Section Title: Benefits Administration – Wage Loss
Subject: Average Earnings
Effective Date: For all decisions on or after January 1, 2022 to December 31, 2022

A. POLICY PURPOSE

When a worker is injured at work, income from various sources may be interrupted. The workers compensation system is designed to replace all employment income lost as a result of a workplace accident, subject to limitations established under *The Workers Compensation Act* (the "Act").

Determining what a worker's average earnings were before their accident is a preliminary step to determining wage loss benefits or certain benefits payable to a deceased worker's spouse or common-law partner. A worker's wage loss benefits are based on their loss of earning capacity, which is calculated as the difference between pre- and post-accident net average earnings.

This policy provides a framework for determining a worker's average earnings. The WCB uses the same method to determine average earnings regardless of the accident date.

Policy 44.80.10.40, *Net Average Earnings*, outlines the calculation of net average earnings.

Policies 44.80.30.10, *Establishing Post-Accident Earning Capacity*, and 44.80.30.20, *Post-Accident Earnings – Deemed Earning Capacity*, provide guidance for determining a worker's post-accident earning capacity.

B. POLICY

I. Determining Average Earnings – General Principles

Section 45 of the Act provides the Workers Compensation Board ("WCB") with discretion in determining average earnings, in accordance with the principles of fairness and justice.

In most circumstances, the WCB uses one of three formulas to determine a worker's average earnings, selecting the formula which best reflects the worker's employment and earnings pattern before the accident. The three formulas the WCB generally uses are:

- the regular earnings formula;
- the average yearly earnings formula; and
- the probable yearly earning capacity formula.

Each of these formulas uses a slightly different methodology to calculate a worker's average earnings. These formulas will be described in greater detail in the next section of the policy.

In some circumstances, none of the three formulas provides an accurate reflection of the worker's average earnings before the accident. Accordingly, the WCB has developed other formulas or methods to calculate average earnings for certain types of workers in specified industries and occupations. These formulas, outlined in the schedules to this policy, take into account the special employment circumstances of these workers.

In addition, the Act and other WCB policies provide for specific adjustments to average earnings in some circumstances (e.g. apprentices, declared workers). In some cases, a worker may be eligible for more than one type of average earnings adjustment. When this occurs, the WCB will apply the adjustment that most benefits the worker under the Act and applicable policies.

The WCB may use a different formula to calculate a worker's average earnings in the short term than it does once a worker has been in receipt of wage loss benefits for 12 weeks, if it determines that doing so would better reflect the worker's employment and earnings pattern.

Workers' average earnings are subject to any maximum annual earnings level that is in place as of the date of the accident.

II. Three Main Formulas Used to Calculate Average Earnings

As stated previously, the WCB generally uses one of three formulas to calculate average earnings, selecting the one that best represents the worker's employment and earnings pattern. The WCB chooses the appropriate formula based on verifiable employment and earnings information.

a) Regular Earnings Formula

Under the regular earnings formula, the worker's average earnings are calculated based on the amount of earnings they would normally receive as remuneration in all occupation(s) in which they were employed on the date of accident, as long as their ability to earn income from each of these occupations was affected by the compensable injury.

The WCB obtains information regarding the amounts the worker gets paid in their normal pay period, and converts this into a weekly amount.

A worker's overtime, special reimbursements, allowances, and/or bonuses that are not regularly paid are not normally included when calculating a worker's regular earnings.

b) Average Yearly Earnings Formula

The WCB may use the average yearly earnings formula to calculate average earnings when a worker has an irregular earnings pattern due to the nature of their work (e.g. seasonal worker, contract worker, pieceworker, or fluctuating overtime).

Average yearly earnings include any verifiable remuneration that the worker received as a result of employment and employment insurance benefits. In contrast to the regular earnings formula, this formula does consider overtime, special reimbursements, allowances and/or bonuses.

To determine a worker's average earnings under this formula, the WCB will generally use documented employment data from any consecutive 12-month period occurring during the one or two years before the date of the accident. The WCB may choose one or more consecutive 12-month periods from any of the previous five calendar years if the WCB is of the view that doing so would produce a more accurate reflection of the worker's employment and earnings pattern before the accident.

c) Probable Yearly Earning Capacity Formula

The probable yearly earning capacity formula forecasts what a worker might be expected to earn for a consecutive 12 month period after the day of accident. While average earnings calculations are still based on the worker's earnings before the accident (to the extent they had any), the formula uses the worker's regular earnings or average yearly earnings and adjusts them to reflect the worker's probable employment and earnings pattern going forward, or alternatively, the employment and earnings pattern of a representative sample of similarly employed workers. It also may include presumed employment insurance benefits.

This formula is used when the formulas for regular earnings and average yearly earnings do not accurately reflect what the worker's average earnings likely would have been, but for the accident. Some of the circumstances in which the WCB will use the probable yearly earning capacity formula to calculate average earnings include when:

- the worker does not have a history of prior employment.
- the worker's employment circumstance at the day of the accident is significantly different from their past employment circumstances.
- the worker is an apprentice or youthful worker under policy 44.80.30.30, *Prospective Earnings - Apprentices and Youthful Workers*.
- the worker is a probationary employee.

Generally, the WCB will only use the probable future earning capacity to calculate average earnings when there is a sufficient degree of certainty about what the worker's average earnings likely would have been, but for the accident.

III. Determining Average Earnings

When a claim is first accepted, it is often difficult for the WCB to estimate the duration of a worker's loss of earning capacity. For this reason, the WCB may establish average earnings at the following stages of the claim:

a. Short-Term Average Earnings;
b. Interim Average Earnings;
c. Average Earnings Review; and
d. Temporary Average Earnings.

a) Short-Term Average Earnings

When the WCB initially determines that the worker is entitled to wage loss benefits, the WCB will apply the average earnings formula which best allows for:

- expeditious payment of benefits; and
- the most accurate approximation of the worker's average earnings at the date of accident.

Calculations will be made on the basis of verifiable information readily available to the WCB.

b) Interim Average Earnings

When the WCB determines that the worker is entitled to wage loss benefits, but has insufficient information to initially establish short-term average earnings, an interim average earnings amount may be set. Upon receipt of verifiable information, a worker's short-term average earnings may be recalculated; any upward or downward adjustments are effective as of the date of the accident. A downward adjustment to interim average earnings may result in an overpayment of wage loss benefits. This overpayment may be collected under Policy 35.40.50, *Overpayment of Benefits*.

c) Average Earnings Review

The WCB automatically conducts an Average Earnings Review once a worker has been in receipt of wage loss benefits for 12 weeks. Twelve weeks of wage loss benefits includes any week in which full or partial wage loss benefits are paid.

It may also conduct an Average Earnings Review before or after this point in appropriate circumstances. Such circumstances include when:

- the WCB receives further documentation which better represents the worker's actual loss of earnings.
- the information provided to the WCB suggests the worker has an irregular employment or earnings pattern.
- the worker or their designate requests a review and the WCB has sufficient information to conduct the review.
- the worker has experienced a recurrence of an injury from a previous workplace accident.
- a worker's entitlement to a permanent disability pension, available under the pre-1992 Act, is being calculated.
- the WCB is calculating survivors' benefits, regardless of date of accident.
- a film industry worker's loss of earning capacity extends beyond the term of their film industry contract.

The Average Earnings Review also applies to workers in specified industries and occupations who have their average earnings determined according to Schedules A to D of this policy.

To conduct its Average Earnings Review, the WCB may receive information or documentation from the Canada Revenue Agency (CRA) or other independent sources.

<u>Effective Date of Average Earnings Adjustment following an Average Earnings Review</u>

An Average Earnings Review takes place when the WCB has sufficient information to conduct it. Upward adjustments are applied retroactively to the date of the accident, and downward adjustments are applied in the 13th week of full or partial wage loss benefits. There are four exceptions to these rules about effective dates, which are described below.

