

Section	Policy
40	44.80.30.20

Section Title: Benefits Administration – *Wage Loss*
 Subject: Post Accident Earnings - Deemed Earning Capacity
 Effective Date: All initial decisions on or after April 1, 1996, regardless of the date of accident. All decisions regarding recurrences that occur on or after July 1, 2010.

A. POLICY PURPOSE

This policy is a companion to WCB policy 44.80.30.10, *Establishing Post Accident Earning Capacity*, which describes more broadly the post-accident earnings that may be included in benefit calculations.

Since January 1, 1992 ("post-91"), the Workers Compensation Board (WCB) has operated on the basis of a wage-loss model. A wage-loss model pays a worker based upon the difference between the worker's average earnings before the accident and what the worker earns, or is capable of earning, after the accident ("post-accident earning capacity").

Prior to January 1, 1992 ("pre-92"), the WCB operated on a disability model. Under the disability model, like the wage-loss model, the amount of the benefit payable is calculated by reference to a worker's average earnings before the accident. Workers' post-accident earning capacity is therefore relevant for pre-92 workers receiving rehabilitation benefits, temporary partial disability benefits ("TPD") or Special Additional Compensation ("SAC").

Usually, a worker's post-accident earning capacity is the amount that he or she is actually earning. However, there are some circumstances in which the WCB will determine that a worker is capable of earning more than he or she is actually earning. In those circumstances, the WCB will deem the amount that the worker is capable of earning and will include it in the calculation of post-accident earning capacity as if it had, in fact, been earned.

This policy describes:

- 1) **When** a worker will be deemed capable of earning an amount that he or she is not actually earning; and
- 2) **How** the deemed earning capacity will be determined.

B. POLICY

Generally speaking, the WCB will deem an earning capacity in one of two situations: in the context of vocational rehabilitation or in the context of a recurrence following a voluntary reduction in earnings unrelated to the compensable injury.

I. VOCATIONAL REHABILITATION

1. DEEMED EARNING CAPACITY AND REHABILITATION:

- a) Deemed earning capacity will typically be demonstrated in the context of vocational rehabilitation activity. Generally, vocational rehabilitation is designed to maximize the worker's post-accident earnings and keep the loss of earning capacity to a minimum. Detail on the goal and process for vocational rehabilitation within the WCB is provided in WCB policy 43.00, *Vocational Rehabilitation*.

- b) The decision to use deemed earning capacity will be secondary to the more important consideration of developing and completing an effective vocational rehabilitation plan. Deemed earning capacity will generally be used as a last resort after all reasonable or available vocational rehabilitation/re-employment options have been exhausted.

2. PRESUMED EARNING CAPACITY:

A worker's post-accident earning capacity will be equal to her or his actual earnings **unless the WCB demonstrates** that the worker is capable of earning more than the amount actually being earned. In such a case, the worker's earning capacity will be deemed to be the higher amount.

3. REQUIREMENTS FOR WCB TO DEMONSTRATE DEEMED EARNING CAPACITY:

- a) The WCB must demonstrate (through adequate vocational assessment, plan development, and documentation) that the worker is capable of competitively finding, competing for, obtaining, and keeping employment in the occupation or group of occupations on which the earning capacity is based.
- b) The WCB must demonstrate that the worker has the physical capacity, education, skills, aptitudes, interests, and personal qualities needed to obtain and keep employment in the occupation or group of occupations in the labour market.
- c) The WCB must demonstrate that work exists for the occupation or group of occupations on which the earning capacity is to be based.
- d) The WCB will use the Individualized Written Rehabilitation Plan (or similar format) as described in WCB policy 43.00, *Vocational Rehabilitation*, as the basis for collecting and weighing information about the worker's earning capacity. At a minimum, the rationale presented in the initial plan must:
 - i. State and describe the occupation or group of occupations the worker is qualified to work in. The description of the occupation will be based on nationally-recognized methods of occupational classification. Where applicable, the description will include any community-specific features of the occupation as determined through *job analysis*;
 - ii. Clearly show how the identified occupation matches the worker's vocational profile (i.e., physical capacity, education, skills, work history, aptitudes, training, interests, personal and important occupational traits). Analysis of the worker's transferable skills will be based on methods clearly recognized in the field of vocational rehabilitation. This analysis and its results will be documented; and,
 - iii. Describe the methods used to establish that there is a labour market in which the worker can compete for the chosen occupation. As well, the results of this labour market analysis must be described.

