A worker's loss of earning capacity is based on the average weekly net earnings at the start of their loss of earnings resulting from the injury, subject to the maximum prescribed earnings. Net earnings refers to probable income tax deductions for those earnings based on appropriate tables produced by Revenue Canada. Therefore, when establishing the earnings-loss benefit rate, WorkplaceNL will use the net claim code status of the worker at the time of the loss of earnings as a result of the injury and maintain this status for the duration of the claim.

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Income Replacement Rate

For all periods of wage loss after April 1, 2018, the income replacement rate, or rate used for calculating earnings-loss benefits, shall be 85 per cent of net earnings.

WorkplaceNL will reimburse employers if they choose to pay the appropriate income replacement rate - 85 per cent of net earnings - to or on behalf of an injured worker.

Where an employer provides an injured worker with earnings in excess of the income replacement benefit rate (85 per cent of net) after an injury, WorkplaceNL does not reimburse any portion of the money paid by the employer. Such cases are viewed as the worker having no loss of earnings.

Provisional Rates

A provisional earnings-loss benefit rate may be established where there is a delay in obtaining documentation on the worker's actual earnings. The worker's employment history, occupation, etc., must be considered when determining a provisional rate. A provisional rate will be regarded as an interim decision and will be reviewed after the required earnings information has been received. In all cases, the worker will be advised of the decision to establish a provisional rate.

Casual Employment

Where a worker's employment is of a casual nature as described in section 89(4) of the Act, consideration may be given to the average annual earnings of:

- a person performing the same work with the same employer; or where there is no such person,
- a person in the same class of employment and in the same locality.

Concurrent Employment

Where a worker is under concurrent contracts of service with two or more employers at the time of an injury, the average earnings shall be based on the combined earnings from those employers. Should the worker be able to continue to work in the concurrent employment, these earnings will be offset from any compensation payable. Compensation payable cannot exceed the maximum amount payable under the Act. Earnings from self-employment where personal coverage is not in place or earnings from an occupation not covered by the Act cannot be included.

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Earnings at Time of Injury Not Representative of Earning Capacity

The average earnings at the time of the injury may not represent the worker's earning capacity:

- because of the worker's age; or
- because the worker is in the course of learning a trade, occupation, or profession

Where this occurs, the probable increase in average earnings may be considered.

Occupational Disease

A worker or their dependents are entitled to compensation even though the worker may not have been employed (i.e., may not have had a loss of earnings) at the time of disablement due to occupational disease.

Labour Market Re-entry (LMR) Program

A worker participating in an LMR program is covered for compensation purposes where an injury arises out of and in the course of the program. The earnings-loss benefit rate will be the benefit level payable during the LMR program, or a higher rate where the worker was receiving earnings during the LMR program.

Recurrences

Earnings-loss benefit rates for recurrences are based on the earnings at the time of the loss of earnings as a result of the recurrence. Where there are no earnings at the time of the recurrence but the worker demonstrates earnings in the 12 months prior to the recurrence, compensation may be based on those earnings.

Employment Benefits Used to Establish Earnings-Loss Benefit Rates

The following employment benefits will be used to establish earnings-loss benefit rates:

- Employment Insurance benefits will be considered as earnings for the purpose of determining the long-term earnings loss benefits (i.e., after 13 weeks).
- Earnings for overtime paid to the worker prior to the injury are considered regular earnings when calculating earnings-loss benefit rates.
- Vacation pay based on a percentage of earnings will be considered as regular earnings in establishing the earnings-loss benefit rate, if included as earnings in lieu of vacation leave and paid (or taxable) prior to the beginning of the earnings loss.

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- Special bonuses (e.g., profit sharing, performance pay, Christmas or year-end bonuses) will be considered regular earnings when all of the following conditions are met:
 - the earnings-loss period exceeds 13 consecutive weeks;
 - the bonuses are paid (or taxable) prior to the beginning of earnings loss; and
 - the bonuses are assessable.
- Earnings from another province (or country - where such earnings are authenticated to WorkplaceNL's satisfaction) will be considered as average annual earnings where they - along with employment earnings from within the province - constitute part of a worker's established annual earning pattern. In the case of recurrences, the Act does not require earnings to occur within the province for the purpose of establishing the earnings-loss benefit rate. Out of province earnings may be considered for recurrences, without an established earnings pattern. Earnings from another province or country will also be considered as earnings where WorkplaceNL extends coverage while the worker is employed outside of the province.
- Pay equity adjustments will be considered part of an injured worker's earnings and used to retroactively increase a worker's long-term earnings-loss benefit rate where the effective date of the increase is on or prior to the date of disablement only.

Employment Benefits Considered as Post-Injury Earnings

To the extent that an injured worker receives employment-related earnings during a period of compensable disability, there is no loss of earnings. Where that happens, WorkplaceNL will suspend or offset the appropriate amount of compensation otherwise payable for the period.

