

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. Employers pay any and all earnings which would have been earned on the day of the injury.

Section 80 of the Act stipulates that average weekly earnings shall be calculated on the basis of:

- a. the amount earned in the period of twelve months immediately preceding the beginning of the loss of earnings as a result of the injury; or
- b. 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, whichever, in the opinion of WorkplaceNL, seems more equitable.

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 compensation rate, since many cases will not conform to usual circumstances. Consideration must be given to the worker's employment history, employment status with the accident employer, etc. Care must be taken to ensure an ongoing, objective assessment of the loss of earning capacity due to the compensable injury.

Short-term compensation rates are based on information supplied to WorkplaceNL by the employer concerning the worker's rate of daily, weekly, monthly or other regular remuneration at the beginning of the loss of earnings. They are usually based on the average weekly earnings for the four pay periods immediately preceding the injury. Immediate rate adjustments will occur with retroactive effect where the worker demonstrates that his or her earnings prior to the loss of earnings justifies a higher short-term rate.

However, a long-term earnings base must be identified when disability continues beyond 13 weeks. After 13 weeks compensation rates will be calculated on the basis of the worker's

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earnings in the twelve months prior to the period of disability, or, where it seems more equitable, on the basis of average annual earnings.

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 the suspension of benefits, once sufficient warning has been issued by WorkplaceNL.

Part 1 – Compensation Benefit Levels

Under section 74(2) of the Act, a worker's loss of earning capacity is based on the average weekly net earnings at the commencement of his or her loss of earnings resulting from the injury, subject to the maximum prescribed earnings. "Net earnings" defined under section 2(v) refers to probable income tax deductions for those earnings based on appropriate tables produced by Revenue Canada. Therefore, when establishing the compensation payable, WorkplaceNL will use the net claim code status of the worker at the time of the injury and maintain this status for the duration of the claim. The accuracy of the net claim code status will be confirmed at the 13-week rate review to establish the long-term earnings base.

1. Income Replacement Rate

For all periods of wage loss after April 1, 2018, the rate used for calculating compensation benefits shall be 85 per cent.

Since January 1, 1995 no employer can supplement the amount that an injured worker is receiving as compensation. Employers will be reimbursed by WorkplaceNL if they choose to pay the appropriate income replacement rate - 85 per cent of net - to or on behalf of an injured worker. However, where an employer provides an injured worker with earnings in excess of the income replacement rate after an injury, WorkplaceNL does not reimburse any portion of the money paid by the employer. Such cases are viewed as having no loss of earnings.

2. Provisional Rates

A provisional compensation rate may be established where there is a delay in obtaining documentation on the worker's actual earnings.

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Consideration must be given to the worker's employment history, occupation, etc., when determining a provisional rate. A provisional rate will be regarded as an interim decision and will be reviewed periodically until it becomes finalized. In all cases, the worker will be advised of the decision to establish a provisional rate.

3. Casual Employment

Where a worker's employment is of a casual nature as described in section 80(4), 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.

4. Concurrent Employment

In accordance with section 80(5), 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. Compensation payable cannot exceed the maximum amount payable under the Act. Earnings from self-employment where personal coverage is not in place (see Part V, No. 3 below) or earnings from an occupation not covered by the Act cannot be included.

5. Earnings at Time of Injury Not Representative of Capacity

Where the average earnings at the time of the injury do 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, profession or calling, the probable increase in average earnings may be taken into consideration. (See Section 76 of the Act.)

6. Industrial Disease (Section 90.1)

Section 90.1 ensures that a worker or his or her 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.

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Part II – Employment Benefits Used to Establish Compensation Rates

The following employment benefits and considerations will be used to establish compensation rates:

1. Employment Insurance benefits will be considered as earnings for the purpose of determining the long-term earnings base, (i.e. after 13 weeks). Employment Insurance benefits may also be considered as earnings for calculation of benefits during the initial period where there is a work-sharing agreement in place or where there is an arrangement for "topping up" of Employment Insurance benefits.
2. Earnings for overtime paid to the worker prior to the injury are considered regular earnings when calculating benefit rates.
3. Vacation pay based on a percentage of earnings will be considered as regular earnings in establishing the compensation rate, if included as earnings in lieu of vacation leave and paid (or taxable) prior to the beginning of the earnings loss.
4. 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:
 - a) the earnings loss period exceeds thirteen consecutive weeks;
 - b) the bonuses are paid (or taxable) prior to the beginning of earnings loss; and
 - c) the bonuses are assessable.
5. Where an allowance such as northern allowance or isolation allowance is no longer applicable because the worker has permanently relocated to an ineligible area, the compensation payable will be reduced considering the amount of lost allowance.
6. 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. 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.

