

Section	Policy
40	44.80.30.10.20

Section Title: Benefits Administration - Wage Loss  
Subject: Post-Accident Earnings - Collateral Benefits (**Unallowable** Employer Top-Up)  
Effective Date: January 1, 1995 - for accidents on or after January 1, 1992 to December 31, 2005

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## **POLICY PURPOSE**

For accidents on or after January 1, 1992, *The Workers Compensation Act* (the Act) states that a worker will not receive more than 90% of her or his actual loss of earning capacity. This is the case even if the payment above the 90% level comes from a source other than the WCB (i.e., a "collateral benefit"). However, the Act does allow payment in excess of 90% of the actual loss of earning capacity under very specific circumstances.

Some collective agreements provide that workers will receive a supplementary payment from their employer so that they get 100% of their actual loss of earnings while receiving compensation benefits. This type of collateral benefit is called "employer top-up", even though top-up sometimes comes out of workers' unused sick leave credits.

In defining when employer top-up is "allowable" or "unallowable", WCB policy describes conditions when wage-loss benefits will or will not be reduced by the amount of the top-up.

This policy describes when employer top-up above 90% of the actual loss of earning capacity is **not** allowable and, when this is the case, how the WCB will calculate a worker's entitlement to WCB wage-loss benefits. A companion policy (44.80.30.10.10) describes when top-up is allowable. Both policies are intended to support the broad intent of the Act to ensure that no worker should receive more money in compensation than while working.

### **A. POLICY**

#### **I. CIRCUMSTANCES WHEN EMPLOYER TOP-UP ABOVE 90% IS NOT ALLOWABLE:**

Employer top-up above 90% of the actual loss of earning capacity is not allowable when the criteria listed in policy 44.80.30.10.10, *Post-Accident Earnings - Collateral Benefits (Allowable Employer Top-Up)*, are not met.

When employer top-up is not allowable, the WCB will reduce wage-loss benefits by the amount of the top-up.

**II. CALCULATION OF ENTITLEMENT WHEN UNALLOWABLE EMPLOYER TOP-UP IS PAID:***THE INITIAL REDUCTION:*

1. When it is determined that top-up is unallowable (i.e., the employer does not have the 24-month exemption which provides for payment of top-up in excess of 90% of the actual loss of earning capacity) and it is identified that top-up is being paid, the WCB will contact the worker or employer to establish the actual (net) amount of top-up being paid directly to the worker by the employer.
2. The net amount of top-up communicated by the employer or worker will be a non-taxable collateral benefit.
3. The amount of the top-up will be compared against the worker's actual loss of earning capacity to determine whether the worker is receiving, through combined WCB wage loss and employer top-up (as well as any other collateral benefit defined in policy 44.80.30.10, *Establishing Post-Accident Earning Capacity*), more than 90% of the loss of actual earning capacity\*.
4. When the worker is receiving more than 90% of the actual loss of earning capacity, the amount above the 90% level will be considered an excess collateral benefit.
5. The WCB wage-loss benefits payable will be reduced by an amount equivalent to the amount of the excess collateral benefit effective the first payment. This occurs so that the sum of WCB wage-loss benefits and the collateral benefit is not more than 90% of the actual loss of earning capacity.

*SUBSEQUENT REDUCTIONS:*

6. When the WCB becomes aware that the amount of the employer top-up is increased or decreased, WCB benefits will be recalculated and adjusted by an equivalent amount effective from the first benefits calculation after the next review required by Policy 44.80.80.20, *Loss of Earning Capacity Reviews* (i.e., at 13 weeks, at 1 year, and then annually).
7. When top-up is continually increased in response to reductions in WCB wage-loss benefits, it could ultimately result in the amount of WCB wage-loss benefits equalling zero.

