

Section	Policy
40	44.80.30.10

Section Title: Benefits Administration - Wage Loss
Subject: Establishing Post-Accident Earning Capacity
Effective Date: For all decisions on or after January 1, 2022

A. POLICY PURPOSE

This policy describes how the WCB establishes a worker's post-accident earning capacity, which is a key component of wage loss benefit calculations. Workers injured in workplace accidents on or after January 1, 1992 receive wage loss benefits based on their loss of earning capacity. Workers injured in workplace accidents before January 1, 1992 are compensated under a disability model, and therefore do not receive wage loss benefits, but their post-accident earning capacity remains relevant for certain other types of benefits.

This policy:

- describes the key principles the WCB uses to establish a worker's post-accident earning capacity;
- outlines the different types of income or benefits the WCB includes or excludes when determining post-accident earning capacity;
- confirms that similar principles will be used to establish a worker's post-accident earning capacity, regardless of the date of accident; and
- provides greater detail of specific calculations and considerations in Schedules A - E.

Schedules

This policy includes five schedules:

Schedule A - Income or Benefits included in Post-Accident Earnings for Workers injured before January 1, 1992

Schedule B - Establishing Post-Accident Earning Capacity – Special Employment Circumstances

Schedule C - Collateral Benefit Threshold Level and Employer "Top Up"

Schedule D - Deemed Earnings and Post-Accident CPP Disability Benefits

Schedule E - Sheltered Income Benefit

B. POLICY

I. Key Principles

Workers are paid for their work in different ways and receive income and benefits from a variety of sources. When deciding whether to include certain types of income or benefits as part of a worker's post-accident earning capacity, the WCB applies the following key principles:

- The worker's post-accident earning capacity will most accurately represent the amount the worker is capable of earning after their accident.

- The WCB will use the formulas or methods contained in WCB Policy 44.80.10.10, *Average Earnings*, with necessary modifications, to establish a worker's post-accident earnings, regardless of the date of the worker's accident.
- The types of income used to calculate post-accident earnings should be consistent with the types of income that may be used to calculate pre-accident earnings, wherever possible.
- The WCB may use information provided by the worker and obtained from independent sources to establish a worker's post-accident earning capacity.

II. Income or Benefits Included in Post-Accident Earnings

Schedule A describes how the WCB establishes a worker's post-accident earning capacity for workers injured in workplace accidents before January 1, 1992.

When establishing post-accident earning capacity for workers whose accidents occurred on or after January 1, 1992, the WCB includes three types of income or benefits: (a) employment earnings; (b) collateral benefits; and (c) sheltered income.

Employment Earnings

Employment earnings include:

- Any employment income the worker earns or is capable of earning, less probable deductions for employment expenses, as shown in Schedule D of WCB Policy 44.80.10.10, *Average Earnings*.
- The real value of any goods or services the worker receives from employers in lieu of wages, such as free or subsidized rent or food.
- The fair market value of anything that would be a taxable benefit under the federal Income Tax Act.

When a worker has actual employment earnings, these will be used to determine wage loss benefits unless the WCB determines that the worker is capable of earning more. WCB Policy 44.80.30.20, *Post-Accident Earnings - Deemed Earning Capacity*, describes the circumstances when the WCB may use deemed earnings rather than actual employment earnings.

The WCB calculates probable deductions for income tax, Canada Pension Plan (CPP) contributions, and Employment Insurance (EI) premiums payable on these earnings as set out in WCB policy 44.80.10.40, *Net Average Earnings*. The WCB will use the same tax deductions and credits it used to determine a worker's pre-accident net average earnings.

Collateral Benefits

As a result of their workplace accident, workers may be entitled to income and benefits designed to replace their lost wages from sources other than the WCB. These wage-replacement benefits are often called collateral benefits.

The Workers Compensation Act (the Act) requires the WCB to take specific types of collateral benefits into account when establishing a worker's post-accident earning capacity if the amount of the collateral benefits, together with the amount of wage loss benefits the worker is entitled to receive under the Act, exceeds certain thresholds. Subsection 41(1) of the Act defines a "collateral benefit" as:

- Any periodic benefit the worker is entitled to receive under the Canada Pension Plan (disability benefit), the Quebec Pension Plan, the Employment Insurance Act (Canada), and

- a policy of disability insurance;
- Any payment to the worker by the worker's employer, including a gratuity or allowance; and
- Any other statutory benefit prescribed by regulation.

With some exceptions set out in section 3 of this policy, collateral benefits are included as part of the worker's post-accident earnings as long as:

- they were earned or accrued while the worker is receiving wage loss benefits; and
- the worker's combination of collateral benefits and wage loss benefits exceeds 100% of actual loss of earning capacity (for accidents on or after January 1, 2006) or 90% of actual loss of earning capacity (for accidents between January 1, 1992 and December 31, 2005).

Schedule C of this policy describes in greater detail the way the WCB determines whether the combination of collateral benefits and wage loss benefits exceeds these thresholds.

When accounting for post-accident CPP disability benefits, the WCB only considers that portion of the benefit attributable to the workplace accident as a collateral benefit. There are special rules to account for CPP Disability benefit payments when a worker's post-accident earnings have been established in accordance with WCB policy 44.80.30.20, *Post-Accident Earnings- Deemed Earning Capacity*. These rules are described in **Schedule D** to this policy.

The WCB calculates probable deductions for all taxable collateral benefits in the same manner it does for post-accident employment earnings, described above.

Sheltered Income Benefit

The WCB uses the word "sheltering" to describe how the taxation system impacts a worker's employment income and tax refund when they are receiving wage loss benefits for a portion of a year.

While employed, the employer deducts income tax, CPP contributions and EI premiums from a worker's wage or salary. The amounts the employer deducts are based on a worker's income level. If a worker receives wage loss benefits only for a portion of a year, the amounts deducted by the employer may no longer be appropriate since the worker's taxable income level has decreased. When a worker files their income tax and benefit return, they may be entitled to a refund of these excess deductions that they would not have received if they were earning taxable income for the entire year.

The WCB treats any entitlement a worker may have to a probable refund of these excess deductions as earnings that the worker is capable of earning after the accident. The WCB refers to this probable refund as a sheltered income benefit. Rules about the treatment of sheltered income are found in **Schedule E** of this policy.

Special Employment Circumstances

Schedule B of this policy describes how the WCB establishes a worker's post-accident earning capacity in special employment circumstances such as employers, directors and independent contractors.

III. Income or Benefits Excluded from Post-Accident Earnings

The following types of income or benefits are always excluded from post-accident earnings for workers injured both before and on or after January 1, 1992:

- i. Retirement pension benefits;

- ii. An annuity or pension payment from the WCB that the worker receives as a result of a previous workplace accident;
- iii. CPP Disability Child benefit payments;
- iv. Vacation pay cash-out or severance pay;
- v. Insurance benefits that are designated for mortgage or loan payments; and
- vi. Any type of income that is specifically excluded from average earnings calculations under WCB Policy 44.80.10.10, *Average Earnings*.

C. REFERENCES

The Workers Compensation Act, sections 27(20), 40(2), and 44(2) (**Prior to January 1, 1992**)

The Workers Compensation Act, sections 39(5), 40(1) and 41 (**On or after January 1, 1992**)

The Workers Compensation Act, sections 39(5), 40(1) and 41 (**On or after January 1, 2006**)

Related WCB Policies:

35.10.120, *Terms and Conditions of Optional Coverage*

44.60.20, *Date of Retirement*

44.60.30, *Special Additional Compensation*

44.80.10.10, *Average Earnings*

44.80.10.40, *Net Average Earnings*

44.80.30.20, *Post-Accident Earnings - Deemed Earning Capacity*

44.80.80.20, *Loss of Earning Capacity Reviews*

History:

1. Policy 44.80.30.10 established by Board Order 46/91, approved December 17, 1991.
2. Policy amended by Board Order 21/93, on June 28, 1993, to adjust threshold for refund of probable income tax deduction to 40 weeks, retroactive to January 1, 1992.
3. Policy amended by Board Order 15/00 on May 30, 2000, effective January 1, 2001. Amendments include having this policy apply to accidents before January 1, 1992, on a forward-going basis, and establishing principles for determining post-accident earnings for all claims. Former policy re-issued as 44.80.30.10.01.
4. Board Order 15/00 amended by Board Order 27/00 on November 29, 2000. Policy re-issued as amended effective January 1, 2001.
5. Policy amended by Board Order 13/01 on April 27, 2001, effective January 1, 2001. Amendments include excluding retirement pensions from post-accident earnings for accidents before January 1, 1992, and using actual earnings instead of deemed earning capacity in certain circumstances. Former policy re-issued as 44.80.30.10.01 and policy 44.80.30.10.01 re-numbered 44.80.30.10.02.
6. Policy 44.80.30.10 approved by Board Order 29/05 on September 29, 2005. The revised policy is effective for decisions/accidents on January 1, 2006. Revisions to the policy include: clarifying the sheltered income process and the impact of collateral benefits in general, and top-up payments specifically.
7. Policy amended by Board Order 29/05, on September 29, 2005, to rescind Board Order 13/01 effective January 1, 2006. The rescinded policy will continue to apply to all loss of earning capacity reviews on or after January 1, 2001, to December 31, 2005. This policy will still apply to any reconsiderations and appeals that derive from these decisions/accidents and re-issued as policy 44.80.30.10.01.
8. Minor formatting and grammatical changes were made to the policy June 27, 2012.
9. Policy was amended by Board Order 42/15 on October 29/15 effective January 1, 2016. The policy was revised to remain consistent with Policy 44.80.10.10 *Average Earnings*. The amendment incorporates the impact of adding Attachment E Line 229 Deductions - CRA

probable business expenses to the Average Earning policy and revises the phrase, "Any income that the worker earns from employment" to "Any income, less CRA probable deductions for business expenses, which the worker earns from employment."

10. The Canada Revenue Agency revised the line numbers in the 2019 income tax and benefit return. Line numbers that used to be three or four digits are now five digits. For example, lines 229 and 236 on the return are now lines 22900 and 23600.
11. Policy was amended by Board Order No. 31/20 on November 26, 2020 effective January 1, 2022. Policy changes include clarifying the key principles and rules used to establish a worker's earnings after the accident, regardless of accident date; consolidating information regarding specific types of income or benefits used to determine a worker's post-accident earning capacity; and providing information on how the WCB conducts certain types of calculations.

SCHEDULE A**INCOME OR BENEFITS INCLUDED IN POST-ACCIDENT EARNINGS**

Workers who were injured in accidents before January 1, 1992 receive compensation under a disability model. Some benefits under this model, such as permanent partial disability benefits, are payable regardless of whether a worker suffers any loss of earnings as a result of their accident.

Other benefits, including rehabilitation benefits, temporary partial disability benefits and special additional compensation (SAC) are based on a worker's loss of earning capacity. Establishing a worker's post-accident earning capacity is necessary to determine the amount of these other benefits.

The WCB considers the following types of income or benefits as post-accident earnings for the purposes of calculating rehabilitation benefits, temporary partial disability benefits and SAC:

- i. employment earnings; and
- ii. injury or illness-related benefits (these benefits are similar to collateral benefits for workers injured on or after January 1, 1992).

Employment Earnings

Employment earnings include:

- Any employment income the worker earns or is capable of earning, less probable deductions for employment expenses, as outlined in Schedule D of WCB Policy 44.80.10.10, *Average Earnings*.
- The real value of any goods or services that the worker receives from employers in lieu of wages, such as free or subsidized rent or food.
- The real value of anything that would be a taxable benefit under the federal Income Tax Act.

When a worker has actual employment earnings, these earnings will be used to determine benefits unless the WCB determines that the worker is capable of earning more than the amount actually earned. WCB Policy 44.80.30.20, *Post-Accident Earnings - Deemed Earning Capacity*, describes the circumstances when WCB may use deemed earnings rather than actual employment earnings.

Injury or Illness-related Benefits

A worker may sometimes receive insurance or other benefits from sources other than the WCB as a result of a workplace accident. As long as those benefits are not specifically excluded by section 3 of this policy, and as long as they were earned or accrued while the worker is receiving benefits from the WCB, they will be included as part of the worker's post-accident earnings.

SCHEDULE B**ESTABLISHING POST-ACCIDENT EARNING CAPACITY
– SPECIAL EMPLOYMENT CIRCUMSTANCES**

Some workers have special employment circumstances that require the WCB to establish their post-accident earnings in a specific manner.

a) Employers, Directors and Independent Contractors Who Have Purchased Optional Coverage for Themselves

When establishing post-accident earning capacity for these workers, the WCB will consider the following factors:

- the degree of involvement the worker has in the day to day operation of their businesses;
- substantiated business earnings;
- the worker's initial medical restrictions;
- the impact that initial and ongoing medical restrictions have on the ability of the worker to earn or potentially earn income; and
- the degree of impact that the worker's restrictions have on their business operations.

Based on these factors, the WCB determines a percentage that best reflects the worker's loss of earning capacity. This percentage will be applied to the amount of average earnings previously established under WCB Policy 44.80.10.10, *Average Earnings*. The worker's average earnings cannot be below the minimum amount of optional coverage set out in WCB Policy 35.10.120, *Terms and Conditions of Optional Coverage*.

b) Concurrent Employment – Business or Farm Income

Where a worker reports positive income from their business or farm, the WCB recalculates the worker's post-accident earning capacity.

c) Deemed Workers

Presuming that an average earnings review has not been requested, the *Average Earnings* policy requires that the WCB set the deemed worker's long-term average earnings level using whichever formula (labour percentage, net business income) produces the higher level of earnings. If the net business income formula produces the higher earnings level, the WCB will use the labour percentage determined by the formula below in its post-accident income calculations.

A worker's individual labour percentage is calculated as a ratio as follows:

- Net Business Income formula divided by
- Gross contract earnings less any company commissions and wages paid to other workers.

This labour percentage is used to establish the labour portion of a worker's post-accident contract.

Schedules A and B of the *Average Earnings Policy* provide additional information about the labour percentage formula, the net business income formula, and labour percentages.

SCHEDULE C**COLLATERAL BENEFIT THRESHOLD LEVEL AND EMPLOYER "TOP UP"****Collateral Benefit Threshold Level**

Under the Act, the WCB only considers collateral benefits in the calculation of wage loss benefits when the combination of these two benefits exceeds a certain threshold. In general, for accidents between January 1, 1992 and December 31, 2005, the threshold level is 90% of the worker's actual loss of earning capacity. For accidents occurring on or after January 1, 2006, the threshold level is 100% of the worker's actual loss of earning capacity.

Once the applicable threshold level is exceeded, the WCB will reduce the amount of wage loss benefits paid to a worker to ensure that this threshold is not exceeded through a combination of wage loss benefits and collateral benefits.

The WCB will perform a series of calculations to determine whether the combination of wage loss benefits and collateral benefits exceeds the applicable threshold level.

The series of calculations are described below:

- i. First, the WCB calculates the worker's wage loss entitlement based on their average earnings subject to any maximum annual earnings level in effect on the date of accident.
- ii. Next, the WCB calculates the net amount of collateral benefits the worker is receiving (i.e. adds up the after-tax amounts of all collateral benefits to which the worker is receiving, as long as they are not excluded under section 3 of the policy). In some cases, the collateral benefits will be non-taxable.
- iii. Finally, the WCB calculates what the worker's wage loss entitlement would have been based on their actual average earnings (i.e. as if there was no maximum annual earnings level in effect on the date of the accident).

The WCB then adds the amounts of items (i) and (ii). If the sum of these two items exceeds the item (iii) amount, the WCB will reduce the amount of the worker's wage loss benefits by the excess amount.

Top-Up

Some employers supplement or "top-up" the wage-loss benefits paid to workers in order to allow these workers to receive roughly the same take-home pay they earned prior to the workplace injury or illness. This collateral benefit is commonly referred to as "employer top-up".

If a worker has an accident on or after January 1, 2006 and the only collateral benefit the worker receives is an employer top-up, the WCB assumes that the combination of employer top-up payments and wage loss benefits does not exceed 100% of the worker's actual loss of earnings. Where the WCB receives information that this assumption is not valid, the WCB will perform a calculation to determine whether the combination of wage loss benefits and employer top-up exceeds 100% of the actual loss of earning capacity. If this threshold of 100% is exceeded, the WCB will reduce the amount of wage loss benefits paid to a worker by the excess amount.

If the worker receives other collateral benefits in addition to the employer top-up, the WCB will perform a calculation to determine whether the combination of wage loss benefits and collateral benefits exceeds 100% of the actual loss of earning capacity. If this threshold of 100% is exceeded, the WCB will reduce the amount of wage loss benefits paid to a worker by the excess amount.

SCHEDULE D**DEEMED EARNINGS AND POST-ACCIDENT CPP DISABILITY BENEFITS**

Where a worker's post-accident earnings have been established in accordance with WCB Policy 44.80.30.20, *Post Accident Earnings – Deemed Earning Capacity*, and the worker is also in receipt of CPP disability benefit payments, the WCB determines the amount of CPP disability benefit payment and deemed earnings to be included as post-accident earnings in the following manner:

- Where the worker's deemed earnings exceed their CPP disability benefit payments, the full amount of the worker's CPP payment is included in worker's post-accident earning capacity. In addition, the difference between the worker's deemed earnings and CPP disability payments is also included in their post-accident earning capacity.
- In the situation where the worker's deemed earnings are less or equal to their CPP disability payments, only the worker's CPP disability payments are included in their post-accident earning capacity.
- In the situation where the worker's earnings have been deemed and the worker has actual earnings, the deemed earnings and the CPP disability payments will be added together and used as post-accident earnings.

SCHEDULE E**SHELTERED INCOME BENEFIT**

As described in this policy, the WCB will consider any possible refunds of excess deductions as income the worker is capable of earning after the accident.

Since it is often difficult for the WCB to establish how long a worker will receive wage loss benefits, it determines the amount of a sheltered income benefit by assuming that all workers receive wage loss benefits for 3 months and employment income for 9 months in each calendar year. The WCB calculates probable payroll deductions for someone working 9 months and for someone working 12 months. The difference between these two amounts is the sheltered income benefit.

Workers who receive wage loss benefits for 40 or more weeks in a calendar year may be adversely affected by this assumption. To minimize any inequity, the WCB recalculates the sheltered income benefit for these workers. This annual recalculation may result in some of these workers receiving a full or partial refund of their sheltered income benefits.

Different rules apply to the treatment of sheltered income benefits as post-accident earnings, depending on the date of the accident:

Workers with Accidents on or after January 1, 2006 -

- The sheltered income benefit amounts will always be included in post-accident earnings.

Workers with Accidents from January 1, 1992 to December 31, 2005 -

- The sheltered income benefit amounts will only be included in post-accident earnings for the first 24 months that the worker receives wage loss benefits.