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Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

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November 21, 2006

Mr. Gary Majesky
WSIB Consultant
IBEW Local 353
1377 Lawrence Avenue East
Toronto, Ontario
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Dear Mr. Majesky:

Thank you for your letter of November 6, 2006 regarding the re-employment rules that would apply to a licensed journeyman electrician.

As a Policy Analyst within the Benefits and Revenue Policy Branch, it would not be appropriate for me to comment on the facts of a specific claim. I will therefore limit my comments to the legislation and applicable WSIB policy.

In your letter, you first raised the issue of how WSIB policy 19-04-05 - - Alternative Work Comparable to the Pre-injury Job - - would apply to journeyman electricians. I should point out that as per s.41 of the *Workplace Safety and Insurance Act*, construction employers who employ construction workers are subject to O.Reg. 259/92, the regulation for re-employment in the construction industry (see attached). WSIB policy 19-04-05, *only* applies to claims involving non-construction workers. It *does not* apply to claims involving construction workers. (Accordingly, the questions you posed regarding the use of 19-04-05 in this type of situation are moot points).

Section 7 of O.Reg 259/92 provides how an employer may meet the re-employment obligation upon receiving notice that the worker is able to perform the essential duties of the pre-injury employment. Essentially it sets out how the employer is to offer the worker a position in the worker's trade at a collective agreement workplace of the employer. In these types of situations, the Regulation does not allow employers to offer work outside of the worker's trade at a collective agreement workplace of the employer.

You also raised the issue of whether the worker's prior status as an apprentice (including the average earnings rules that are specific for apprentices) should be considered when determining whether the employer is meeting his or her re-employment obligation. Although the WSIB's policies do not directly speak to this, if a worker's status changes from that of apprentice to that of journeyman, and the worker *subsequently* experiences a work-related injury, the worker's *prior* status as an apprentice should not be considered when determining whether the employer is meeting his or her re-employment obligation.

(The prior change in status could affect a journeymans' long-term earnings recalculation. Under the WSIB's average earnings policies (also attached), a break in the employment pattern - - such as a change in status from apprentice to journeyman - - shortens the recalculation period of the worker's long-term average earnings.)

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As I indicated above, it is not appropriate for me to comment on specific claims. If you have any concerns regarding the adjudication of a specific claim, I would suggest that you speak with the service delivery team handling the claim. If you have any further questions regarding the legislation, Regulation, or WSIB policy, please let me know.

Yours sincerely,

Adam Starkman
Policy Analyst
Benefits and Revenue Policy Branch

/attachments

Workplace Safety and Insurance Act, 1997
Loi de 1997 sur la sécurité professionnelle et l'assurance contre les accidents du travail

ONTARIO REGULATION 259/92

No Amendments

REINSTATEMENT IN THE CONSTRUCTION INDUSTRY

Notice of Currency:* This document is up to date.

*This notice is usually current to within two business days of accessing this document. For more current amendment information, see the Table of Regulations (Legislative History).

This Regulation is made in English only.

PART I
GENERAL

1. This Regulation prescribes the requirements, mentioned in subsection 54 (9) of the Act, imposed on employers engaged primarily in construction to re-employ injured workers who perform construction work. O. Reg. 259/92, s. 1.

2. In this Regulation,

"suitable employment" means employment that is in the worker's trade, that the worker has the necessary skills to perform and that does not pose a health or safety hazard to the worker. O. Reg. 259/92, s. 2.

3. An employer is obligated under this Regulation until the day that is the earliest of,

(a) two years after the date of the injury to the worker;

(b) one year after the date the Board notifies the employer that the worker is medically able to perform the essential duties of the worker's pre-injury employment; and

(c) the date the worker reaches sixty-five years of age. O. Reg. 259/92, s. 3.

4. (1) In order to fulfil the employer's obligations under this Regulation, the employer shall accommodate the work or the workplace to the needs of a worker who is impaired as a result of the injury to the extent that the accommodation does not cause the employer undue hardship. O. Reg. 259/92, s. 4 (1).

(2) An employer shall give written notice to the Board of the particulars of the way in which the employer intends to accommodate the work or the workplace to the needs of a worker under subsection (1). O. Reg. 259/92, s. 4 (2).