\* A worker's actual loss of earning capacity is calculated as described in section 40(1) of *The Workers Compensation Act, Calculation of Loss of Earning Capacity*. The calculation is based on probable Income Tax, Canada Pension Plan, and Unemployment Insurance deductions as described in policy 44.80.10.40, *Net Average Earnings*, or policy 44.80.10.40.01, *90% of Net Average Earnings*, and any post-accident earnings as described in policy 44.80.30.10, *Establishing Post-Accident Earning Capacity*. This calculation does not take the statutory maximum level of wage-loss benefits into consideration.

8. Unallowable top-up paid prior to the date that the WCB became aware that unallowable top-up was being paid will not be considered. As well, unallowable top-up paid after the date that the WCB became aware and until the implementation of the subsequent reduction will not be considered. An overpayment will not be created and cost-relief will not be considered.
9. For "compute for information only" self-insurers, unallowable top-up will be considered in the **calculation** (i.e., the WCB does not directly pay the worker) of benefits. Any reduction in the calculation of benefits will be reflected in the document provided to the worker for income tax purposes (T5007).
10. Where there is any conflict between this policy and other Board Policy dealing with collateral benefits, this policy prevails as it relates to employer top-up.

Schedule "A" provides a purely illustrative example of the effect of top-up on WCB benefits.

## **B. REFERENCES**

*The Workers Compensation Act*, 39(5), 40(1), 40(3), 40(4), 41(1) to 41(7), 85(2), 109.2, and 109.3

### **Related WCB Policies:**

35.40.50, *Overpayment of Benefits*

44.80.10.10, *Net Average Earnings*

44.80.10.40.01, *90% of Net Average Earnings*

44.80.30.10, *Establishing Post-Accident Earning Capacity*

44.80.30.10.10, *Post-Accident Earnings - Collateral Benefits (Allowable Employer Top-Up)*

44.80.80.20, *Loss of Earning Capacity Reviews*

### **History:**

1. Policy 44.80.30.10.20 established by Board Order 56/94, effective January 1, 1995.
2. Effective application date confirmed by Board, September 18, 1995.
3. Illustrative example in Schedule A corrected to more accurately show where in the calculation sheltering provisions are considered. Issued January 5, 1996.
4. Minor revisions made to Section II and references section – March 2003.
5. Policy amended by Board Order 16/05 on May 26, 2005, to rescind Board Order 56/94 effective January 1, 2006. The rescinded policy continues to apply to decisions made on accidents which happened from January 1, 1995, to December 31, 2005, and any reconsiderations and appeals that derive from these decisions.
6. Minor formatting, wording, and grammatical changes were made to the policy June 27, 2012.

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**CALCULATION OF ENTITLEMENT IN CASES OF EMPLOYER TOP-UP**


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**EXAMPLE**

Terry Jones earns \$1,100.00 per week prior to being injured:

* Actual weekly gross	= \$1,100.00
* Probable Income Tax, CPP, UI	= (\$300.00)
* Weekly net income	= \$800.00
* 90% of ACTUAL loss of earnings	= <b>\$720.00</b>

Terry is injured and benefits are calculated based on WCB maximum of \$903.85\* per week:

* Maximum weekly gross	= \$903.85
* Probable Income Tax, CPP, UI, sheltered income	= (\$248.50)
* Weekly net income	= \$655.35
* 90% of net (sheltered)	= \$589.82
* Weekly benefit paid by WCB	= <b>\$589.82</b>

**The Effect of Top-up to 100% of Actual Net:**

Terry now receives top-up of \$210.18 per week from the employer, which brings Terry back up to the previous weekly net income of \$800.00:

* Top-up (non-taxable collateral benefit) is \$210.18.	
* Weekly benefit paid by WCB	= \$589.82
* Plus: top-up	= \$210.18
* Total (combined) benefits	= <b>\$800.00</b>

Is the sum of WCB benefits plus the top-up more than 90% of the worker's actual loss of earnings (in this case, \$720.00 per week)? The answer is "yes"; \$800.00 is \$80.00 more than \$720.00. The weekly WCB benefit will now be \$509.82, to recognize the excess top-up of \$80.00. Note that the sum of the new weekly WCB benefit and the top-up equals 90% of the worker's **actual** loss of earning capacity.

\* 1993 maximum