

DISCUSSION PAPER

1. TITLE AND DATE

Workers Participating in Non-WorkSafeBC Return to Work Programs

2. ISSUE

This issue relates to the calculation of short-term average earnings of a worker who participates in a non-WorkSafeBC (“WCB”) return to work (“RTW”) program and subsequently sustains a work-related injury during the program.

In some cases, the worker is paid by the employer who is in turn, reimbursed, or partially reimbursed, by an insurance provider. In other cases, the worker is paid partially by the employer and partially by an insurance provider, and in still other cases, the worker receives only insurance payments. At present, policy does not address whether or not insurance payments are considered earnings when calculating short-term average earnings. Currently, practice does not consider them as such.

At issue is whether or not insurance payments should be considered earnings when calculating a worker’s short-term average earnings, if the worker sustains a work-related injury while participating in a non-WCB RTW program.

3. BACKGROUND

3.1 Law and Policy

The *Workers Compensation Act* (“*Act*”) entitles a worker to compensation when disabled from earning full wages and provides a general rule for calculating a worker’s short-term and long-term average earnings.¹

The general rule for calculating a worker’s short-term average earnings is to use the worker’s rate of pay at the date of injury up to the maximum wage rate permitted by the *Act*. For workers who receive regular earnings on a

¹ Section 5(2) of the *Act* and section 33.1 of the *Act*, respectively.

standard five-day work week, the calculation of date of injury earnings are based on the worker's actual earnings on the day of injury.

After the initial 10 week period, long-term average earnings are calculated based on the worker's gross earnings, as determined by the WCB, for the 12 month period immediately preceding the date of injury.

"Earnings" is not a defined term in the *Act*, but the *RS&CM*, Volume II provides that a worker's average earnings are normally composed of wages or salary.² However, whether or not insurance payments may be considered earnings is not set out in policy.

4. DISCUSSION

4.1 Current Practice

A worker who sustains an injury not related to work may end up participating in a non-WCB RTW program. In some cases, the worker may be paid by the employer who is in turn, reimbursed, or partially reimbursed, by an insurance provider. In other cases, the worker may be paid partially by the employer and partially by an insurance provider, and in still other cases, the worker may receive only insurance payments.

When a worker participating in a non-WCB RTW program sustains a work-related compensable injury, policy does not address whether or not insurance payments should be considered earnings when calculating short-term average earnings. Current practice has been to exclude insurance payments as earnings where insurance payments make up part or all of a worker's earnings.

Accordingly, when an insurance company pays a worker 100% of his or her wages for participating in the RTW program, generally, current practice is to determine that the worker's short-term average earnings are \$0. Where the employer and an insurance company both pay the worker a portion of his or her wages, generally, current practice is to determine the short-term average earnings based on what the employer pays the worker, without including insurance payments.

As a result, where insurance payments make up part or all of a worker's earnings, the worker's short-term average earnings may be determined to be significantly lower than the amount actually received by the worker for participating in the RTW program.

² Policy item #68.00, *Composition of Average Earnings of the RS&CM*.

4.2 Insurance Payments as Earnings

Although “earnings” is not a defined term in the *Act*, dictionary definitions of “earnings” denote a payment or return on labour.³ That notion is consistent with the overall purpose and intent of the *Act*.⁴ Moreover, in *Larson’s Workers’ Compensation Law*, authorities have often analyzed whether or not insurance payments depended upon the tasks being performed by the individual.⁵ If the insurance payments would have been paid in any event, their identification as payment for the work being performed is questionable. If the continuation of the insurance payments was dependent upon continued participation in the program, their identification as payment for the work being performed is much stronger.

Therefore, insurance payments may be considered as part of the earnings of a worker who is injured while participating in a non-WCB RTW program provided that payment relates to the work being performed. Evidence which would demonstrate that payment of insurance payments relate to the work being performed would include:

- Continued payment of insurance payments being dependent upon active participation in the RTW Program.
- The employer funding the insurance program as a wage replacement scheme.
- The RTW Program being integrated into the normal production activities of the host employer.

For example, if a worker is only in the workplace for four hours, but receives a top up in insurance proceeds for an additional four hours not related to the work being performed, the insurance proceeds would not be considered earnings for the purposes of calculating short-term average earnings. Conversely, if the worker is in the workplace for eight hours, and the worker receives half of his or her wages through payment of insurance proceeds, the insurance proceeds may be considered earnings for the purposes of calculating short-term average earnings.

5. OTHER JURISDICTIONS

Like the current practice in British Columbia, six other Canadian jurisdictions do not consider insurance payments to be earnings when calculating a worker’s average earnings.⁶ Two other jurisdictions have not considered this issue.⁷

³ Cambridge Dictionaries Online: <http://dictionary.cambridge.org/>; Merriam-Webster Online Dictionary: <http://www.merriam-webster.com/>.

⁴ The notion is also consistent with the reference to remuneration in section 33.1(1) of the *Act* and the reference to disability from earning full wages in section 5(2) of the *Act*.