PART II
UNION WORKERS

5. This Part applies if, at the time the worker was injured, the employer was subject to a collective agreement with a union representing the worker. O. Reg. 259/92, s. 5.

6. (1) In this Part,

"collective agreement workplace of the employer" means,

(a) a construction project of the employer that is within the jurisdiction of the collective agreement, subject to subsection (2), or

(b) a shop of the employer in respect of which there is a construction industry collective agreement between the employer and the union. O. Reg. 259/92, s. 6 (1).

(2) A construction project is not a collective agreement workplace if the collective agreement contains restrictions on the mobility of workers from the workplace where the worker was injured to the construction project. O. Reg. 259/92, s. 6 (2).

7. (1) Upon receiving notice from the Board that the worker is able to perform the essential duties of the worker's pre-injury employment, the employer shall offer to employ the worker in a position in the worker's trade at a collective agreement workplace of the employer if,

(a) at the workplace where the worker was injured, there are at least as many workers in the injured worker's trade as there were, not counting the injured worker, when the worker was injured;

(b) work within the worker's trade is being performed at a collective agreement workplace of the employer by a worker who was hired, assigned or transferred on or after the date of the injury; or

(c) there is an available position in the worker's trade at a collective agreement workplace of the employer. O. Reg. 259/92, s. 7 (1).

(2) Clause (1) (a) does not apply if there are no workers in the injured worker's trade. O. Reg. 259/92, s. 7 (2).

8. Upon receiving notice from the Board that the worker, although unable to perform the essential duties of the worker's pre-injury employment, is able to perform suitable work, the employer shall offer the worker the first opportunity to accept suitable employment that becomes available at a collective agreement workplace of the employer. O. Reg. 259/92, s. 8.

9. Upon receiving notice from the Board that the worker will never be medically able to work on a construction site, the employer shall offer the worker the first opportunity to accept suitable employment that becomes available at a workplace of the employer. O. Reg. 259/92, s. 9.

PART III
NON-UNION WORKERS

10. This Part applies if, at the time the worker was injured, the employer was not subject to a collective agreement with a union representing the worker. O. Reg. 259/92, s. 10.

11. (1) This section applies if the employer is still employing workers at the workplace where the worker was injured. O. Reg. 259/92, s. 11 (1).

(2) Upon receiving notice from the Board that the worker is able to perform the essential duties of the worker's pre-injury employment, the employer shall offer to employ the worker in a position in the worker's trade at the workplace where the employee was injured if at the workplace,

(a) there are at least as many workers in the injured worker's trade as there were, not counting the injured worker, when the worker was injured;

(b) work within the worker's trade is being performed by a worker who was hired on or after the date of the injury; or

(c) there is an available position in the worker's trade. O. Reg. 259/92, s. 11 (2).

(3) Clause (2) (a) does not apply if there are no workers in the injured worker's trade. O. Reg. 259/92, s. 11 (3).

12. (1) This section applies if the employer is no longer employing workers at the workplace where the worker was injured or if none of the conditions in clauses 11 (2) (a), (b) and (c) are satisfied. O. Reg. 259/92, s. 12 (1).

(2) Upon receiving notice from the Board that the worker is able to perform the essential duties of the worker's pre-injury employment, the employer shall offer to employ the worker in a position in the worker's trade at a construction project or shop of the employer if, at any such project or shop,

(a) there is an available position in the worker's trade; or

(b) work within the worker's trade is being performed by a worker who was hired on or after the date of the injury. O. Reg. 259/92, s. 12 (2).

13. (1) If the employer is required under section 11 or 12 to offer to employ the worker in a position, the position must be comparable to the position the worker had at the time of the injury in respect of earnings, duration of project and proximity to domicile. O. Reg. 259/92, s. 13 (1).

(2) If more than one position is available, the employer must offer to employ the worker in the position that is the most similar to the position the worker had at the time of the injury in respect of earnings, duration of project and proximity to domicile. O. Reg. 259/92, s. 13 (2).

14. Upon receiving notice from the Board that the worker, although unable to perform the essential duties of the worker's pre-injury employment, is able to perform suitable work or, upon receiving

notice from the Board that the worker will never be medically able to work on a construction site, the employer shall offer the worker the first opportunity to accept suitable employment that becomes available at a workplace of the employer. O. Reg. 259/92, s. 14.