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7. Pay Equity adjustments will be considered part of an injured worker's earnings and used to retroactively increase a worker's long-term compensation rate where the effective date of the increase is on or prior to the date of disablement only.

Part III – 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 (subject to Sections 74(1) and 81(1) of the Act). Where that happens WorkplaceNL will suspend the appropriate amount of compensation otherwise payable for the period.

- A. Regardless of when accumulated, the following (most common) benefits paid to a worker by an employer - including lump sum payouts of such benefits anytime during or at the end of the employment relationship - are considered post-injury earnings. The onus is on employers to notify WorkplaceNL if this occurs.
1. Annual leave benefits
 2. Sick Leave benefits
 3. Statutory Holiday Pay
 4. Family Leave
 5. Compassionate Leave
 6. "Banked" overtime earnings (see Part II, 2 also)
 7. Vacation pay which is taxable during the period (see Part II, 3 also)
 8. Special bonuses e.g. profit sharing, performance pay, Christmas or year-end bonuses which are taxable during the period (see Part II, 4 also)
 9. Pay in lieu of notice or redundancy pay from an employer
- B. 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.
10. Permanent Partial Disability (PPD) benefits which a worker is receiving for the same injury.
 11. Canada Pension Plan (CPP) disability benefits – see Policies EL-03 and EL-03(R).
 12. Income from a registered employment pension plan which a worker applies for and receives following a work injury.

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Part IV – Employment Benefits Not Considered as Post-Injury Earnings

The following employment-related benefits are not considered as earnings and post-injury payments will not result in suspension or reduction of compensation entitlement:

1. Permanent Partial Disability (PPD) benefits which a worker is receiving for another injury.
2. Income from a registered employment pension plan which a worker is entitled to before the work injury.
3. A lump sum payout of a worker's pension contributions (from a registered employment pension plan).
4. Severance pay which is the sum of money paid to a worker on employment termination, based specifically on length of employment or years of service.
5. Canada Pension Plan (CPP) disability benefits which a worker is entitled to and which are not related to the work injury - see Policies EL-03 and EL-03(R).

Part V – Benefit Calculations Specific Employments

1. 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% of net earnings, 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 section 74.

2. Commercial Fishers

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

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3. Self-Employed Workers with Personal Coverage

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, compensation benefits will be based on the amount of personal coverage in place at the time of the injury as verified by WorkplaceNL's assessment records.

4. Active Directors

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, section 2(z)(iv).

Such directors, managers and executive officers 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, section 2(h) of the Act. The compensation rate shall be determined giving regard to 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.

5. Owners/Operators of Equipment

Where a worker, as defined by section 2(z) of the Act, owns and operates a piece of equipment and is paid on the basis of a unit price for both equipment and operator, a determination of what portion of the payment represents earnings will have to be made.

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, he/she will have the opportunity to submit evidence, such as earnings documentation as confirmed

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by the records of the employer.

6. Offshore Workers

A. Trawlermen

Average weekly earnings will be determined by dividing the sum of the gross earnings (of the trips included) by the number of days from the first day of the first trip to the last day of the last trip and multiplying by seven (total earnings ÷ days worked x 7 = weekly earnings).

B. Oil Rig Workers

Depending on how the earnings are reported, the gross weekly earnings can be determined as follows:

- (a) Where there are broken weeks between earnings, the same method as described above for trawlermen will be used.
- (b) Where monthly earnings are submitted, the monthly average will be divided by 4.3333 in order to establish the average gross weekly earnings.

7. Coastal Marine Workers

The shift pattern for many workers in this category is either the first half of the month "on" and the second half of the month "off", or vice versa. For the "injury month" or "return to work month" only, entitlement will be on the basis of a day and a half for each shift lost - pay factor of 1.5. When a worker's disability extends beyond the "injury month", the claims will be treated as a regular seven-day worker's claim - pay factor 1.0.

Exceptional Circumstances

In cases 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. Such a decision will be considered for that specific case only and will not be precedent setting.

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Reference: Workplace Health, Safety and Compensation Act (the Act) Sections 2(h), 2(v), 2(z)(iv), 19(e), 40(2), 47, 55, 64, 73, 74, 76-81.1, 90.1 & 120.
Workplace Health, Safety and Compensation Regulations, Sections 7 & 20-22
Policy, CO-01 Coverage for Commercial Fishers

Amendment History

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