<u>Exceptions</u>

1. Whenever a worker has experienced a recurrence of an injury arising from a previous workplace accident, the WCB conducts an Average Earnings Review. Any adjustment in average earnings takes effect as of the date of recurrence.

   Policies 44.10.20.60, *Recurring Effects of Injuries and Illnesses (Recurrences),* and 44.80.30.20, *Post-Accident Earnings – Deemed Earning Capacity*, provide guidance on the impact a recurrence has on the calculation and adjustment of a worker's net average earnings.

2. Whenever the WCB calculates a worker's entitlement to a permanent disability pension, the WCB conducts an Average Earnings Review. The average earnings the WCB arrives at as a result of this review takes effect on the same day as the pension, regardless of when the review is performed.

3. Whenever the WCB is calculating survivors' benefits for a spouse or a common-law partner, the WCB conducts an Average Earnings Review. The average earnings the WCB arrives at as

a result of this review is effective the date of the accident. Where applicable, the WCB will also take into consideration any indexing adjustments and the worker's date of death.

4. Whenever a film industry worker's loss of earning capacity extends beyond the term of their film industry contract, the WCB conducts an Average Earnings Review. The average earnings the WCB arrives at as a result of this review takes effect on the first working day the worker suffers a loss of earning capacity after the contract ends.

d) Temporary Average Earnings

Occasionally, the WCB determines it has insufficient information to conduct an Average Earnings Review when a worker has been in receipt of 12 weeks of wage loss benefits. In such cases, the WCB may set a temporary average earnings amount. An Average Earnings Review will take place once the WCB receives sufficient information. Upward adjustments are applied retroactively to the date of the accident, and downward adjustments are applied in the 13th week of full or partial wage loss benefits.

A downward adjustment to temporary average earnings may result in an overpayment of wage loss benefits. This overpayment may be collected under Policy 35.40.50, *Overpayment of Benefits*.

Concurrent Employment

A worker may be employed with more than one employer when they suffer a compensable injury. A worker's concurrent employment income is included in the calculation of average earnings when the worker's ability to earn that income is affected by the compensable injury. This is the case regardless of whether the worker's concurrent employment is in an industry with mandatory WCB coverage.

The appropriate formula from Schedules A - C attached to this policy will be used to calculate and substantiate actual average earnings from self-employment (including farming). If the formula result is positive and the worker's ability to earn that income is affected by the compensable injury, this concurrent income will be included in average earnings. Otherwise, the worker's self-employment income is not included in average earnings.

Removal of Claim Costs

Schedule B of Policy 31.05.10, *Cost Relief/Cost Transfer - Class E,* provides cost relief to Class-E employers for the additional compensation costs that arise when the WCB adjusts the worker's average earnings for concurrent employment.

Under Policy 35.40.50, *Overpayment of Benefits*, an employer may receive a credit to their claim cost experience that arises from an overpayment.

C. REFERENCES

The Workers Compensation Act, section 45 (Prior to January 1, 1992)
The Workers Compensation Act, section 45 (On or after January 1, 1992)

Related WCB Policies:

WCB Policy 31.05.10, *Cost Relief/Cost Transfer - Class E*
WCB Policy 35.10.50, *Status of Workers, Independent Contractors and Employers*
WCB Policy 35.10.120, *Terms and Conditions of Optional Coverage*

WCB Policy 35.40.50, *Overpayment of Benefits*
WCB Policy 44.10.20.60, *Recurring Effects of Injuries and Illnesses (Recurrences)*
WCB Policy 44.80.10.40, *Net Average Earnings*
WCB Policy 44.80.30.10, *Establishing Post-Accident Earning Capacity*
WCB Policy 44.80.30.20, *Post-Accident Earnings – Deemed Earning Capacity*
WCB Policy 44.80.30.30, *Prospective Earnings - Apprentices and Youthful Workers*
WCB Policy 44.80.30.35, *Determining Average Earnings for Declared Workers*

History:
1. Establishment of Average Earnings approved by Board Order 77/85 on May 22, 1985.
2. Clarification of Board Order 77/85 approved by Board Order 87/86 on May 14, 1986.
3. Policy 44.80.30 approved by Board Order 14/90 on June 21, 1990.
4. Policy 44.80.10.10 approved by Board Order 18/92 on April 30, 1992.
5. Effective dates and application of policy 44.80.30 and 44.80.10.10 clarified by Board Order 17/93 on April 30, 1993.
6. Policy updated for current position and division titles May 2, 1994.
7. Policy amended by Board Order 13/00 on April 27, 2000. Former policy re-issued as 44.80.10.10.01 effective April 30, 1992 – December 31, 2000.
8. The Schedules and Appendix have been amended – March 2003.
9. December 2009 – Policy updated to change the name from the Canada Customs and Revenue Agency "CCRA" back to the Canada Revenue Agency "CRA".
10. Policy amended by Board Order 08/11 on April 28, 2011, effective June 1, 2011. Former policy rescinded and re-issued as 44.80.10.10.01. Policy changes included modifying schedules for determining average earnings in special circumstances; dividing Schedule A into two separate schedules, one for self-employed persons and one for deemed workers; establishing Schedule C for individuals working in the film industry; setting a guaranteed coverage level which will not require the substantiation of earnings; permitting the substantiation of earnings at time of purchase, renewal or claim for those wishing to purchase more coverage than the guaranteed level; simplifying the calculation of post-accident earnings; and refunds or credits based on lower earnings than the level of personal coverage purchased.
11. Minor formatting changes were made to the policy and the reference section was updated June 27, 2012.
12. Policy was amended by Board Order No. 42/15 on October 29, 2015 effective January 1, 2016. Schedule "E" CRA Probable Business Expenses - Line 229 Deductions was added to the policy.
13. Policy updated November 10, 2017 to reflect Schedule B of policy 31.05.10, *Cost Relief/Cost Transfer - Class E,* which provides cost relief to Class E employers for claim costs involving concurrent employment.
14. Policy was amended by Board Order No. 37/20 on December 17, 2020 effective for all decisions on or after January 1, 2022. Changes to the policy include limiting average earnings to any maximum earnings level in effect on the date of the accident; stating that short-term average earnings will be accurately set to reflect a worker's employment and earnings pattern; outlining that an average earnings review will be conducted at the same time for all workers, regardless whether they are receiving full or partial wage loss benefits; and clarifying when adjustments in average earnings are applied and when overpayments may be collected.
15. Policy was archived December 31, 2022.

SCHEDULE A

SELF-EMPLOYED PERSONS WHO HAVE PURCHASED OPTIONAL COVERAGE FOR THEMSELVES

Under policy 35.10.120, *Terms and Conditions for Optional Coverage*, employers, directors and independent contractors may purchase coverage for themselves, personally. Employers, directors, and independent contractors who purchase their own optional coverage become "workers" under the Act. Policy 35.10.120 sets the minimum and maximum amounts of optional coverage that can be purchased.

Establishing Average Earnings

The WCB frequently requires that the earnings of self-employed persons who have purchased optional coverage be substantiated. This is particularly the case when the worker has purchased more than the minimum amount of optional coverage required by Policy 35.10.120.

Substantiated pre-accident earnings are earnings that have been verified with income tax information received from the Canada Revenue Agency (CRA) or other independent sources. Income tax information includes income tax and benefit return(s) and other taxpayer information including all supporting information slips, schedules, and financial statements. The WCB does not accept documentation that changes a worker's income from that which was previously reported to the CRA except for adjustments made by the CRA.

In all cases, average earnings for workers that have purchased optional coverage will never be less than the minimum amount of optional coverage. This minimum average earnings amount also applies to sole proprietors, partners and directors regardless what percentage of the corporation they own.

When the minimum amount of optional coverage has been purchased, the WCB sets the worker's average earnings equal to this minimum amount and pays wage loss benefits based on this amount. Where the worker also receives collateral benefits post-accident, the WCB will substantiate their actual earnings. When the worker receives income and benefits for the same work-related injury or illness from the WCB and other sources, these other sources of benefits are considered collateral benefits.

When the worker has purchased more than the minimum amount of optional coverage, the WCB pays wage loss benefits based on the minimum amount of optional coverage until the person's actual pre-accident earnings can be substantiated. Once actual earnings have been substantiated, the WCB pays wage loss benefits based on the lesser of worker's actual pre-accident earnings or the amount of optional coverage purchased, subject to the minimum amount of optional coverage.

If wage loss benefits based on the lesser of actual earnings or the amount of optional coverage purchased are higher than benefits the worker has been receiving based on the minimum amount of optional coverage, the WCB will retroactively adjust wage loss benefits to the date of accident.

Calculating and Substantiating Actual Earnings

The WCB will use the "net business income formula" described below to calculate actual earnings for self-employed persons who have purchased optional coverage. Some formulas consider the degree of ownership or control of a corporation. Additional information is provided regarding the use of optional inventory adjustment and amortization/depreciation and business use of home expenses.

<ins>Sole Proprietors and Partners</ins>

[Net Business Income]*

Plus

[Depreciation/amortization]*

Plus

[Business use of home expenses declared on financial statements].

*Pro-rated based on the percentage of ownership for partnerships

<ins>Directors with 50% or greater ownership or Directors who control decisions for the corporation</ins>

[T4 income from the director's personal income tax and benefit return]

Plus

[Shareholder's percentage of Net Business Income]

Plus

[Depreciation/amortization].

<ins>Directors with less than 50% ownership and who do not control decisions for the corporation</ins>

These persons will be treated as T4 earners. The WCB will not include the shareholder's percentage of Net Business Income when calculating actual earnings for these persons.

<ins>Farming Income</ins>

When calculating farming income using the net business income formula, optional inventory adjustments recorded will be excluded.

SCHEDULE B

DEEMED WORKERS

Subsection 60(2.1) of the Act provides the WCB with the authority to deem someone who is not otherwise a worker under the Act to be one. Policy 35.10.50, *Status of Workers, Independent Contractors and Employers*, provides the WCB with a framework for determining whether someone should be deemed a worker.

Deemed workers are generally not paid T4 income, but are paid by contract, which can make their average earnings more difficult to calculate. The WCB has developed a Labour Percentage Schedule for certain specific industries, which is designed to separate out the labour portion of the contract from the price of materials, equipment and commissions. This schedule is found in *Guideline 3 - Labour Percentage Schedule* of Policy 35.10.50. As described below, the WCB frequently uses the labour percentages in *Guideline 3* to determine average earnings for deemed workers.

Short-Term Average Earnings

Average earnings will be generally based on reported earnings calculated using the following labour percentage formula:

> [gross contract earnings as reported by the employer less any company commissions and wages paid to other workers] **multiplied by**
>
> [the applicable labour percentage set out in *Guideline 3*].

Reported earnings are earnings declared on the employer's accident (incident) report. When the employer's accident report includes company commissions and wages paid to other workers in these figures, the reported earnings will be adjusted to exclude these amounts before the designated labour percentage is applied to determine the short-term average earnings level.

If a worker or their designate disagrees with the labour percentage set out in *Guideline 3*, they can request an Average Earnings Review prior to the WCB conducting its own Average Earnings Review under section 3(c) of this policy. When the WCB has sufficient information, it will calculate the worker’s average earnings based on the net business income formula set out in Schedule A to this policy. The WCB compares the results of the two formulas and selects the higher amount to represent the worker’s short-term average earnings.

If the net business income formula produces a higher average earnings level than the labour percentage formula does, the WCB will use the worker’s individual labour percentage in its post-accident income calculations. The calculation and use of the worker’s individual labour percentage are described in Policy 44.80.30.10, *Establishing Post-Accident Earning Capacity*.

Average Earnings Review

If a worker or their designate previously requested an Average Earnings Review, the WCB sets the worker’s average earnings equal to the result of that review.

As outlined in section 3(c) of this policy, once the deemed worker has been in receipt of wage loss benefits for 12 weeks, and presuming that an Average Earnings Review has not been requested prior to that time, the WCB will conduct an Average Earnings Review. Income tax and other information will be obtained to substantiate pre-accident income if not already done.

When conducting an Average Earnings Review, the WCB will use the labour percentage formula below or, where the worker provides sufficient information to the WCB, the net business income formula set out in Schedule A to this policy.

The labour percentage formula used to calculate and substantiate pre-accident average earnings is described below.

> [gross contract earnings less any company commissions and wages paid to other workers**]**
> **multiplied by**
>
> [the applicable labour percentage set out in *Guideline 3*].

Based on the result of the Average Earnings Review, the WCB sets a worker's average earnings level using whichever one of these two formulas produces the higher level of earnings. If the net business income formula produces a higher average earnings level than the labour percentage formula does, the WCB will use the worker's individual labour percentage in its post-accident income calculations. The calculation and use of the worker's individual labour percentage are described in Policy 44.80.30.10, *Establishing Post-Accident Earning Capacity*.

Section 3(c) of this policy outlines the effective date of any adjustment in average earnings resulting from an Average Earnings Review. Any upward adjustment in average earnings is applied retroactively to the date of accident. Any downward adjustment is applied in the 13^{th} week of full or partial wage loss benefits.

SCHEDULE C

FILM INDUSTRY

Production companies are required to purchase coverage for all workers with the exception of entertainers (anyone who works in front of the camera) or independent contractors who are self-employed and can demonstrate autonomy and a degree of control over their work or services such as directors, writers or creative talent. Entertainers or independent contractors are eligible to purchase optional coverage with the WCB.

Policy 35.10.120, *Terms and Conditions of Optional Coverage*, sets the minimum and maximum amounts of optional coverage that can be purchased by self-employed persons. Average earnings for workers and self-employed persons working for production companies in the film industry are determined as described below.

Average earnings for self-employed persons are subject to the minimum amount of optional coverage.

Short-Term Average Earnings

Average earnings are determined based on the remuneration details of the contract, extrapolated to the end of the contract, subject to any maximum annual earnings level in effect on the date of accident.

Average Earnings Review

If the loss of earning capacity extends beyond the term of the contract, the WCB will conduct an Average Earnings Review (see section 3(c) of the policy). Ongoing wage loss benefits will be paid on the basis of the worker's actual loss of earnings as determined by the WCB, subject to the any maximum annual earnings level in effect on the date of accident.

Rights and royalties will not be included in pre-accident or post-accident average earnings.

SCHEDULE D

PROBABLE EMPLOYMENT EXPENSES - LINE 22900 DEDUCTIONS

An employer may require an employee to pay for expenses to earn their employment income. Eligible employment expenses are claimed on Line 22900 of the Canada Revenue Agency (CRA) income tax and benefit return. If a worker claims employment expenses on Line 22900 of the CRA income tax and benefit return, the earnings used to establish the worker's pre-accident earnings are reduced by these probable employment expenses. The adjusted average earnings are used to determine wage loss benefits or wage-replacement benefits after the worker has been in receipt of 12 weeks of benefits.

For accidents on or after January 1, 1992, probable deductions for income tax, Canada Pension Plan (CPP) contributions and Employment Insurance (EI) premiums and other deductions prescribed by regulation are based on the worker's adjusted average earnings. These probable deductions are determined using the applicable Net Average Earnings or successor policy.

For accidents prior to January 1, 1992, the wage-replacement rate (75% of gross) will be applied to the worker's adjusted average earnings.