4. DEEMED EARNING CAPACITY FOLLOWING COMPLETION OF A PLAN:

- a) Deemed earning capacity will be used in the loss of earning capacity calculation when:
 - i. The worker has completed the training part of the vocational rehabilitation plan designed to help the worker obtain new skills or improve current skills;
 - ii. The worker has been given reasonable job search assistance (i.e., separate from the training part of the plan); and,
 - iii. The information the plan was based on, including labour market analysis, has not substantially changed;

Training (i.e., skills obtained or improved upon) is not necessarily provided in all cases. If a worker does not receive training, then deemed earning capacity must still be clearly demonstrated in accordance with section three of this policy.

- b) The minimum length of job search assistance which will be provided before the deemed earning capacity is used in calculating the loss of earning capacity will be determined by:
 - i. The unemployment rate in Manitoba for the worker's level of education at the end of the written plan (e.g., less than high school education, high school education, etc.) multiplied by;
 - ii. A figure representing the number of weeks of job search generally needed for each percentage point in Manitoba's unemployment rate at the time the worker is going to start a job search.

This minimum length of job search for each educational category is presented in Schedule A, and represents the cumulative length of job search for a worker. The schedule will be reviewed each year to update unemployment rates and their effect on the length of minimum job search.

- c) The minimum weeks of job search assistance as calculated above must be provided before the deemed earning capacity may be imposed. However, minimum job search times may be extended based on the merits of individual cases (e.g., the labour market is tighter than anticipated, the worker presents special needs).
- d) Continuation of job search assistance is subject to WCB policy 44.10.30.60, *Co-operation and Mitigation in Recovery*. In order to be fully eligible for benefits and services, the worker must be a very active and cooperative participant in the job search process.
- e) The type and amount of job search assistance given by the WCB will be in accordance with WCB policy 43.00, *Vocational Rehabilitation*.
- f) Deemed earning capacity will be based on the established actual earnings for a given occupation. This amount will be presumed to be the minimum of the range for an occupation as established at the time of the Individualized Written Rehabilitation Plan and as confirmed after completion of the Plan. The exception occurs when it is demonstrated that the worker would be placed higher in the range due to his or her current vocational profile and the usual practices of the industry in question.

5. INTERRUPTION OR DISCONTINUATION OF A PLAN THROUGH NO FAULT OF THE WORKER:

Sometimes a plan is stopped and not expected to re-start in the foreseeable future through no fault of the worker (e.g., the worker becomes unable to participate due to a non-compensable medical condition). When this happens, the deemed earning capacity will be based on the worker's earning capacity at the time of the non-compensable intervening event.

6. CHANGE IN CIRCUMSTANCES UPON COMPLETION OF A PLAN:

- a) If the information on which the plan was based has changed, the deemed earning capacity will be based on the worker's new (changed) earning capacity and not the earning capacity originally anticipated by the plan.
- b) If this change results in an earning capacity which is lower than first expected, the WCB may continue (i.e., where vocationally appropriate for the worker and cost-effective for the WCB) full or partial wage-loss benefits together with more vocational rehabilitation efforts.