Back to top

WSIB Workplace Safety & Insurance Board ONTARIO
CSPAAT Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

Subject: **Average Earnings**
Title: **Determining Long-term Average Earnings: Workers in Permanent Employment**
Document Number: **18-02-03**

Print

Policy

The long-term average earnings of a worker in permanent employment are generally the same as a worker's short-term average earnings. A worker's average earnings are recalculated to long-term average earnings if the decision-maker determines that it is unfair to continue paying loss of earnings (LOE) benefits based on the short-term average earnings.

NOTE

Either of the workplace parties can request a recalculation.

LOE benefits are paid based on the worker's long-term average earnings from the beginning of the 13th week of LOE benefits.

Back to top

Guidelines

Definitions

Permanent employment is employment where a worker

- is employed (by the employer) 52 weeks a year, with no seasonal or cyclical layoffs, and
- has no set termination date, apart from retirement
- may be full or part-time
- may have earnings that vary from day to day or week to week due to irregular hours or method of payment.

Permanent employment may involve occasional short-term layoffs or non-earning periods such as shortages of work, plant shutdowns during holidays, retooling, strikes, or lockouts. Such temporary layoffs or non-earning periods do not reflect a break in the employment pattern.

Workers in permanent employment may include

- workers whose salary is based solely on commissions, **or**
- drivers paid per mileage driven.

NOTE

In some industries, such as construction, employers may hire workers for either permanent or non-permanent employment. (For a definition of non-permanent employment see 18-02-04, Determining Long-term Average Earnings: Workers in Non-Permanent Employment.) Therefore, the type of industry may not always be indicative of the employment relationship.

The decision-maker's determination to consider a worker to be in permanent or non-permanent employment is generally based on the earnings information provided by the employer (see 15-01-02, Employers' Initial Accident Reporting Obligations).

A **recalculation** involves redetermining a worker's average earnings taking into account the worker's long-term employment pattern. The recalculated long-term average earnings become effective from the beginning of the 13th week of LOE benefits.

A **break in the employment pattern** is a change in the worker's employment that is significant enough to make the period before the break irrelevant to the determination of the worker's long-term average earnings. This may involve a **permanent** change

- of employers
- from full- to part-time work, or vice-versa
- from permanent to non-permanent employment, or vice versa
- in job grade, classification, trade, or method of payment
- from self-employment to permanent employment, or vice-versa, or
- in status from dependent contractor to worker in permanent employment (see 18-02-08, Determining Average Earnings: Exceptional Cases).

A break in the employment pattern shortens the recalculation period for long-term average earnings (see "Recalculation period" in this document).

A **non-earning period** is the time during which the worker was not earning due to layoff, contract termination, illness, or leave of absence.

Non-earning periods that **are** part of the employment pattern (e.g., layoffs, contract terminations) are factored into the recalculation. Non-earning periods that **are not** part of the employment pattern (e.g., parental/maternity leave) are factored out (see "Non-earning periods excluded from recalculation" in this document).

When to conduct a recalculation

Generally, the worker's long-term average earnings are the same as the worker's short-term average earnings and a recalculation is not necessary. A recalculation may be done if it is not fair to continue paying LOE benefits based on the worker's short-term average earnings. It is considered unfair if the worker's short-term average earnings profile does not reflect the long-term average earnings profile.

The short-term average earnings may not reflect the worker's long-term earnings profile if the worker

- had prior earnings that are not included in the short-term average earnings
- worked irregular overtime that is or is not included in the short-term average earnings
- earned irregular bonuses or commissions, or
- experienced temporary layoffs due to work shortages, retooling, or holiday shutdowns.

Recalculation period

Long-term average earnings are based on the employment earnings in the 12 months before the injury, or a lesser period. The recalculation period may be shortened by a break in the employment pattern (see "Break in the employment pattern" in this document).

If a shorter recalculation period is to be used, the start of the period is the date when the actual change (the movement from one pattern of employment to another) occurred.