Regardless of when accumulated, the following (most common) benefits paid to a worker by an employer - including lump sum pay-outs of such benefits anytime during or at the end of the employment relationship - are considered post-injury earnings. The onus is on employers and workers to notify WorkplaceNL if this occurs.

- Annual leave benefits
- Sick leave benefits
- Statutory holiday pay
- Family leave
- Compassionate leave
- Overtime earnings
- Vacation pay that is taxable during the period
- Special bonuses (e.g., profit sharing, performance pay, Christmas or year-end bonuses) which are taxable during the period
- Pay in lieu of notice or redundancy pay from an employer

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- Concurrent earnings

The following employment-related benefits are also considered post-injury earnings. When they are paid to a worker during a period of disability, WorkplaceNL will appropriately reduce the amount of compensation payable.

- Permanent Partial Disability (PPD) benefits that a worker is receiving for the same part of the body
- Canada Pension Plan (CPP) disability benefits
- Income from a registered employment pension plan that a worker applies for and receives following a work injury

Employment Benefits Not Considered as Post-Injury Earnings

The following employment-related benefits are not considered as post-injury earnings and a worker's entitlement to compensation will not be suspended or reduced:

- Permanent Partial Disability (PPD) benefits that a worker is receiving for another part of the body.
- Income from a registered employment pension plan to which a worker is entitled before the work injury.
- A lump sum pay-out of a worker's pension contributions from a registered employment pension plan.
- Severance pay that is the sum of money paid to a worker when employment is terminated, and is based specifically on length of employment or years of service.
- Canada Pension Plan (CPP) disability benefits to which a worker is entitled and that are not related to the work injury.
- Continued employer contributions to benefit programs on behalf of the worker, such as group or private insurance programs, following a work injury.

Benefit Calculations for Specific Employments

The following guidelines are used to calculate earnings-loss benefits related to specific employment situations:

- **Injury Resulting from Rescue Work**
Where a worker who is not normally required to perform rescue work, suffers an injury in the course of employment while performing an emergency rescue for the purpose of saving human life, compensation shall be paid on the basis of 100 per cent of net earnings. This is regardless of whether the person being rescued is a worker. Workers who are expected to perform rescue activities as part of their regular occupation, such as firefighters, police officers, and emergency services personnel, are compensated based on the appropriate income replacement rate provided by the Act.

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- **Commercial Fishers**

For guidelines on establishing the earnings-loss benefit rate for commercial fishers, refer to Policy CO-01 Coverage for Commercial Fishers.

- **Self-Employed Workers with Personal Coverage**

Self-employed workers may buy optional personal coverage from WorkplaceNL. Earnings-loss benefits for self-employed workers with personal coverage must be based on demonstrated earnings only, except where demonstrated earnings exceed the amount of personal coverage obtained. In those cases, the earnings-loss benefit rates will be based on the amount of personal coverage in place at the time of the injury as verified by WorkplaceNL's assessment records.

- **Active Directors of an Incorporated Entity**

Directors, managers and executive officers of an incorporated company who are actively engaged in the operation of the employer's business, are considered workers within the scope of the Act. They can be considered for earnings-loss benefits where it is demonstrated that they receive earnings from the employer and such earnings can be identified in the records of that employer.

The earnings-loss benefit rate shall be determined by considering the earnings level declared by the director, manager or executive officer for assessment purposes and the earnings level demonstrated by the records of the employer.

- **Owners and Operators of Equipment**

Where a worker, as defined by the Act, owns and operates a piece of equipment and is paid on the basis of a unit price for both equipment and operator, the earnings loss benefit rate is based on the labour portion only.

The amount specified for assessment purposes may be used to calculate a loss of earning capacity benefit. The Assessment Department has established guidelines for determining the labour portions in these types of cases, normally a percentage of total payment.

In a case where a worker feels that the portion allowed for earnings is not equitable, the worker will have the opportunity to submit evidence, such as earnings documentation as confirmed by the records of the employer.

- **Rotational Employment**

Average weekly earnings will be determined by dividing the sum of the gross earnings by the number of days from the first day to the last day of the earnings period considered. This will include periods of no earnings where it was the scheduled rotation off.

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Merits and Justice

Where the individual circumstances of a case are such that the provisions of this policy cannot be applied or to do so would result in an unfair or unintended result, WorkplaceNL will decide the case based on its individual merits and justice, as outlined by Policy EN-22 Merits and Justice. Such a decision will be considered for that specific case only and will not be precedent-setting.

Reference:

Workplace Health, Safety and Compensation Act, 2022, sections 2(1)(j), 2(1)(bb), 2(1)(jj), 20(1), 47, 56, 63, 64, 74, 82, 83, 84-91, 105 and 144

Workplace Health, Safety and Compensation Administrative Regulations, sections 7, 20 and 28

Policies:

CO-01 Coverage for Commercial Fishers

EN-03 Recurrences

EN-22 Merits and Justice

Amendment History

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