7. SPECIFIC INSTANCES WHEN IMPLEMENTATION OF DEEMED EARNING CAPACITY WILL RESULT:

- a) Deemed earning capacity will be used in the loss of earning capacity calculation when:
 - i. The worker refuses an actual job offer which is consistent with the Individualized Written Rehabilitation Plan and the WCB has demonstrated that all requirements in section three of this policy have been met. In such a case, the deemed earning capacity will be the salary or wage of the refused job where it is comparable to the earning capacity expected on completion of a written plan; or,
 - ii. The worker discontinues a job which is consistent with the Individualized Written Rehabilitation Plan, and the WCB has demonstrated that all requirements in section three of this policy have been met. In such a case, the deemed earning capacity will be the salary or wage being earned by the worker where it is comparable to the earning capacity expected on completion of a written plan.
- b) If the salary or wage of the refused or discontinued job is not comparable to the earning capacity expected upon completion of the written plan, deeming will be based on the salary or wage of the refused or discontinued job unless the WCB can demonstrate a different earning capacity ("comparable" means that the salary or wage, over time, will roughly equal the earning capacity expected upon completion of the written plan).
- c) The deemed earning capacity will be determined and applied at the time the worker refuses an actual job offer or discontinues a job.

8. RELATIONSHIP WITH WCB'S BROADER POLICY ON CO-OPERATION AND MITIGATION IN RECOVERY:

- a) Deemed earning capacity will be used under the WCB's broader policy on mitigation (WCB policy 44.10.30.60, *Co-operation and Mitigation in Recovery*) when:
 - i. The worker voluntarily leaves the workforce by expressing that he or she is not interested in looking for any work. In this case, the deemed earning capacity will be the worker's earning capacity at the time of leaving, unless it is demonstrated that the worker is capable of, through rehabilitation, a higher earning capacity. The WCB must be prepared to undertake this rehabilitation (i.e., must offer it to the worker).
 - ii. The worker refuses to cooperate in or complete a program of vocational rehabilitation. In this case, the deemed earning capacity will be the earning capacity expected on completion of the vocational rehabilitation plan.
 - iii. The worker refuses to participate or cooperate to a degree that it is impossible to undertake adequate vocational assessment/plan development and reasonably/accurately determine an anticipated earning capacity. In this case, it will be presumed that the worker has no loss of earning capacity until the worker demonstrates a willingness to cooperate in the development of a plan.

9. PERIODIC REVIEW OF DEEMED EARNING CAPACITY:

A deemed earning capacity will be reviewed periodically in accordance with WCB policy 44.80.80.20, *Loss of Earning Capacity Reviews*.

II. VOLUNTARY REDUCTION IN EARNINGS - RECURRENCE

When a worker voluntarily reduces their earnings for reasons unrelated to the compensable injury and suffers a recurrence while in less remunerative employment, the WCB will deem the worker capable of earning the difference between their average earnings prior to the accident (indexed)

and their average earnings at the time of recurrence as in the following example:

A worker was earning \$40,000 per year at the time of an accident in 2001. They recover from the injury, return to the accident employer and earn at or above their pre-accident earnings until 2006, at which time they turn 55 and voluntarily leave their accident employment for reasons unrelated to the compensable injury.

Shortly after leaving their accident employment, the worker returns to the workforce part-time and earns \$15,000 per year. They suffer a recurrence of their injury in 2010. Their pre-accident earnings indexed are \$48,000. This worker will have a deemed earning capacity of \$33,000 (pre-accident average earnings indexed [\$48,000] – earnings at the date of recurrence [\$15,000] = deemed earning capacity [\$33,000]). The net result is that this worker will be paid benefits based on a loss of earning capacity of \$15,000 (the amount that they were earning at the time of their recurrence).*

**Note: This example is intended to illustrate deemed earnings only. It does not take into account other factors in calculating loss of earning capacity such as the impact of calculating benefits at 75% of gross average earnings (for claims prior to January 1, 1992) or a percentage of net average earnings, or tax sheltering (for claims on or after January 1, 1992).*

C. REFERENCES

The Workers Compensation Act, sections 27(15), 27(20), 40(2), and 44(2) [prior to January 1, 1992]

The Workers Compensation Act, sections 22, 27(20), 39(1), 39(2), and 40(1) [on or after January 1, 1992]

The Workers Compensation Act, sections 22, 27, 39(1), 39(2), and 40(1) [on or after January 1, 2022]

Related WCB policies:

43.00, *Vocational Rehabilitation*

44.10.60.30, *Co-operation and Mitigation in Recovery*

44.80.10.10, *Average Earnings*

44.80.30.10, *Establishing Post Accident Earning Capacity*

44.80.80.20, *Loss of Earning Capacity Reviews*

History:

1. Policy on Deemed Income originated by Board Order 125/85, effective July 24, 1985.
2. Board Directive of December 4, 1985, confirms deeming may apply during summer months for workers in institutional programs.
3. Board Directive of January 22, 1986, clarifies that deeming may be authorized by Rehabilitation Department Management, effective January 1, 1986.
4. Policy replaced and numbered 44.80.30.20 by Board Order 32/92, effective June 22, 1992. Board Order 125/85 rescinded.
5. Board Order 35/93 clarifies, on September 30, 1993, that Board Order 32/92 applies to all decisions on or after June 22, 1992, regardless of the date of accident.
6. Policy 44.80.30.20 replaced by Board Order 06/96 on February 29, 1996, effective for all decisions on or after April 1, 1996, regardless of date of accident. Former policy amended to reflect that it ceases effect on March 31, 1996, and re-numbered 44.80.30.20.01.
7. The Administrative Guidelines have been revised. Revisions made to the policy and reference section – March 2003.

8. Policy amended by Board Order 14/10 on June 24, 2010, effective July 1, 2010. A new section "Voluntary Reduction in Earnings – Recurrence" was added to accommodate recurrences when there is a voluntary reduction in a worker's earnings for reasons unrelated to the compensable injury.
9. Minor formatting and grammatical changes were made to the policy June 27, 2012.
10. Minor formatting and grammatical changes were made, and the references to Policy 44.10.30.60 was updated with the revised policy name on August 14, 2018.
11. Section no. 8 was updated to reflect the revised name for Policy 44.10.30.60 on October 19, 2018.
12. Policy 43.20.30.10, *Rehabilitation Services for Part-time Workers*, was repealed by Board Order No. 46/19 on December 18, 2019. The statement on and reference to policy 43.20.30.10 were removed.
13. In May 2020, Schedule 'A' - Minimum Length of Job Search Assistance was revised to show the relevant 5 year history. In addition, the history section was reduced by removing the entries related to schedule updates.
14. Minor formatting changes were made to the policy, July 2021.
15. In December 2022, the policy was updated to reflect the amendment and renumbering of section 27 by *The Workers Compensation Amendment Act* (commonly referred to as Bill 18). The policy was also revised to reflect minor formatting and gender-neutral language.

D. ATTACHMENTS

Schedule "A" - Minimum Length of Job Search Assistance Required Before Deeming May Occur

SCHEDULE A

POLICY 44.80.30.20

**MINIMUM LENGTH OF JOB SEARCH ASSISTANCE
REQUIRED BEFORE DEEMING MAY OCCUR
(in Weeks)**

Worker's Education Level at the End of Individualized Written Rehabilitation Plan	2023	2022	2021	2020	2019
Some High School	23	31	36	28	31
High School Graduate	13	18	22	14	16
Some Post-Secondary	13	23	31	14	19
Post-Secondary Certificate or Diploma	12	12	16	12	12
University Degree	12	12	12	12	12

Subject to Minimum of 12 weeks of Job Search
Figures are rounded to the nearest week.
Effective July 1 in each year.

VARIABLES USED TO CALCULATE MINIMUM WEEKS OF JOB SEARCH

Unemployment Rate by Education Level	2023	2022	2021	2020	2019
Some High School	9.7	13.1	15.1	11.6	12.8
High School Graduate	5.5	7.6	9.2	6.0	6.8
Some Post-Secondary	5.6	9.5	12.8	5.9	8.1
Post-Secondary Certificate or Diploma	3.7	5.2	6.7	4.1	4.1
University Degree	3.0	4.0	5.0	3.5	4.2
Statistical Factor	2.4	2.4	2.4	2.4	2.4

The minimum weeks of job search are recalculated annually and the amounts apply as of July 1.

The first table above displays minimum job search amounts over a five-year period.

A historical summary of minimum job search amounts can be obtained by contacting policy@wcb.mb.ca.