Example – Break in the employment pattern

Bill started working for a large automotive parts manufacturer as an assembly line worker in 1985 and was promoted to foreman on May 15, 2000. Bill suffered a work-related injury on February 1, 2001, which required him to remain off work for more than 12 weeks.

A recalculation was requested at the 12th week. While the recalculation period would normally be the 12 months before the injury (i.e., from **February 1, 2000** to January 31, 2001), it was shortened by the break in the employment pattern. As a result, the period of recalculation is from **May 15, 2000** to January 31, 2001.

Extending the recalculation period

If necessary, the 12 month period may be extended to include the full calendar year before the injury, plus the current year up to the date of injury.

This simplifies the process of gathering the worker's past earnings information with the use of income and deduction printouts (available from Canada Revenue Agency), T-4 slips, paycheque statements, or letters from employers. The recalculation period may not extend beyond a break in the employment pattern.

Non-earning periods excluded from recalculation

Non-earning periods that are not part of the worker's employment pattern are factored out of the recalculation period. These periods may include

- parental/maternity leaves
- unpaid periods of injury or illness
- periods of injury or illness for which the worker received long-term disability benefits
- periods of injury or illness for which the worker received workplace insurance benefits* or benefits from another insurance plan
- periods of full-time schooling
- unpaid leaves of absence
- periods of incarceration
- periods on social assistance benefits **
- strikes/lockouts
- unpaid periods of absence due to jury duty, spouse's (including same-sex partner) or children's illnesses, funerals, dentist, or doctor appointments.

The decision-maker may require a worker to provide documentation with respect to non-earning periods.

* This only includes periods during which the worker was

- unable to work and receiving full benefits (i.e., full LOE benefits under the WSIA, s.37(1) temporary total disability, or s.147(2) supplementary benefits under the Workers' Compensation Act), and
- participating in early and safe return to work (ESRTW) activities (see 19-02-02, The Goal of ESRTW and the Roles of the Parties), or
- active in a labour market re-entry (LMR) assessment or plan (see 19-03-01, Overview), and/or involved in a return to work placement program (see 19-04-09, Re-employment Penalties and Payments).

** This may include periods during which the worker was

- not working and receiving social assistance benefits, or
- working and receiving social assistance benefits.

Non-earning periods included in the recalculation

Non-earning periods that are part of the employment pattern may include temporary layoffs due to work shortages, retooling, or holiday shutdowns. Gross employment insurance (EI) benefits received for these non-earning periods are included as earnings.

If a worker has periodic employment earnings supplemented by social assistance benefits and this is reflective of their employment pattern, the decision-maker may accept only the earnings and time worked from employment.

Recalculation method

To determine a worker's long-term average earnings, the decision-maker divides the worker's total earnings in the recalculation period, by the length of the recalculation period.

Periods of non-covered self-employment are considered part of the worker's employment pattern and do not shorten the recalculation period. As a result, neither the earnings from the non-covered self-employment nor the time worked in the non-covered self-employment may be included in the recalculation.

The decision-maker does not recalculate the worker's average earnings solely due to a pay increase or decrease prior to the injury. However, if

- the worker's average earnings are to be recalculated (e.g. the worker had irregular overtime that was not included in the short-term average earnings), **and**
- the worker had received a pay increase or decrease in the recalculation period,

the decision-maker factors in the pay increase/decrease.

Example - Pay increase

In the 365 days* (12 months) before the injury Joe earned

- $20/hr in a 40-hour week ($800/wk) for the first 36 weeks
- $20.80/hr in a 40-hour week ($832/wk) for the last 16 weeks, and
- $250 in overtime.

To calculate Joe's long-term average earnings the decision-maker adds the

- earnings in the recalculation period including overtime, for a total of $42,362
- divides this total by the recalculation period ($42,362 divided by 365*) x 7, for a weekly amount of $812.42
- adds to this weekly amount
  - the amount of the pay increase ($32/wk)
  - multiplied by the number of weeks in the recalculation period that the worker was paid at the old rate (36 weeks),
  - multiplied by 7, divided by 365,*

for a long-term average earnings of $834.51.

Formula

$812.42 + [($32 x 36) x 7]/365*= $834.51

Example - Pay decrease

If in the 365 days* (12 months) before the injury Sergei earned

- $20.80/hr for the first 16 weeks
- $20.00/hr for the last 36 weeks, and
- $250 in overtime.