⁵ Volume 5, Chapter 93, *Calculation of Wage Basis and Benefits*, [2] *What is Included in Wage*.

⁶ Manitoba, Newfoundland/Labrador, Northwest Territories/Nunavut, Nova Scotia, Prince Edward Island and Saskatchewan.

In Alberta, however, insurance payments may be considered earnings where those benefits are being paid for work performed. A worker's earnings would be whatever the worker is being paid for the work performed, regardless of whether the worker is paid by the actual employer or the insurance company. Similarly, in New Brunswick, insurance payments may be considered earnings provided that the insurance payments best represent the worker's earnings at the time of injury. In Ontario, insurance payments may only be considered earnings for trainees/learners provided that the insurance benefits would terminate when the worker receives loss of earnings payments.

6. OPTIONS AND IMPLICATIONS

Option 1: Status quo

Under this option, no changes would be made to policy. Policy would not address whether or not insurance payments should be considered earnings when calculating short-term average earnings of a worker who is injured while participating in a non-WCB RTW program.

Implications

- Current practice of generally excluding insurance payments as earnings in the calculation of short-term average earnings would continue.
- Where insurance payments make up part or all of a worker's earnings, the worker's short-term average earnings may be determined to be significantly lower than the amount actually received by the worker for the work performed.

Option 2: Amend policy to state that insurance payments may be considered earnings provided that payment relates to the work being performed

Under this option, a new policy would be added to Chapter 9 of the *RS&CM* dealing with short-term average earnings of workers participating in non-WCB RTW programs.

The new policy would provide that generally, for insurance payments to be considered earnings, payment must relate to the work being performed. Policy would also provide a non-exhaustive list of evidence to demonstrate that insurance payments relate to the work being performed. An example would also

⁷ The Commission de la santé et de la sécurité du travail ("CSST") in Quebec advises that there are no non-CSST RTW programs. The Yukon Workers' Compensation Health & Safety Board has not encountered any non-Workers Compensation Health and Safety Board RTW programs before.

be included to demonstrate when insurance payments generally would and would not be considered earnings.

Furthermore, there would be a cross-reference to policy on Exceptional Circumstances⁸ for calculating long-term average earnings of a worker who is injured while participating in a non-WCB RTW program.

Draft policy amendments reflecting this option are attached as Appendix A.

Implications

- Insurance payments would be included in the calculation of short-term average earnings if they relate to the work being performed.
- Where insurance payments make up part or all of a worker's earnings, the worker's short-term average earnings would more accurately reflect the amount received by the worker for the work performed.
- The Claims Management Solutions project team has advised that the impact of the proposed changes to policy would be minimal, as non-WCB RTW program claims would generally be handled through manual processes.

7. CONSULTATION

Stakeholders are invited to provide feedback on the discussion paper, options, draft policy, and any additional comments that may be relevant to the issue.

Stakeholder comments will be accepted until **October 16, 2008**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

By mail: Louise Kim
Policy Analyst
Policy and Research Division
WorkSafeBC
P.O. Box 5350, Stn. Terminal
Vancouver, B.C. V6B 5L5

By fax: 604 279-7599

By e-mail: policy@worksafebc.com

WorkSafeBC's governing body, the Board of Directors, will consider the options expressed by stakeholders before it adopts any amendments to the current policies.

⁸ Policy item #67.60, *Exceptional Circumstances*, of the *RS&CM*.

Please note that all comments become part of the Policy and Research Division's database and may be published, including the identity of organizations and those participating on behalf of organizations. The identity of those who have participated on their own behalf will be kept confidential according to the provisions of the *Freedom of Information and Protection of Privacy Act*.

**PROPOSED DRAFT POLICY
REHABILITATION SERVICES & CLAIMS MANUAL, VOLUME II**

#65.05 Workers Participating in Non-Board Sponsored Return to Work Programs

Where a worker is participating in a non-Board sponsored Return to Work Program, insurance proceeds may be considered earnings for the purposes of determining short-term average earnings. Generally, for insurance proceeds to be considered earnings, payment must relate to the work being performed.

For example, if a worker is only in the workplace for four hours, but receives a top up in insurance proceeds for an additional four hours not related to the work being performed, the insurance proceeds are not considered to be earnings for the purposes of determining short-term average earnings. Conversely, if the worker is in the workplace for eight hours, and the worker receives half of his or her wages through payment of insurance proceeds, the insurance proceeds may be considered earnings for the purposes of determining short-term average earnings.

Evidence which demonstrates that payment of insurance proceeds relate to the work being performed includes, but is not limited to:

- Continued payment of insurance proceeds is dependent upon active participation in the Return to Work Program.
- The employer funds the insurance program as a wage replacement scheme.
- The Return to Work Program is integrated into the normal production activities of the host employer.

See policy item #67.60 to determine the long-term average earnings for a worker participating in a non-Board sponsored Return to Work Program.