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

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 his or her 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. It is for these cases that the Act allows certain workers to receive 100% of their loss of earning capacity.

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 allowable (i.e., which workers can receive top-up, in what amount, and for how long). A companion policy (44.80.30.10.20) describes where top-up is not 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 ALLOWABLE:

The Act establishes that top-up above 90% of the worker's actual loss of earning capacity is allowable when:

1. The top-up does not result in the worker receiving more than 100% of the actual loss of earning capacity, effective January 1, 1995; and,

2. Top-up above 90% of the actual loss of earning capacity is limited to the first 24 months of accumulated benefits after January 1, 1995 (per claim) or the date of accident, whichever is later; and,

3. There is a collective agreement(s) in force since January 1, 1992, which provides for the payment of top-up to the worker by the employer; and,

4. a. The employer is covered under sections 73(a) to 73(d), *Classes of Industries*, as of December 31, 1991 (i.e., self-insured employers); **or,**

   b. The employer is not covered under sections 73(a) to 73(d) as of December 31, 1991, and applies to and receives the approval of the WCB to pay top-up above 90% of the actual loss of earning capacity.

5. Top-up is allowable for workers covered under the collective agreement for the full 24 months of accumulated benefits when the collective agreement was in effect at the time of the accident. Top-up would still be allowable when a successor agreement did not have top-up provisions and the worker then experienced a recurrence.

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

II. CRITERIA FOR APPROVING APPLICATIONS BY EMPLOYERS:

1. Effective January 1, 1995, an employer not covered under sections 73(a) to 73(d) as of December 31, 1991 (i.e., does not automatically receive the 24 month exemption), can only pay top-up above 90% of the actual loss of earning capacity where:

   a. The employer submits a written application to the WCB requesting authorization to pay top-up above 90% of the actual loss of earning capacity; and,

   b. The application is authorized by the Executive or Senior Director of the responsible division (after October 2000, by the appropriate Sector Director).

2. The Executive or Senior Director/Sector Director will consider applications effective January 1, 1994, and will approve applications which are accompanied by sufficient documentation to substantiate that the application meets the requirements of *The Workers Compensation Act*.

3. For the purposes of this policy, a "collective agreement" is as defined in *The Labour Relations Act*. This definition is contained in the attached Schedule "A".

4. Employers may apply for the 24 month exemption at any time. If the application criteria are met, the exemption will be effective January 1, 1995. If an employer applies and is approved after January 1, 1995, any relevant claims from January 1, 1995, to the date of approval will be revisited by the WCB.

III. SITUATIONS WHEN EMPLOYER TOP-UP IS NOT ALLOWABLE:

Employer top-up is not allowable unless it is paid under the circumstances described in *The Workers Compensation Act* and this policy. When this is not the case, the top-up will be considered an excess collateral benefit. WCB wage-loss benefits will be reduced by an amount equivalent to the amount of the excess collateral benefit. The specific calculation used in these situations is detailed in policy 44.80.30.10.20, *Post-Accident Earnings - Collateral Benefits (Unallowable Employer Top-Up)*.

B. REFERENCES

The Workers Compensation Act, sections 39(5), 41(1) to 41(7), and 73

Related WCB Policies:

44.80.30.10, *Establishing Post-Accident Earning Capacity*
44.80.30.10.20, *Post-Accident Earnings - Collateral Benefits (Unallowable Employer Top-Up)*
44.80.80.20, *Loss of Earning Capacity Reviews*

History:

1. Policy 44.80.30.10.10 established by Board Order 56/94, effective January 1, 1995.
2. Effective application date confirmed by the Board, September 18, 1995.
3. Schedule "A" updated for change in the definition of a "Collective Agreement" on March 12, 2003.
4. Policy amended by Board Order 16/05 on May 26, 2005, to rescind Board Order No. 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.
5. Minor formatting, grammatical and wording changes were made to the policy June 27, 2012.

Attachments:

Schedule "A" Definition of Collective Agreement

DEFINITION OF "COLLECTIVE AGREEMENT"

For the purposes of this policy, a "collective agreement" is defined as in *The Labour Relations Act*. The definition is as follows:

> *"collective agreement" means an agreement in writing between an employer or an employers' organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement and does not include a project agreement under section 163.1; ("convention collective")*

This schedule will be updated should there be an amendment to the definition in *The Labour Relations Act*.