To calculate Sergei's long-term average earnings the decision-maker

- adds the earnings for a total of $42,362
- divides this total by the recalculation period
- ($42,362 divided by 365*) x 7, for a weekly amount of $812.42
- subtracts from this weekly amount
    - the amount of the pay decrease ($32/wk)
    - multiplied by the number of weeks that the worker was paid at the old rate (16 weeks)
- multiplied by 7 and divided by 365*

for a long-term average earnings of $802.60

Formula

$812.42 - [($32 x 16) x 7]/365* = $802.60

*This is the length of the recalculation period and may be less than 365 if the recalculation period is shortened by a break in the employment pattern, or non-earnings periods that are factored out.

NOTE

This applies only if the pay increase/decrease is not related to a change in job grade or classification. If the pay increase/decrease is due to a change in job grade or classification this reduces the recalculation period (see "Break in the employment pattern" in this document).

Table of earnings

For a list of items that are included or excluded from the recalculation of long-term average earnings, see 18-02-02, Determining Short-term Average Earnings.

Temporary long-term average earnings

If the decision-maker does not have the complete earnings information necessary to determine long-term average earnings, temporary long-term average earnings may be established based on a best estimate of the worker's long-term earnings. LOE benefits may be paid based on this amount until the necessary information is obtained.

Severely impaired workers

The long-term average earnings of a severely impaired worker (a worker with a non-economic loss rating of 60% or more and receiving full LOE benefits), may not be less than 75% of the worker's short-term average earnings. Once the decision-maker determines the permanent impairment rating of such a worker, any adjustment to the long-term average earnings is made retroactively to the beginning of the 13th week of LOE benefits.

Effective date of long-term earnings

If a recalculation of the worker's average earnings is conducted, LOE benefits are paid based on the long-term average earnings effective from the beginning of the 13th week of benefits. Long-term average earnings may be adjusted if the information used for the recalculation is found to be incorrect or incomplete. For example, following the recalculation the worker could receive an irregular bonus that was earned prior to the injury.

An adjustment is made when the decision-maker receives the new information. The adjusted long-term average earnings are retroactive to the beginning of the 13th week of benefits.

If the adjustment results in a lower rate, a benefit-related debt is created and may be recoverable

(see 18-01-04, Recovery of Benefit-Related Debt).

Obligation to provide information

To determine long-term average earnings, the decision-maker requires the worker and/or employer to supply relevant earnings information. The following documents are accepted as "proof of earnings"

- Income and Deduction Statement from Canada Revenue Agency
- T4 statements issued by the employer
- pay cheque stubs
- Record of Employment as submitted for EI purposes, or
- letters from prior employers.

The decision-maker has sole discretion to determine what is acceptable "proof of earnings." The decision-maker may exercise discretion where documents not listed above are submitted as "proof of earnings."

The decision-maker may reduce or suspend benefits if the worker fails to provide the requested information within the specified time period. If the worker must obtain information from a third party (e.g., Canada Revenue Agency) and does not obtain this information, the decision-maker must be satisfied that the worker failed to take all reasonable steps to acquire the information before reducing or suspending the worker's benefits. If the worker subsequently supplies the required information, full benefits are reinstated; however, this payment is not retroactive.

If the employer fails to provide the requested information, the employer may be found guilty of an offence and subject to a penalty (see 22-01-08, Offences and Penalties - Employer).

Application date

This policy applies to all decisions, for all accidents occurring on or after December 1, 2002.

Document history

This document replaces 18-02-03 dated December 1, 2002.

This document was previously published as:
18-02-03 dated July 7, 2000
18-02-03 dated September 14, 1999
4.1 dated January 1, 1998.

Back to top

References

Legislative authority

Workplace Safety and Insurance Act, 1997, as amended
Sections 21, 23, 53, 66, 152

Minute

Administrative
#16, June 11, 2004, Page 367

Back to top

Published: 12-Oct-2004
Application Date: This policy applies to all decisions, for all accidents occurring on or after December 1, 2002.

