

## **WORKPLACE SAFETY AND INSURANCE BENEFITS**

### **Claims After January 1, 1998**

The following information relates to workers injured on the job after January 1, 1998. Accidents occurring before this time are subject to different rules and receive different benefits. The Workers' Compensation Act changed in 1998 to the Workplace Safety and Insurance Act, bringing with it a new benefit structure. These are commonly known as the "Bill 99" changes.

#### **BENEFITS**

The monetary benefits that can be paid for a post-January 1, 1998 compensable injury are:

- C. loss of earnings benefits
- C. non-economic loss benefits
- C. retirement benefits.

#### **LOSS OF EARNINGS BENEFITS (LOE)**

Loss of Earnings benefits based on 85% of their net pre-accident earnings. The earnings on which benefits are based are subject to minimums and maximums, which change every year. LOE benefits are paid biweekly. There is some inflation protection for LOE benefits.

Board policy requires a recalculation of the amount of the LOE benefits where the worker has been in receipt of LOE for 12 weeks. This recalculation of LOE is then based on earnings from past 2 years prior to the injury. The LOE benefits paid in the 13<sup>th</sup> week and thereafter are then based upon this new calculation of pre-injury earnings.

Depending on the worker's prior employment pattern, this can be either a discretionary recalculation (where the pre-injury employment was of a "permanent" nature) or an automatic recalculation (where the pre-injury employment was "non-permanent" in nature). It is possible to challenge the recalculation:

- if some income has not been included that should have been (eg. overtime, bonus, allowances for meals or car) or
- if there are some periods of no earnings that should be excluded (eg. while on LTD, social assistance, full time school, parental leave, jail) from the recalculation period. or
- to shorten the recalculation period by providing information about a break in the employment pattern (a change from permanent to non-permanent or vice versa) which will block the recalculation from going back the full 2 years.

There are varying levels of LOE benefits payable to workers, paid bi weekly:

1. **Full LOE** benefits are paid when the worker is co-operating in health care measures **and** in either an early and safe return to work plan with the accident employer, or in a labour market re-entry program, but is not yet back to work.
2. **Partial LOE** benefits, where the injured worker has returned to modified work at the accident employer, but at a wage loss, will be 85% of the difference between the net pre-accident weekly earnings and the net average amount being earned at the modified work with the accident employer. Of course, if the injured worker returns to modified work at no wage loss, there will be no LOE benefits payable by the Board

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.

3. **Partial LOE** benefits are payable following a Labour Market Re-entry (LMR) program when a wage loss remains. LMR services are offered by the Board where the accident employer can not bring the worker back to work, and are designed to give the worker skills to be able to re-enter the workforce at a level similar to the pre-injury wages.

The amount of LOE paid at the end of LMR does not depend on whether the worker is actually working but instead depends on what the Board deems the worker to be able to earn following the completion of the LMR program. The Board has the power to decide what employment is suitable for the injured worker in estimating post-accident earnings. If the worker chooses not to complete the LMR program, they will be deemed to have done so in any event. The partial LOE will be 85% of the difference in the net wages between the pre-injury earnings and the deemed earnings of the suitable employment or business.

For illustration purposes only to demonstrate the mathematical formula, a worker was earning \$100 a week (net) prior to the injury. The Board determines that the worker can earn \$60 a week (net) in suitable employment after the injury. The worker would receive 85% of that \$40 difference (or \$34) as a Loss of Earnings benefit ( $\$100 - \$60 = \$40$ ;  $\$40 \times 85\% = \$34$ ).

4. **Zero LOE** benefits are payable where the injured worker is not co-operating in a program which the Board thinks would help them return to work, or where the accident employer has offered suitable modified work at no wage loss that the worker has refused. 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 will offset CPP-Disability (CPP-D) benefits in accordance with Policies 18-01-09 and 18-01-13 (effective January 2004), using the higher of CPP-D benefits or deemed wages as the post-injury earnings. The Board should examine any relevant information that may indicate the basis for the CPP-D payment, and will offset 100% of any CPP-D payments made to a worker in relation to the work related injury/disease. Where however CPP-D benefits are being paid for both work related and non work related injuries/diseases the Board can only offset the percentage of the CPP-D benefits that relate to the compensable injury/disease.

When there has been a material change in circumstances, the worker must tell the Board within 10 days so that the Board can adjust the LOE if necessary. This especially holds true about return to work information: details about wages, hours worked, etc. must be given to the Board within 10 days. For example, if the injured worker gets a higher paying job than what the LOE was based upon, the worker must tell the adjudicator within 10 days of the new wages being earned. This would mean that the LOE would be recalculated and most likely decreased.

LOE benefits are reviewable every year or when a material change in circumstances happens. A final LOE review is to take place 6 years after the initial injury, at which point the LOE is set to age 65. This means that the Board can not review the LOE to either increase it or decrease it more than six years after the injury, unless:

- the worker has misled the Board in that time span, or
- the LMR plan is not yet complete, or
- after the 72-month 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 72-month period expires, the worker suffers a significant temporary deterioration in his or her condition that is related to the injury, or
- when the 72-month period expires,
  - the worker and the employer are co-operating in the worker's early and safe return to work, or
  - the worker is co-operating in health care measures.

(Note: The last three bullet points on reviewing a final LOE award have only been in place since July 1, 2007).

Where the LOE benefits have been negatively affected by a Board decision about the worker's level of participation in return to work or labour-market re-entry, the worker should begin to look for modified work or seek training on their own and keep track of the efforts to do so. Without these efforts, full benefits may not be payable retroactively.

### **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 LOE 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 system did not change in any significant way from the pre-1998 process.

The NEL process takes about six months from start to finish. The process will not start 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), if there is any remaining permanent physical or functional abnormality or loss, the NEL process will start.

In some circumstances, the Board will "rate" the injury from the documents on file. However, in most cases, the Board sends the injured worker a list of doctors to choose from to perform the NEL examination. This doctor examines the worker and sends a copy of the assessment to the Board, who sends a copy of the assessment to both the worker and to the accident employer. Only the Board can ask for a second assessment, if the first assessment was not accurate.

To find out what percentage of permanent impairment remains, the Board plugs the reported findings from the assessment into charts laid out in the AMA Guide to the Evaluation of Permanent Impairment (3<sup>rd</sup> edition). (Note that this Guide is now out of print as new editions have been published, but the Board must use the 3<sup>rd</sup> 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. The base and the adjustment sums are subject to change yearly. In 1990 the base was \$45,000.00; in 2004, the base amount was \$52,156.06. In 1990 the adjustment sum was \$1,000.00; in 2004, the adjustment sum was \$1,159.43. For example, a worker who was injured at age 30, who was 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 2009, the lump sum cut-off was \$12,555.89, for injuries happening after January 1, 1998). 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. However, the NEL monthly amount ends with the worker's death, thus it may be financially more advantageous to take the NEL as a lump sum. Having made either choice (lump sum or monthly award), the worker can not change their minds later.

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 (eg. lesser range of motion, etc.), and then submit that to the Board. If the Board agrees that there has been deterioration, then the Board will send the worker for another assessment by another NEL doctor and the process will be repeated as above. However, unless there is a change of 10% or more, the NEL will not be adjusted.

### **RETIREMENT BENEFITS**

For workers who receive LOE for 12 continuous months, the Board sets aside additional funds to be used as a retirement pension equal to 5% of each LOE payment. Workers can choose to contribute 5% of the LOE payment themselves as well to bring the total to 10%. The retirement pension from the Board is paid when the worker reaches age 65.

Revised March 2009