Section Title: Benefits Administration – *Wage Loss*
Subject: Average Earnings
Effective Date: For all decisions on or after June 1, 2011 to December 31, 2021

A. POLICY PURPOSE

Workers may earn employment income of several different kinds, or from different sources. For many, earnings consist of a salary. For others, however, earnings may include commissions, lump sums for contract work, piece rates, or other forms of pay. Workers may also periodically receive bonuses, holiday pay, or other kinds of income.

When a worker is injured at work, income from various sources may be interrupted. The workers compensation system is designed to replace the employment income lost as a result of a workplace accident or disease. It is essential, therefore, that the Workers Compensation Board (WCB) accurately determines a worker's actual loss of earnings at the time of a compensable injury.

This policy is designed to determine a worker's average earnings at the time of a compensable injury. Section 45 of *The Workers Compensation Act* (the Act) as it existed prior to January 1, 1992, and subsections 45(1) and 45(2) of the Act as it existed on or after January 1, 1992, refer to the method by which the WCB establishes average earnings. The two subsections (on or after January 1, 1992) provide some discretion in the area of average earnings. This policy ensures that the same method of calculating average earnings is available regardless of the date of accident. The method used will always be the one that best reflects the worker's actual loss of earnings.

Subsequent WCB decisions about changes to the worker's average earnings as a result of wage adjustments (i.e., raises), inflation, etc., are not affected by this policy.

Any definitions of earnings for the establishment of earnings before the accident are also to be applied consistently in the establishment of earnings after the accident.

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B. POLICY

1. Formulas

The establishment of a worker's average earnings under either section 45 of the Act as it pertains to workers injured prior to January 1, 1992 or subsections 45(1) and 45(2) of the Act as it pertains to workers injured on or after January 1, 1992 will be governed by the same formulas. These formulas incorporate either regular earnings at the time of accident, or average yearly earnings or probable yearly earning capacity. The formula that best represents the worker's loss of earnings will be chosen.

2. Definitions

Regular Earnings:

Regular earnings are the amount of earnings a worker normally receives as remuneration in the occupation(s) in which he or she was employed at the time of injury. Regular earnings are based on the normal payment schedule (daily, weekly, monthly, annually, etc.) converted to a weekly amount. Earnings from concurrent employment (whether in a covered or non-covered industry) which are reduced or eliminated due to an accident in a covered industry are included in regular earnings.

Regular earnings do not normally include overtime, special reimbursements for employment expenses or bonuses that are not regularly paid.

Average Yearly Earnings:

Average yearly earnings include any remuneration that the worker received as a result of employment or employment-insurance benefits. To determine a worker’s true loss of earnings, the WCB will generally use documentable employment data from any consecutive 12-month period during the one or two years before the compensable accident. If the WCB determines that this calculation does not produce an accurate reflection of a worker’s loss of earnings, it will generally use documentable employment data from a 12-month period during, or an average of, a longer period of up to five years.

Probable Yearly Earning Capacity:

Probable yearly earning capacity is the worker's projected earnings for the next twelve months. It is based on the worker's regular earnings at the time of accident as applied to the worker's established work pattern. Consistent with section 45 of the Act (1992), the probable yearly earning capacity must be based on the worker's earnings before the accident, but may be based on "income from employment and employment insurance benefits, and over such period of time, as the board considers fair and just."

Substantiated Earnings:

Substantiated earnings are earnings (either pre-accident or post-accident) that have been verified with income tax information received from the Canada Revenue Agency (CRA) or another independent source. Income tax information includes income tax 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 on the basis of an audit.

Minimum Level of Personal Coverage:

The minimum level of personal coverage which can be purchased by a self-employed person is established annually under WCB policy 35.10.120, *Terms and Conditions of Optional and Personal Coverage*.

3. First Payment:

At the time of first payment, the WCB will apply the average earnings formula which, on the basis of verifiable information readily available to the WCB, allows for:

a. Expeditious payment of benefits; and

b. Reasonable approximation of the worker's average earnings at the time of the accident. In most cases this formula will be the regular earnings at the time of accident, although the WCB may use the average yearly earnings if it has sufficient documentation and the resultant average earnings would be greater.

4. Average Earnings Review:

An average earnings review occurs whenever the WCB recalculates a worker's average earnings. The WCB may review and adjust a worker's average earnings on any claim when further documentation is received which indicates that a recalculation would result in a more accurate representation of the actual loss of earnings.

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The WCB will initiate an average earnings review for any claim when:

a. The employer or the worker has indicated an irregular earnings pattern on his or her accident report form; or

b. Information provided to the WCB indicates an irregular earnings pattern;

Adjustments arising from a) or b) are retroactive to the time of accident if they result in an increase and effective at 13 weeks if they result in a decrease in the worker's average earnings.

c. The worker requests the review;

The WCB will advise all workers of the option to request an average earnings adjustment based on average yearly earnings and will provide reasonable assistance to the worker to secure documentation in support of same.

The resultant adjustment, if any, is retroactive to the time of accident if it results in an increase and effective at 13 weeks if it results in a decrease in the worker's average earnings.

d. Pension-benefit entitlement is being calculated;

When a pension is to be established and average earnings have not been reviewed, an average earnings review will be conducted. The effective date for the revised average earnings is the same as the effective date for the pension.

e. Recurrence;

When there is a recurrence and average earnings were not reviewed between the time of the original accident and the return to work, an average earnings review will be conducted. The effective date will be the date of the recurrence.

f. A worker has been in receipt of benefits for 12 weeks.

The resultant adjustment, if any, is retroactive to the time of accident if it results in an increase and effective at 13 weeks if it results in a decrease in the worker's average earnings.

5. Concurrent Employment:

When a worker is employed with more than one employer at the same time and is injured while working at a covered job, average earnings will include earnings from all the occupations in which the worker was employed at the time of the injury.

Concurrent employment includes situations when a worker is self-employed and employed by another person at the same time.

When the concurrent income is from self-employment (including farming), the appropriate formula from Schedules A, B or C, attached to this policy, will be used to calculate and substantiate actual average earnings from self-employment. If the result is positive, the concurrent self-employment income will be included in average earnings provided it is being lost as a result of the injury. If the result is negative (a loss) it will not be included in average earnings (i.e., will not be used to reduce benefits).

The WCB will use the formula for each source of income that best represents the loss of earnings.

Income from concurrent employment is only included in average earnings when the worker’s ability to earn that income is affected by the compensable injury.

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The WCB will monitor post-accident concurrent self-employment income. If the concurrent business or farm income increases, compensation benefits will be recalculated.

6. Schedules of Special Circumstances:

The WCB Board of Directors may make schedules to address the special circumstances of certain workers in specific industries and occupations. These schedules form part of the policy and would allow for the consistent determination of average earnings.

7. Removal of Claim Costs:

Schedule B of WCB 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.

C. REFERENCES

The Workers Compensation Act, section 45 (before January 1, 1992)
The Workers Compensation Act, subsections 45(1) and 45(2) (On or after January 1, 1992)

Related WCB policies:

31.05.10, *Cost Relief/Cost Transfer - Class E*
35.10.50, *Status of Workers, Independent Contractors and Employers*
35.10.120, *Terms and Conditions of Optional and Personal Coverage*
44.80.30.10, *Establishing Post-Accident Earning Capacity*

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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. In October 2020, the effective date and application of Schedule “E” was clarified.
15. Minor formatting changes were made to the policy, July 2021.
16. Policy was archived December 31, 2021.

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SCHEDULE "A"

SELF-EMPLOYED PERSONS WHO PURCHASED PERSONAL COVERAGE

In this policy, the term self-employed person means an employer, a director or an independent contractor.

Establishing Earnings Level

In all cases, the worker's average earnings will never be less than the minimum level of earnings for personal coverage purchased by Partners, Sole Proprietors and Directors regardless of percent ownership in the corporation.

When minimum personal coverage has been purchased, the WCB calculates compensation benefits based on the minimum level of earnings for personal coverage. Where the person is receiving collateral benefits, the WCB will substantiate actual earnings.

When personal coverage has been purchased for greater than the minimum amount, the WCB calculates compensation benefits based on minimum level of earnings for personal coverage until the person's actual earnings can be substantiated. Once actual earnings have been substantiated, compensation benefits will be based on the lesser of actual earnings or personal coverage purchased.

If the compensation benefits based on the lesser of actual earnings or personal coverage purchased are higher than compensation benefits based on the minimum level of earnings for personal coverage, benefits will be adjusted retroactively to the date of the accident.

Calculating and Substantiating Income

The "net business income formula" used to calculate actual earnings for self-employed persons who have purchased personal coverage are set out below.

Partners and Sole Proprietors

[Net Business Income] **Plus**

[Non-cash expenses such as depreciation, amortization or other special deductions]

Plus

[Personal expenses that the worker has allocated on financial statements as being due to business, such as expenses claimed for using his or her home for business]

Directors with 50% or greater ownership or Directors who control decisions for the corporation

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

Plus

[Shareholding percentage of Net Business Income]

Plus

[Non-cash expenses such as depreciation, amortization or other special deductions]

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

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

Farming Income

When calculating farming income using the net business income formula, the optional inventory adjustment recorded for the current year and prior year will be excluded. When the inventory is sold, the income will be included in the formula.

Calculating and Substantiating Post-Accident Earnings

Post-accident earnings from self-employment would be determined by using the appropriate methods or formulas contained in this policy for average earnings that best reflects the person's actual post-accident earnings.

In consultation with the self-employed person, entitlement to compensation benefits will be determined by considering the following factors:

- the person's input regarding his or her involvement in the day to day operations of the business;
- the determination of initial medical restrictions;
- the ongoing monitoring of medical restrictions and its potential impact on the person's ability to earn or potentially earn income; and
- the substantiation of actual earnings and the determination of the impact the individual's restrictions has on his or her business operations.

Based on these factors, the WCB determines a percentage that best reflects the self-employed person's loss of earning capacity. This percentage will be applied to the amount of personal coverage previously established. The worker's average earnings cannot be below the minimum level of earnings for personal coverage.

Non-Cash Expenses for Partners, Sole Proprietors, Directors with 50% or greater ownership or Directors who Control Decisions for the Corporation

When minimum personal coverage has been purchased, the full non-cash expenses will be used to calculate post-accident income.

When personal coverage has been purchased for greater than the minimum amount, non-cash expenses used in the calculation of post-accident income are limited to the amount of non-cash expenses used in the pre-accident income calculation.

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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. WCB policy 35.10.50, *Status of Workers, Independent Contractors and Employers*, provides a framework for the WCB to determine whether a person is a deemed worker.

Establishing Initial Average Earnings

Initial average earnings will be based on reported earnings calculated as follows:

> [gross contract earnings as reported by the employer less company commissions and wages paid to other workers]
>
> **multiplied by**
>
> [the applicable labour percentage set out in the guidelines to WCB policy 35.10.50*]

Reported earnings are earnings declared on the employer's accident report. When the employer's accident report includes contract commissions or wages paid to other workers in earnings figures, the reported earnings will be adjusted to exclude these items before the designated labour percentage is applied to establish the initial average earnings level.

Establishing Average Earnings Effective Week 13

If the worker is expected to be on benefits for more than 12 weeks, the WCB will do an average earnings review (see point #4 of the policy). Income tax and other information will be obtained to substantiate pre-accident income if not already done.

If average earnings based on the substantiated amount of lost earnings is greater than the initial average earnings, benefits will be adjusted retroactively to the date of the accident. If the average earnings based on the substantiated amount of lost earning is less than the initial average earnings, the lower average earnings is effective at week 13.

The method used to calculate and substantiate pre-accident average earnings is set out below.

[Gross contract earnings less company commissions and wages paid to other workers]

multiplied by

> [the applicable labour percentage set out in the guidelines to WCB policy 35.10.50*]

If a worker provides information to the WCB indicating that the pre-accident income calculated using the net business income formula from schedule A is higher than pre-accident income using the labour percentage formula, the WCB would set the pre-accident average earnings on the basis of the net business income formula. In these cases, the adjusted labour percentage will also apply to any post-accident income calculations.

Calculating and Substantiating Post-Accident Earnings

Post-accident earnings from self-employment would be determined by using the appropriate methods or formulas contained in this policy for average earnings that best reflects the worker's post-accident earnings.

*Please contact the WCB at 954-4655 for a copy of the Guidelines.

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SCHEDULE "C"

FILM INDUSTRY

Average earnings for workers and self-employed persons working for production companies in the film industry are determined in the following manner.

Average earnings would be determined based on the remuneration details of the contract annualized, subject to the maximum optional/personal coverage (MOC) level set out in WCB policy 35.10.120, *Terms and Conditions of Optional and Personal Coverage*. If the loss of earning capacity extends beyond the term of the contract, the WCB would conduct an average earnings review (see point #4 of the policy). Ongoing benefits would be paid on the basis of the person's actual loss of earnings as determined by the WCB, subject to the annualized amount of coverage purchased and the MOC level. The WCB would substantiate this amount based on CRA or other independent sources.

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

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SCHEDULE "D"

PROBABLE YEARLY EARNING CAPACITY

The probable yearly earning capacity formula forecasts what a worker may be expected to earn for a consecutive 12 month period after the accident. This formula is used when neither regular earning nor average yearly earnings accurately reflect the worker's loss of earning capacity. Examples of when it would be used include:

- The worker does not have a history of prior employment (e.g., due to unemployment or other reasons) or was not available for work for a portion of the previous 12 months (e.g., was going to school, was unable to work for verifiable health or personal or family reasons, was incarcerated, or was receiving WCB temporary total disability benefits).
- The worker's employment circumstance at the time of the accident is significantly different from past employment circumstances (e.g., the worker has experienced a career or occupational change, or some other change in circumstances that is likely to affect future earnings).
- The worker is an apprentice or youthful worker (see WCB policy 44.80.30.30).
- The worker is a probationary employee.

The formula uses the worker's regular earnings or average yearly earnings adjusted to reflect the worker's employment pattern or the earnings and employment pattern of a few similarly employed workers. It also may include presumed employment insurance benefits.

For probationary employees, benefits are based on the worker's regular or average yearly earnings at the time of the accident and are adjusted to reflect the starting wage of a non-probationary employee when the worker's probationary period would have ended (unless it is established that the worker would not have successfully completed the probationary period).

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SCHEDULE "E"

CRA PROBABLE BUSINESS EXPENSES – LINE 229 DEDUCTIONS

This Schedule is effective January 1, 2016 and applies to all claims regardless of when the accident occurs.

The average earnings formula determines what a worker may be expected to earn for a consecutive 12 month period after the accident. If the worker claims employment expenses on Line 229 of the Canada Revenue Agency income tax return, then the gross earnings used to establish the average earnings rate is reduced by the probable employment expenses stated on Line 229. The formula in this schedule is effective for calculating average earnings on claims at 13 weeks.

For all claims, when there are Line 229 deductions, the order for computing the average earnings is as follows:

[Total earnings]

less

[Line 229 probable deductions payable by the worker]

less

[Income Tax payable by the worker]

less

[CPP contributions payable by the worker]

less

[Employment Insurance premiums payable by the worker]

less

[other deductions the WCB Board of Directors may establish by regulation]

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