WSIB ONTARIO Workplace Safety & Insurance Board
CSPAAT Commission de la sécurité professionnelle et de l'assurance contre les accidents du travail

Subject: **Average Earnings**
Title: **Determining Long-term Average Earnings: Workers in Non-permanent Employment**
Document Number: **18-02-04**

Print

Policy

Earnings for a worker in non-permanent employment typically fluctuate as the worker moves from job to job, has periods of unemployment, or experiences periods of higher or lower earnings. Therefore, it is likely that a worker's long-term average earnings will be different than the short-term average earnings. Since it would be unfair to continue paying a worker's loss of earnings (LOE) benefits based on the short-term average earnings, the decision-maker automatically recalculates the average earnings to long-term average earnings.

LOE benefits are paid based on the worker's long-term average earnings from the beginning of the 13th week of LOE benefits.

Back to top

Guidelines

Definitions

Non-permanent employment is employment where a worker is hired

- for a specific period of time, or
- for a temporary period through a union hall.

Workers in non-permanent employment include

- contract workers
- seasonal or cyclical workers, or
- temporary agency workers.

NOTE

In some industries, such as construction, employers may hire workers for either permanent or non-permanent employment. (For a definition of permanent employment, see 18-02-03, Determining Long-term Average Earnings: Workers in Permanent Employment.) Therefore, the type of industry may not always be indicative of the employment relationship.

The decision-maker's determination to consider a worker to be in permanent or non-permanent employment is generally based on the earnings information provided by the employer (see 15-01-02, Employers' Initial Accident-Reporting Obligations).

A **recalculation** involves redetermining a worker's average earnings to take into account the worker's long-term employment pattern. The recalculated long-term average earnings become effective from the beginning of the 13th week of LOE benefits.

A **break in the employment pattern** is a change in the worker's employment significant enough to make the period before the break irrelevant to the determination of the worker's long-term earnings. This may include a change

- from permanent employment to non-permanent employment, or vice-versa
- in status from dependent contractor to worker in non-permanent employment (see 18-02-08, Determining Average Earnings: Exceptional Cases), or
- in status from worker with optional insurance to worker in non-permanent employment.

A break in the employment pattern shortens the recalculation period for long-term average earnings.

A **non-earning period** is a period during which the worker was not earning due to reasons such as, layoff, contract termination, illness, or leave of absence.

Non-earning periods that **are** part of the employment pattern (e.g., layoffs, contract terminations) are factored into the recalculation (see "Non-earning periods included in recalculation" in this document). Non-earning periods that **are not** part of the employment pattern (e.g., maternity/parental leave) are factored out (see "Non-earning periods excluded from recalculation" in this document).

When to conduct a recalculation

The decision-maker conducts the recalculation of the worker's average earnings after the worker has received 12 weeks of LOE benefits.

Recalculation method

To determine a worker's long-term average earnings, the decision-maker

- establishes the recalculation period
- adds up the total earnings from all employment during the recalculation period (including Employment Insurance (EI) benefits)
- subtracts non-earning periods which should be excluded from the recalculation period
- divides the earnings by the resulting weeks (or days) in the recalculation period to produce a weekly long-term average earnings amount.

Periods of non-covered self-employment are considered part of the worker's employment pattern and do not shorten the recalculation period. As a result, neither the earnings from the non-covered self-employment nor the time worked in the non-covered self-employment may be included in the recalculation.

Recalculation period

Long-term average earnings for these workers are generally based on employment in the 24 months before the injury.

To simplify the process of gathering the worker's past earnings information, the 24-month period may be either

- extended to include the two full calendar years before the injury, plus the current year up to the date of injury, or
- shortened to the full calendar year before the injury, plus the current year up to the date of injury, provided that the worker's employment pattern is accurately reflected.

If the decision-maker extends/shortens the recalculation period, the decision-maker may have regard to the worker's seasonal or cyclical work pattern.

Example

Dave works as a seasonal worker for the same employer each year from April 1st to October 31st. On May 15, 2002, Dave suffers a work-related injury. In this case, the decision-maker first attempts to gather earnings information for the 24-month period before the injury (i.e., May 15, 2000 to May 14, 2002).

Dave cannot easily provide this information. As a result, Dave submits T4 slips for the 2000 and 2001 taxation years, as well as Employment Insurance documentation and earnings information from the employer for the period of January 1, 2002 to May 14, 2002. Because the period of January 1st to March 31st represents a non-earning period *each year* for Dave, the decision-maker uses the period of April 1, 2000 to May 14, 2002 (25.5 months) as the recalculation period.

Break in the employment pattern

In all cases, the recalculation period is shortened by a break in the employment pattern. If a shorter recalculation period is to be used, the start of the period is the date when the actual change occurred (i.e., the movement from one pattern of employment to another).

Example – Break in the employment pattern

Patti was a permanent employee with ABC Ltd. from January 12, 1998 until September 15, 1998 when she was laid-off because of a work shortage. Patti received employment insurance benefits (EI) until April 1, 1999 when she found a permanent job with XYZ Inc. Due to a lay-off on April 20, 2000, Patti again received EI benefits until May 10, 2000. Patti joined the roster of JKL Temporary Services on May 25, 2000 and was referred on assignment with RS Employer on June 5, 2000. Patti suffered a work-related injury on August 30, 2000.

In this case, Patti is considered a worker in non-permanent employment at the time of injury. She is subject to an automatic recalculation based on her earnings from the 24 months before the injury (i.e. August 30, 1998 to August 29, 2000). In determining the recalculation period, however, the decision-maker notes that Patti's prior employment is considered "permanent". Therefore, the earnings prior to the start of Patti's employment with RS Employer are not considered in determining her long-term average earnings. The date on which Patti started work with RS Employer represents the "break in the employment pattern" and would be the date from which the recalculation for the long-term average earnings starts. Therefore, the recalculation period is from June 5, 2000 until August 29, 2000.

Non-earning periods included in recalculation

The decision-maker considers periods of unemployment to be part of the employment pattern for workers in non-permanent employment. The decision-maker, therefore, does not factor out periods of unemployment due to lay-offs, terminations, seasonal employment, or unavailability of work. However, because these periods are included, gross employment insurance (EI) benefits received for these periods are included as earnings.

Example

After Kajol, an administrative assistant, receives 12 weeks of LOE benefits the decision-maker recalculates Kajol's long-term average earnings. During the 730 day (24-month) recalculation period, Kajol had two periods during which EI benefits were received totalling $6,000. Receipt of EI benefits does not affect the recalculation period, but the EI earnings are added to Kajol's employment earnings in the 730 day (24 month) period.

Non-earning periods excluded from recalculation

Non-earning periods that are not part of the employment pattern are factored out of the recalculation period. These periods may include

- parental/maternal leaves
- unpaid periods of injury or illness
- periods of injury or illness for which the worker receives long-term disability benefits
- periods of injury or illness for which the worker receives workplace insurance benefits* or

benefits from another insurance plan
- periods of full-time schooling
- periods of incarceration
- periods on social assistance benefits **
- unpaid leaves of absence
- strikes/lockouts
- unpaid periods of absence due to jury duty, spouse's (including same sex partners/couples) or children's illnesses, funerals, dentist or doctor appointments.

* This only includes periods during which the worker was

- unable to work and receiving full benefits (i.e., full LOE benefits under the WSIA, s.37(1) temporary total disability, or s.147(2) supplementary benefits under the Workers' Compensation Act), and
- participating in early and safe return to work (ESRTW) activities (see 19-02-02, The Goal of ESRTW and the Roles of the Parties), or
- active in a labour market re-entry (LMR) assessment or plan (see 19-03-01, Overview), and/or involved in a return to work placement program (see 19-04-09, Re-employment Penalties and Payments).

** This may include periods during which the worker was

- not working and receiving social assistance benefits, or
- working and receiving social assistance benefits.

Example

Sarah, a clerk, has a work related injury. After 12 weeks of LOE benefits the decision-maker recalculates Sarah's long-term average earnings. The usual recalculation period is 730 days (24 months). During this period Sarah was on a 182 day (six month) maternity leave and had no earnings. This six month non-earning period is deducted from the recalculation period reducing it from 730 days to 548 days. The 548 days are then divided into the total earnings from all employers to produce the long-term average earnings.

The decision-maker may require workers to provide supporting documentation with respect to non-earning periods. The following are accepted documents

- EI notices confirming periods of entitlement to benefits received, or
- notices from Social Services confirming periods of entitlement and benefits.

If a worker has periodic employment earnings supplemented by social assistance benefits and this is reflective of their employment pattern, the decision-maker may accept only the earnings and time worked from employment.

Table of earnings

For a list of items that are included or excluded from the recalculation of long-term average earnings, see 18-02-02, Determining Short-term Average Earnings.

Temporary long-term average earnings

If the decision-maker does not have the complete earnings information necessary to determine long-term average earnings, temporary long-term average earnings may be established based on a best estimate of the worker's long-term earnings. LOE benefits may be paid based on this amount until the necessary information is obtained.

Workers with no prior employment history

A worker may not be in the accident job long enough for an employment pattern to be established. As well, the worker may not have a prior earnings history (e.g., it is the worker's first job, or the worker has returned to the workforce after an absence of more than two years).

If the accident job is seasonal or cyclical, and the duration of the lay-off period is established through past practice, the decision-maker can determine the long-term average earnings by using the long-term average earnings of another worker similarly employed by the accident employer.

If this information is not available, the decision-maker can use the worker's short-term average earnings multiplied by the number of weeks in the season or cycle and add the probable Employment Insurance (EI) benefits payable. The calculation of probable EI benefits is derived from the basic benefit rate and maximum amount payable set out in the *Employment Insurance Act*, and as a result, is subject to change.

If the accident job is not seasonal or cyclical, and no clear recurring lay-off can be established, the decision-maker can determine the long-term average earnings by using the long-term average earnings of another worker similarly employed by the accident employer.

If this information is not available, the decision-maker can use the period of time the worker was employed with the accident employer and the worker's total earnings for that period.

Severely impaired workers

The long-term average earnings of a severely impaired worker (a worker with a non-economic loss rating of 60% or more and receiving full LOE benefits) may not be less than 75% of the worker's short-term average earnings. Once the decision-maker determines the permanent impairment rating of such a worker, any adjustment to the long-term average earnings is made retroactively to the beginning of the 13th week of LOE benefits.

Effective date of long-term average earnings

If a recalculation of the worker's average earnings is conducted, LOE benefits are paid based on the long-term average earnings effective from the beginning of the 13th week of benefits. Long-term average earnings may be adjusted if the information used for the recalculation is found to be incorrect or incomplete. For example, following the recalculation the worker could receive an irregular bonus that was earned prior to the injury.

An adjustment is made when the decision-maker receives the new information. The adjusted long-term average earnings are retroactive to the beginning of the 13th week of benefits.

If the adjustment results in a lower rate, a benefit-related debt is created and may be recoverable (see 18-01-04, Recovery of Benefit-related Debts).

Obligation to provide information

To determine long-term average earnings, the decision-maker requires the worker and/or employer to supply relevant earnings information. The following documents are accepted as "proof of earnings"

- Income and Deduction Statement from Canada Revenue Agency
- T4 statements issued by the employer
- pay cheque stubs
- Record of Employment submitted for EI purposes, or
- letters from prior employers.

The decision-maker has the sole discretion to determine what constitutes acceptable "proof of earnings". Where documents not listed above are submitted as "proof of earnings," the decision-maker may exercise his or her discretion.

The decision-maker may reduce or suspend benefits if the worker fails to provide the requested information within the specified time period. If the worker must obtain information from a third party (e.g., Canada Revenue Agency) and does not obtain this information, the decision-maker must be satisfied that the worker failed to take all reasonable steps to acquire the information before reducing or suspending the worker's benefits. If the worker subsequently supplies the required information, full benefits are reinstated; however, this payment is not retroactive.

If the employer fails to provide the requested information, the employer may be found guilty of an offence and subject to a penalty (see 22-01-08, Offences and Penalties - Employer).

Application date

This policy applies to all decisions, for all accidents occurring on or after December 1, 2002.

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This document was previously published as:
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Back to top

References

Legislative authority

Workplace Safety and Insurance Act, 1997, as amended
Sections 21, 23, 53, 66, 152

Minute

Administrative
#10, June 11, 2004, Page 366

Back to top

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