

**Submission to the Standing Committee on Social Policy:**

**Bill 152**

**Poverty Reduction Act**

Injured Workers' Consultants

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## **Submission to the Standing Committee on Social Policy Re:**

### **Bill 152 - Poverty Reduction Act**

We are pleased to support Bill 152 and offer some suggestions for improvement. This submission aims to show the following:

1. Poverty is a substantial problem for injured workers. Injured workers with permanent disabilities have a heightened risk of poverty while facing the same stigmas and barriers as other persons with disabilities.
2. The workers' compensation system is failing to meet the needs of injured workers, relegating a substantial portion of injured workers to impoverished lives and leading many to turn to other government programs (such as ODSP) for assistance.
3. With a few additions, Bill 152 has the potential to eradicate poverty amongst injured workers, which will make a substantial contribution to the overall poverty reduction goal.

#### **Poverty Reduction Includes Injured Workers**

We welcome the introduction of Bill 152 and believe that it has the potential to make a significant difference to the poverty of Ontarians. Injured workers, unfortunately, are part of the dramatic picture of poverty of Ontario. Most people are not aware that many injured workers live in poverty.

Although many workers' compensation claims involve no lost time at all, or short periods of temporary disability, workers who suffer a permanent impairment from their work injury are too often left in poverty. There are some 344,000 workers in Ontario who have suffered from a workplace injury or disease which has left them with a permanent disability. This number increases every year by another 13, 000 – 14, 000. For these injured workers, our workers' compensation system does not always offer good coverage and compensation.

We trust that our MPPs, who speak to injured workers in their constituency offices and their ridings on a weekly basis, know something about this. In the

past decade, injured workers and researchers have made an effort to research and document this issue. Here are some figures from the research documenting the poverty of injured workers:<sup>1</sup>

### Unemployment

- A 2001 study of workers injured before 1990 found that **60% were unemployed** at the time of the study.
- In 2003, Deloitte's accounting firm conducted a value for money audit of the Labour Market Re-entry Program (formerly vocational rehabilitation). It found that of those injured workers who completed a program, **55.7% were deemed employable but were unemployed.**

### Poverty

- A 2007 survey by the Thunder Bay and District Injured Workers Support Group found **42% of the injured workers were living on social assistance, and 71% had incomes below Statistics Canada's Low Income Cut Off.**
- A 2008 pilot survey of injured workers in Toronto by the Ontario Network of Injured Workers Groups found that **70% were unemployed and 69% reported incomes below Statistics Canada's Low Income Cut Off.**

### Reliance on Social Assistance

- September 2005 figures from the Ministry of Community and Social Services show **727 Ontario Works (OW) and 3,148 Ontario Disability Supports Program (ODSP) cases were also in receipt of WSIB benefits.** The actual number of injured workers in receipt of social assistance is likely much higher, as these figures do not account for injured workers who have been cut off of WSIB benefits.

### Homelessness

- In 2006, the Street Health Community Nursing Foundation surveyed homeless people with disabilities living in Toronto. It found that of those who had been employed, **57% reported that workplace injuries played a role in their becoming disabled. Almost half (46%) had received workers' compensation benefits** in the past but none were receiving workers compensation benefits at the time of the survey.

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<sup>1</sup> Further details can be found in the Appendix.

## Non-Reporting of Injuries

- In 2008, Morneau Sobeco reviewed the WSIB Experience Rating program. It found that some employers might achieve lower WSIB premiums by not reporting injuries. Morneau Sobeco found this could represent a large number of claims, perhaps up to **25,000 unreported workers compensation claims in 2007.**

The government and the WSIB should address the policies and programs that shift the costs of treatment and financial support for injured workers from the employer funded workers' compensation system onto the publicly funded social safety net, and there will be greater resources available for the government's poverty reduction measures.

### ***"It Wasn't Supposed to Be"***

Our workers' compensation system was established in 1915 to prevent injured workers from becoming "a charge on the community". It was a system of "full justice not half measures", in the words of its founder William Meredith, for which injured workers traded their right to sue their employers in case of injury. Ontario led the way in 1915, and set a high standard. In the words of Justice Meredith, one of the main purposes of workers' compensation was that the injured worker should not "become a burden upon his relatives or friends or on the community"

<sup>2</sup>

## **Legislation and Policy Problems that Cause Poverty**

The current workers' compensation system has led to impoverished lives for many injured workers. There have been various legislative and policy changes over the years that have caused the poverty of injured workers. Three significant examples of these changes are: Bill 162 (1989) which introduced "deeming"; Bill 165 (1995), which initiated the de-indexation of benefits, and Bill 99 (1998) which introduced massive cuts to benefits and entitlements. It is beyond the scope of our submission to address the complex legislative histories and the historical contexts of these bills, so we will focus on one example of how legislative and policy change has impoverished injured workers, which we refer to as deeming.

### ***Pretend /"Deemed" Employment Leads to Real Poverty***

Deeming refers to the practice of assigning a rate of pay to a disabled worker that the WSIB determines the worker *ought* to be able to earn in employment. The WSIB deducts the deemed income from loss of earnings benefits. When an

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<sup>2</sup> Final Report on Laws Relating to the Liability of Employers, 1913, at page xvi, available online at: [awcbc.ca](http://awcbc.ca)

injured worker has a permanent disability and cannot return to his/her former employment, there is a period of retraining for a new job, called “labour market re-entry”. Once “retrained” in a new occupation the WSIB “deems” (“pretends” would be a better description) that injured workers will be earning the wages of that occupation **whether they find work or not!**

Here is an example of how deeming works:

Mary was earning \$11 an hour before her workplace injury, which left her with a permanent back condition. She cannot to her pre-injury job due to her condition, so she is retrained as a customer service representative. Employers are reluctant to hire Mary, since she requires accommodations for her disability and because English is not her first language, so Mary is unable to find work. The Board pretends that Mary earns \$10 per hour regardless and compensates her for a portion of the difference between her pre-accident wages of \$11 an hour and the \$10 hourly wage she would earn if she worked as a customer service representative! With less than a dollar an hour to live on, **based on “pretend” employment**, Mary resorts to ODSP, which shifts responsibility from the employer funded WSIB to the publicly funded ODSP plan.

We all know that there are many ‘Marys’ in each constituency that you represent, and the impact on the overall poverty of Ontarians is considerable.

Former Minister of Labour Steve Peters made an amendment to the *Workplace Safety and Insurance Act* (Bill 187) that “propos[ed] to eliminate ‘deeming’ from the WSIA”.<sup>3</sup> However, no such change of policy or practice has occurred at the WSIB level, despite the protestations of injured workers’ organizations like the Ontario Network of Injured Workers Groups (ONIWG), legal clinics, and others. The WSIB continues to deem wages to unemployed or underemployed workers, as is evident in its Policy Document “Reviewing LOE Benefits (Prior to Final Review)”.<sup>4</sup>

We believe that Bill 152 could provide a framework for injured workers, government institutions, and the WSIB to address the current flaws in the workers’ compensation system. This will reduce the poverty of injured workers and the transfer of costs onto the health and welfare system.

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<sup>3</sup> Letter from the Honourable Steve Peters to injured Workers’ Consultants, April 27, 2007. See Appendix.

<sup>4</sup> Please see the Appendix for a complete copy of this document. In particular, Example #4 of page 5 demonstrates the WSIB’s deeming practice.

### ***Lack of Recognition of Diversity***

The above example of “deeming” illustrates how the WSIB systemically fails to recognize the barriers faced by different groups at higher risk of poverty. The WSIB makes no provision to account for the heightened risks of unemployment that injured workers face. Yet we all know that aboriginal people, visible minorities, recent immigrants, older people, and persons with disabilities face a greater risk of unemployment and poverty. We welcome the recognition of diversity in Bill 154 and believe that it will help convince the WSIB to do the same, thus reducing overall poverty. We would also add that the list is not exhaustive, groups such as the official language minority in Ontario experience very high rates of illiteracy which is also a factor contributing to poverty.

### **Inclusion of People in Poverty Themselves**

We welcome Bill 152’s constructive approach to reducing poverty by working on solutions, rather than blame. We particularly welcome the intent to bring the people affected by poverty **themselves** into to poverty reduction strategy (Section 6). This is going to be a key litmus test for the success of the strategy, we believe.

The spirit of inclusion of people in poverty stands in sharp contrast to the past de-funding of the Ontario Network of Injured Workers’ Groups (ONIWG) by then Minister of Labour Chris Stockwell in 2000. ONIWG was a network of injured workers groups across Ontario that relied on funding from the ministry to assist injured workers in peer groups in their communities. Injured workers are still suffering the negative effects of the government’s decision to cut funding. We hope that the current Government will re-enact funding for ONIWG and welcome the new spirit of inclusion contained in Bill 152.

### **Suggestions for Strengthening Bill 152**

#### ***Include Agencies, Boards, and Commissions such as the WSIB***

We believe that Bill 152 would be strengthened by including all of government in the poverty reduction strategy. The present form of Bill 152 is silent on whether agencies, boards, and commissions will be included in the strategy, but we hope that you agree that they should be involved.

We think that Bill 152 could be strengthened by specifically adding agencies, boards, and commissions to the initiative and making them a part of the solution. In particular, Bill 152 could ask the WSIB to,

- formally recognize that injured workers face the same barriers and stigmas as other persons with disabilities, particularly in finding sustainable employment
- gather and disclose annual statistics on the rate of poverty and employment amongst injured workers
- formulate and implement strategies (such as policy reform) to bring injured workers out of poverty

Bringing all of government into the poverty reduction strategy, including agencies such as the WSIB, will maximize the resources available for this initiative and this will make a substantial contribution to the legislation's overall goal.

***Aim Higher – Reduction is Good, but Elimination is Better.***

A 25% reduction in poverty is a good but modest goal. We think that it is possible to aim to eliminate poverty entirely, particularly in the case of injured workers.

From the time of its inception in 1915, one of the main objectives of the workers' compensation system was to insulate workers against poverty. Injured workers were to be compensated for the duration of their disabilities<sup>5</sup>. With so many injured workers living in poverty, it is evident that the he current system falls short of this goal. Legislative and policy changes that eliminate practices such as deeming can drastically reduce poverty amongst injured workers and make a substantial contribution towards eradicating poverty in Ontario. Including injured workers in the poverty reduction strategy could not only eliminate poverty for injured workers themselves but also free up resources in healthcare and social assistance that can be used towards a broader poverty elimination goal.

*Respectfully Submitted by Injured Workers' Consultants Community Legal Clinic*

*21 April, 2009*

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<sup>5</sup> Meredith Report, page xvii

***APPENDIX:***

***Data Sources: Poverty of Injured Workers***

## **Poverty Reduction Includes Injured Workers: A Summary of the Research on Injured Workers and Poverty**

### **Unemployment**

In 2001 the Institute for Work and Health published a study of workers who had been injured before 1990. Prior to their injuries the workers had stable employment histories. After their injuries, most found it difficult to retain employment and experienced chronic employment instability following their injury. Sixty percent (60%) of the group was unemployed at the time of the interview. (Pre-1990 Claims Unit study final report to the Workplace Safety and Insurance Board, 2001, Peri Ballantyne, Institute for Work and Health, available online at: [http://www.iwh.on.ca/system/files/documents/pre-1990\\_claims\\_report\\_wsib.pdf](http://www.iwh.on.ca/system/files/documents/pre-1990_claims_report_wsib.pdf))

In 2003, the WSIB commissioned a value for money audit of its Labour Market Re-entry Program (formerly vocational rehabilitation) by the Deloitte's accounting firm. The audit looked at outcomes for completed training programs over roughly 3 years, between January 1999 and October 2002. Deloitte's found that 55.7% of the injured workers were deemed employable but were unemployed.

Of the deemed employable group, 60% received some compensation benefits for partial loss of earnings, meaning they were deemed to have returned to work at a wage loss. The other 40% of the deemed employable received no WSIB benefits, meaning they were deemed to have returned to work at their pre-injury wage. The Executive Summary of the Value for Money Audit of the Ontario WSIB LMRP by Deloitte's accounting is available online at:

[http://www.wsib.on.ca/wsib/wsibsite.nsf/LookupFiles/DownloadableFileExecSummLMRAudit/\\$File/LMRExecSummFinal.pdf](http://www.wsib.on.ca/wsib/wsibsite.nsf/LookupFiles/DownloadableFileExecSummLMRAudit/$File/LMRExecSummFinal.pdf)

The deeming process, that compensates injured workers as if they were fully employed, regardless of their actual situation, and the LMR process, which aims for employability and not employment, combine to produce particularly harsh results for injured workers who were injured in low paying or minimum wage jobs. When the system presumes that injured workers can at least get a full time minimum wage job, there is little or no compensation or training available to those who were in low paying work when they were injured.

### **Poverty**

We understand that the committee has been presented with a copy of the poverty survey done by the Thunder Bay and District Injured Workers Support Group in 2007 which found 42% of the injured workers living on social assistance, and 71% with incomes below Statistics Canada's Low Income Cut Off.

Our community legal clinic works with The Ontario Network of Injured Workers Groups, of which the Thunder Bay Group is a part, which has begun to survey injured workers

across the province. In December 2008, they pre-tested the survey with 27 injured workers in Toronto. After their injury, 19 of the 27 (70%) were unemployed and 17 felt they had little chance of finding employment. Eighteen of the 26 (69%) who answered a question about current income reported incomes less than the Canadian low-income cut-off. The largest income group after injury was the less than \$5,000 per year group (with 7 people in that group). Although none of these people had used food banks before their injuries, 6 people reported that they now have to use food banks because their incomes are so low. Seven people reported strong feelings of wanting to commit suicide because of their situations. These results are very similar to the findings in Thunder Bay.

### **Reliance on Social Assistance**

We did not have an opportunity to obtain the most recent statistics but the September 2005 figures from the Ministry of Community and Social Services state there were 727 Ontario Works (OW) and 3,148 Ontario Disability Supports Program (ODSP) cases who were also in receipt of WSIB benefits. For the ODSP caseload, that was about 1.5 % of the total caseload. These are the types of cases documented in the above noted Deloitte's audit where the injured workers are unemployed but deemed employed at a wage loss. The Deloitte's audit found that among the injured workers who were unemployed after retraining, the ratio of those on partial loss of earnings benefits to those deemed to have no loss of earnings was about 60:40. The Ministry statistics do not indicate how many OW and ODSP cases are injured workers who have been cut off WSIB altogether. However, the Deloitte's ratio can be used to project that there may be another 2500 cases on ODSP who have been completely cut off by the WSIB.

There are a significant number of injured workers on the caseload of OW and ODSP that should more appropriately be taken care of by our workers' compensation system. Looking into those cases will not only help to fulfill the objectives of our workers compensation system and but also will leave our social assistance programs with more resources to address the poverty of those in need.

### **Homelessness**

In 2006, the Street Health Community Nursing Foundation published a study based on surveys of 85 homeless people with disabilities who were living in Toronto. Of those who had been employed, 57% reported that workplace injuries played a role in becoming disabled and 46% of those who had worked had received workers' compensation benefits, although none were receiving workers compensation benefits at the time of the survey. The report is available online at [www.streathealth.ca](http://www.streathealth.ca) ) These findings suggest that under-compensation for a workplace injury may be a significant contributing factor in the cascade of factors leading to poverty that can also lead to homelessness.

### **Non Reporting of Injuries**

When work-related injuries are not even reported to the WSIB, all of the costs are shifted onto our public health care system and other parts of our social safety net like social

assistance. This occurs more often than many people realize. A cross Canada survey asked about work injuries in the previous year and several questions established eligibility in their workplace for workers compensation coverage and whether a claim had been filed. Of those suffering an injury eligible to receive workers' compensation and working in an industry with compulsory coverage, 40% did not file a workers' compensation claim. Even among cases with lost time, 30% did not submit a workers' compensation claim. See 'How many injured workers do not file claims for workers' compensation benefits?' by H. Shannon and G. Lowe, published in the American Journal of Industrial Medicine, Volume 42, Issue 6, p. 467, published online 18 November 2002 at <http://www3.interscience.wiley.com>.

The Ontario WSIB recently began to review its Experience Rating program, the program that determines the rates paid by most employers on the basis of their reported injury statistics. The report of consulting firm Morneau Sobeco confirmed that one of the unintended consequences of the Experience Rating program is that some employers may achieve improved performance, and therefore lower WSIB premiums, by not reporting injuries. Workers reported they were discouraged from reporting injuries and employers agreed that their organization did not always report injuries. Morneau Sobeco reported that although the percentages were fairly small, they could represent a large number of claims, up to 25,000 unreported workers compensation claims in 2007. See page 9, Recommendations for Experience Rating, Morneau Sobeco report to WSIB, October 2008.

If the government addresses the WSIB policies and programs that shift the costs of treatment and financial support for injured workers from the employer funded workers' compensation system onto the publicly funded social safety net, there will be greater resources available for the government's poverty reduction measures.

## Ministry of Labour

## Ministère du Travail



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APR 27 2007

Mr. Peter Bird, Chair  
Injured Workers' Consultants  
411 - 815 Danforth Avenue  
Toronto, Ontario  
M4J 1L2

Dear Mr. Bird:

Thank you for your letter about how increases to the minimum wage could affect injured workers.

Our government is committed to creating a brighter future for injured workers. One of our first steps as a government was to undertake an independent audit of the Workplace Safety and Insurance Board (WSIB). Given a more stable WSIB, we can do more to help injured workers who have not seen any meaningful increases in WSIB benefits for 12 years.

As you are aware, as part of the Ontario budget of 2007, the government is proposing a number of improvements to increase WSIB benefits and provide greater fairness and flexibility to the workplace safety and insurance system. The amendments to the *Workplace Safety and Insurance Act, 1997 (WSIA)*, if approved by the legislature, would require the WSIB to determine loss of earnings (LOE) benefits on both suitable and available employment. This change would help injured workers retain benefits when work they could perform after rehabilitation is not available or suitable. In essence, we are proposing to eliminate "deeming" from the *WSIA*.

Additional enhancements proposed for injured workers would include the following:

- Increases to the indexation of benefits amounting to three adjustments of 2.5 per cent each, on July 1, 2007, and on January 1 in each of 2008 and 2009.
- Allow a review of benefits for some workers who suffer a temporary or permanent deterioration in their condition once their benefit level is fixed 72 months after injury
- Give workers who reach the age of 65 greater financial control through a lump sum payment in lieu of monthly payments in cases where a recipient's loss of retirement income benefits would be less than \$3,000 a year
- Add \$810,000 a year in ongoing funding to the Office of the Worker Adviser to allow it to improve and expand services to injured workers and their survivors
- Provide greater representation on the WSIB Board of Directors by increasing the size of the board and clarify that the positions of Chair and President are separate

I have noted your comments about how the proposed increases to the minimum wage may affect the calculation of WSIB benefits. The calculation of such benefits falls under the jurisdiction of the WSIB. You have therefore appropriately sent a copy of your letter to Mr. Steve Mahoney, Chair of the WSIB, for his consideration.

Over the last few years, our government and the WSIB have worked with injured workers' groups, labour and the business community to ensure a strong and financially stable WSIB that is focused on the prevention of workplace injuries and is sustainable for future generations of Ontario workers and their families. Together, we are making progress.

Thank you again for writing to me on how increases to the minimum wage could potentially affect injured workers' benefits.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Peters". The signature is stylized with a large initial "S" and a long horizontal stroke.

Steve Peters  
Minister

c. Mr. Steve Mahoney, Chair, WSIB

 Print Header

Subject: **Loss of Earnings (LOE) (Accidents from 1998)**  
Title: **Reviewing LOE Benefits (Prior to Final Review)**  
Document Number: **18-03-03**

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## Law

### s.23(3)

A person receiving benefits under the insurance plan or who may be entitled to do so shall notify the Board of a material change in circumstances in connection with the entitlement within 10 days after the material change occurs.

### s.44(1)

Every year or if a material change in circumstances occurs, the Board may review payments to a worker for loss of earnings and may confirm, vary or discontinue the payments.

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## Guidelines

### Material change reviews

A worker who is eligible to receive benefits must report any material change in circumstances to the WSIB. Types of material changes to be reported include, but are not limited to, changes in

- health (medical) status
- earnings/income including Canada Pension Plan/Quebec Pension Plan (CPP/QPP) disability benefits paid because of the work-related injury or disease
- employment status
- availability for, or co-operation in, health care or early and safe return to work (ESRTW) activities, or Labour Market Re-entry (LMR) programs
- optional insurance coverage.

A LOE benefit may be adjusted at any time prior to the final review for any material change or failure to report a material change which occurs on or after January 1, 1998. The adjustment to the LOE benefit is effective from the date the material change occurred.

### Exception

The WSIB starts offsetting CPP/QPP disability benefits from the date the worker is notified that he or she is entitled to monthly CPP/QPP disability benefits, whether this change is reported on time or not, see [18-01-13, Calculating CPP/QPP Offsets from FEL/LOE Benefits](#).

For more information on what may be considered a material change, see [22-01-02, Material Change in Circumstances - Worker](#).

## Material change in earnings

### Significance test - 10% or greater

To determine if a change in earnings is “material”, the decision-maker compares the recently reported net average earnings (NAE) with the NAE being used to pay the LOE benefit. If there is a significant change (increase or decrease) in the post-injury NAE, usually 10% or greater, it is considered “material”, and the WSIB adjusts the LOE benefit accordingly.

Each time new post-injury earnings are reported, decision-makers compare these to the earnings last used to actually adjust the benefit.

### Example

Yvonne reports an increase in her weekly earnings to her decision-maker. She is now earning 9% more than she was when her LOE amount was determined. Should Yvonne’s decision-maker adjust her LOE benefit?

Yvonne’s decision-maker uses the “significance test” to determine whether the change in her earnings is material, usually, a change of 10% or more is considered material, and results in an adjustment of benefits. Decision-makers can use discretion, though, when deciding whether LOE benefits should be adjusted. Since the change in this case is only 9%, Yvonne’s decision-maker will probably decide not to adjust the LOE benefit at this time.

If Yvonne’s earnings increase further, by another 4% in the next 6 months, for example, her decision-maker should reconsider and adjust her benefits. A 13% increase (9% + 4%) is likely material. Yvonne’s benefits would be adjusted, however, only from the date her earnings increased by the additional 4%.

### Exception - CPP/QPP disability benefits

The *Workplace Safety and Insurance Act* requires that the WSIB have regard for any portion of the CPP or QPP disability benefits paid because of the work-related injury. As a result, the WSIB does not use the “significance test” in these cases, but offsets the LOE benefit by considering CPP or QPP as post-injury earnings. The WSIB offsets the amount of CPP/QPP disability benefits which exceed the amount the worker is determined to be able to earn after the injury, see [18-01-13, Calculating CPP/QPP Offsets from FEL/LOE Benefits](#).

### NOTE

CPP/QPP disability benefits are not used to offset LOE benefits while a worker is co-operating in ESRTW or LMR.

### Decrease in post-injury earnings that occur prior to the 72-month period

The WSIB may increase a worker’s LOE benefit only if the worker suffers a significant reduction in earnings, or is not able to earn, due to

- a recurrence, see [15-03-01, Recurrences](#)
- a deterioration in the impairment, see [18-05-09, Redeterminations and Recalculations](#)
- a job change related to the injury, or
- another situation directly related to the injury.

If the earnings decrease because of the work-related injury, the worker may also be entitled to an ESRTW program, LMR assessment or re-assessment and/or a LMR plan, see [19-02-01, Overview](#) and [19-03-01, Overview](#).

### NOTE

If a worker requires a new LMR plan, the WSIB calculates the LOE benefit using the suitable and available employment or business (SEB) earnings at the completion of the plan.

## Increase in post-injury earnings that occur prior to the 72-month period

The WSIB reduces a worker's LOE benefit only if the worker

- experiences a significant increase in earnings
- receives income that could be considered earnings from employment, or
- receives CPP/QPP disability benefits paid as the result of the work-related injury/illness. The WSIB offsets the amount of CPP/QPP disability benefits which exceed the amount the worker is determined to be able to earn after the injury, see [18-01-13, Calculating CPP/QPP Offsets from FEL/LOE Benefits](#).

## ESRTW ends

If a worker has a wage loss upon completion of an ESRTW program, the LOE benefit is based on the worker's *actual earnings*, regardless of the job being performed, see [18-03-02, Payment of LOE Benefits](#).

Actual post-injury earnings are the worker's total salary remuneration from all employment (e.g., base salary from one or more jobs including production bonuses, shift premiums, overtime). A worker's post-injury annual earnings may include additional sporadic earnings and a review of the annual post-injury earnings should be considered to ensure that the appropriate benefit is paid.

## LMR ends

If a worker has a wage loss upon completion of a LMR plan, the LOE benefit is based on the

- actual earnings of the worker in the SEB-identified job, see [19-03-03, Determining Suitable and Available Employment or Business, and Earnings](#), or
- most recent wage information for the SEB earnings identified in the LMR assessment, if the worker is not working or is working in the SEB but is *under-employed*. See "Examples" below.

## Under-employed

A worker is considered to be under-employed when he or she is employed in such a way that does not permit the use of his or her full abilities, skills and training in mitigating the loss of earnings resulting from the work-related injury, see [19-03-03, Determining Suitable and Available Employment or Business, and Earnings](#).

## Actual earnings from SEB-identified job

In conducting a LOE review for a worker employed in a SEB-identified job, the WSIB uses the worker's actual earnings to pay the LOE benefit, even if the earnings are not consistent with recent wage information. The only exception would be in cases where the worker is under-employed. See "Examples" below.

## Periodic reviews without material change

If LOE benefits are paid for an extended period without a material change review, the decision-maker may review the benefit to determine if it is being paid correctly. The extent and frequency of these periodic reviews depends on

- the degree of the impairment

- whether the worker has returned to the workforce
- whether the worker is working within the identified SEB, and
- the amount of the loss of earnings.

If, after the usual follow-up, a worker fails to respond to inquiries or to otherwise co-operate in a periodic review, a decision-maker can withhold the LOE benefit until the worker contacts the decision-maker or co-operates in the review, see [22-01-03, Workers' Co-operation Obligations](#).

Any change in entitlement resulting from the material change is effective from the date the material change occurred. If a debt results from the changed entitlement, the amount is calculated and considered due and owing retroactive to the date of the material change, see [18-01-04, Recovery of Benefit-Related Debts](#).

## