

WORKERS' COMPENSATION BENEFITS

Claims Between January 1, 1990 and December 31, 1997

The following information relates to workers injured on the job between January 1, 1990 and December 31, 1997. Accidents occurring before this time or after this time are subject to different rules and receive different benefits.

The Workers' Compensation Act changed in 1990, and with those changes came a new benefits structure. Every injured worker who had a new accident after January 1st, 1990 but before December 31, 1997, receives benefits under what are commonly known as the "Bill 162" amendments.

BENEFITS

Workers injured between the start of 1990 and the end of 1997 are paid benefits based on 90% of their net pre-accident earnings. There are varying levels of inflation protection, depending on the circumstances. The earnings on which benefits are based are subject to minimums and maximums. These minimums and maximums change every year.

The benefits that can be paid are:

- a) temporary benefits
 - temporary total disability benefits
 - temporary partial disability benefits
 - full
 - difference
 - 50% or less
- b) future economic loss benefits
- c) future economic loss supplementary benefits
- d) non-economic loss benefits
- e) retirement pension.

A. TEMPORARY DISABILITY BENEFITS

When a worker is initially injured to the point where they lose time from work, they are usually considered to be temporarily disabled. During the period of time when the worker is temporarily disabled, two types of benefits can be paid. Initially, the worker will receive **temporary total** disability benefits; later the worker may receive **temporary partial** disability benefits.

1. Temporary total disability benefits are paid when the Board considers that, due to the injury, the worker is unable to work at any job. Temporary total disability benefits are paid bi-weekly.
2. As recovery from the injury occurs, payment moves into temporary partial disability benefits, also paid bi-weekly, where the Board is of the opinion that the worker is capable of performing suitable modified work, but are not yet ready to return to their previous employment. Sometimes, workers are considered only temporarily partially disabled right from the start of a claim. Workers are often not aware that they are in this category or have changed categories, as there may not be a change in the amount of benefits received. However, the Board's expectations are significantly different for an injured worker who is considered temporarily partially disabled. The "temporarily partially disabled" label means that there is an expectation that the injured worker can and will participate in returning to work that fits their medical restrictions.

There are three types of temporary partial disability benefits:

(a) temporary partial full benefits, where the injured worker is co-operating with a program aimed at getting them back to work, but they are not yet working. These benefits are paid at the full temporary total rate;

(b) temporary partial difference benefits, where the injured worker has returned to modified work. The amount of these benefits will be 90% of the difference between the net pre-accident weekly earnings and the net average amount being earned at the modified work. In other words, the Board will pay 90% of the difference in wages, up to the maximum rate, by taking into account the amount being earned in wages. Of course, if the injured worker returns to modified work at no wage loss, there will be no benefits payable by the Board

(c) temporary partial 50% benefits, paid at 50% (or less) of the temporary total benefit rate, where the injured worker is not cooperating in a program which the Board thinks would help them return to work. If the injured worker refuses a medically suitable modified job, which would have resulted in no wage loss, their benefits will be reduced to zero. The Board can also look at Canada Pension Plan disability benefits received for the injury in determining the amount of benefits to be paid in this category.

It is important to remember that as soon as the injured worker is able to work at some job (within medical restrictions), they should be contacting their employer to see if there is a job there. If the employer does not have suitable work or will not have in the near future, the injured worker should contact the Board for assistance (which could include helping the worker get back to work with the accident employer). In the meantime, the worker should begin to look for modified work elsewhere, and keep track of the efforts to do so. Without these efforts, full benefits may not be payable retroactively.

The law also says that when there has been a material change in circumstances, the worker must tell the Board within 10 days. This especially holds true about return to work information: details about wages, hours worked, etc. must be given to the Board within 10 days.

B. FUTURE ECONOMIC LOSS (FEL)

About one year post-injury, if not fully recovered, injured workers move out of the temporary benefits category and into the **future economic loss** category. The determination of compensation for future economic loss of earnings should be done by the Board 12 months after the accident but can be done up to 18 months or longer after the accident, if the worker's medical condition is such that the FEL determination couldn't be made before then.

A worker who suffers an injury that results in a **permanent impairment** or that results in **12 continuous months of temporary disability** is entitled to a Future Economic Loss award. This award ends when the worker reaches age 65. The FEL award is calculated on the basis of a formula: the FEL is equal to 90% of the difference between the worker's net average pre-accident earnings and what the Board says are the estimated net average post-accident earnings. There is a Board policy dealing with how the Board can look at what Canada Pension Plan disability benefits are being paid when setting the FEL amount. As of January 2004, the Board must use only the higher of deemed wages or CPP-D (ie. it can not add these two amounts together, as it used to in the past).

FEL benefits are usually paid monthly. Under certain circumstances, the injured worker can ask that the FEL be paid as a lump sum.

The Board has the power to decide what employment is suitable for the injured worker, in

estimating post-accident earnings. For example, if the worker was earning \$1000 a month (net) prior to the injury, and the Board determines that the worker can only earn \$600 a month (net) in suitable employment after the injury, the worker would receive 90% of that \$400 difference (or \$360) as a monthly Future Economic Loss award ($\$1000 - \$600 = \$400$; $\$400 \times 90\% = \360). Note that these numbers are for illustration purposes only, just to demonstrate the mathematical formula.

The law used to state that the FEL award had to be reviewed 24 months after the date of its initial determination, 60 months after the date of its initial determination, and within 24 months after reconsideration of a Non-Economic Loss award (where the Non-Economic Loss award is increased). The FEL award was not varied unless there was at least a 10% change.

For FEL decisions made after January 1, 1998, the law allows the Board more choices in when it reviews the FEL benefit, and it is not limited to merely reviewing the FEL twice after it is set. At the 60 month point from the first FEL determination, the FEL award is then set to age 65: this is the final FEL award. After that final FEL award is set, the Board – and injured workers – are limited in the ability to re-open the final FEL determination. The legislation changed in July 2007 to only allow a re-opening of a final FEL award if one of the following circumstances exists:

- before the 60-month post-initial FEL determination period expires, the worker fails to notify the WSIB of a change in circumstances or engages in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan, or
- the worker was provided with a labour market re-entry (LMR) plan and the plan is not completed when the 60-month post-initial FEL determination period expires, or
- after the 60-month post-initial FEL determination period expires, the worker suffers a significant deterioration in his or her condition that
 - results in a redetermination of the degree of permanent impairment
 - results in an initial determination of a permanent impairment
 - is likely, in the WSIB's opinion to result in a redetermination of the degree of permanent impairment, or
- after the 60-month post-initial FEL determination, the worker suffers a significant temporary deterioration in his or her condition that is related to the injury.

Workers must now tell the Board of any material change in their circumstances, within 10 days of it happening, so that the Board can adjust the FEL if necessary. For example, if the injured worker gets a higher paying job than what the FEL was based upon, the worker must call the Board within 10 days to tell the adjudicator of the new wages being earned. This would mean that the FEL will be recalculated and most likely decreased.

Once the worker has started to receive FEL benefits, the worker can no longer receive biweekly benefits in that claim.

C. FEL SUPPLEMENT

A worker who is getting a FEL award and who is co-operating in a Board-approved rehabilitation program can receive a supplement to the FEL award. The total compensation payable for the combination of FEL and FEL supplement is equal to 90% of the worker's pre-injury net average earnings (subject to the maximums). If the worker does not co-operate, the FEL supplement can be discontinued.

After January 1, 1998, the worker must co-operate in an early and safe return to work program or a labour market re-entry program in order to be eligible for the supplementary benefits. Once any of these programs ends or is cancelled, the supplement stops. If the program is cancelled, the

worker must take their own rehabilitation action (eg. job searching) if the supplement is to be restored retroactively (via the appeal process, for example).

Once the FEL supplement stops (so that the worker is only left with the FEL benefit), there are only limited ways to get it restarted:

- if it stopped because of non-co-operation, the worker has to start co-operating;
- if it stopped because the retraining program ended, or because the worker is past the final FEL review, the worker must show that the medical condition has deteriorated below the level shown in the NEL report.

D. RETIREMENT PENSION

In addition, for workers who receive a FEL, the Board sets aside additional funds to be used as a retirement pension, equal to 5% of each FEL payment. Workers can choose to contribute 5% of the FEL payment themselves as well, to bring the total to 10%. Every worker who has this money set aside will receive a retirement pension from the Board upon reaching age 65.

E. NON-ECONOMIC LOSS (NEL)

The Non-Economic Loss (NEL) award is granted to workers who suffer a permanent impairment as a result of their compensable injury. While the FEL pays for loss of earning power, the NEL was supposed to pay for "non-economic" losses: those losses that do not relate to the ability to earn a wage.

The NEL process is fairly straight-forward. The process will not take place until the worker has reached maximum medical recovery (ie. the condition is stable and will not get any better or any worse). Once the worker has recovered as much as is possible from the injury (eg. after therapy is complete, or after recovery from surgery), the Board will look at the medical reporting to see if there is any evidence of either a permanent physical or functional abnormality or loss remaining. If there is, the Board will start the NEL process.

In some circumstances, the Board will "rate" the injury from the documents on file. However, in most cases, the Board will send the injured worker a list of doctors, and the worker must select one doctor off the list to examine the worker. This doctor will examine the worker and mark their findings down.

The doctor who does the examination sends a copy of the assessment to the Board. The Board will then send a copy of the assessment to both the worker and to the accident employer. While before January 1, 1998, it was possible for either the worker or the employer to get a second assessment, now only the Board can ask for a second assessment, if the first assessment was not accurate.

Once the assessment process is over, the Board will then apply a rating chart to find out what percentage of permanent impairment remains. The Board plugs the reported findings into charts laid out in the AMA Guide to the Evaluation of Permanent Impairment (3rd edition). (Note that this Guide is now out of print as new editions have been published, but the Board must use the 3rd Edition by Regulation). The charts rate things like range of motion, amputation, muscle weakness, sensory deficit, etc, for each body part. Those charts in the Guide will yield a percentage of impairment of "the whole person".

That percentage figure will be multiplied by a base sum plus or minus an adjustment for each year that the worker was either over or under age 45 at the time of the injury, to a maximum of 20 adjustment sums. In 1990 the base was \$45,000.00, but this figure is subject to change

yearly; in 2004, the base amount was \$52,156.06. In 1990 the adjustment sum was \$1,000.00; it too changes yearly, so that in 2004, the adjustment sum was \$1,159.43.

For example, a worker who was injured at age 30, who is determined by the Board in 1990 to have a 20% disability, would have received 20% of \$60,000.00 (\$45,000.00 base amount plus 15 adjustment sums of \$1,000 each for \$15,000.00 in additional amounts).

The NEL award will be sent out as a lump sum, if the award is less than a certain amount (in 1990, it was \$10,000.00; in 2004, the lump sum cut-off was \$11,590.00. These amounts can be found in the Board's policy setting out Benefit Rates). Otherwise it will be paid monthly, unless the worker asks within 30 days of being notified of the NEL to receive it in a lump sum. The entire NEL process takes about six months from start to finish.

If the worker's condition deteriorates in the future, the worker can ask that the NEL be reassessed, once a year has passed since the last assessment. In order to do so, the worker will have to produce a medical report (from their own doctor) that will show findings worse than those in the last NEL report (ie. the doctor will have to do the same tests and mark down the findings to show lesser range of motion, etc.), and then submit that to the Board. If the Board agrees that there has been a deterioration, then the Board will send the worker for another assessment by another NEL doctor, who will then report back to the Board. The Board will then plug those findings into the AMA Guide charts and come up with a new NEL percentage. However, unless there is a change of 10% or more, the NEL will not be adjusted.

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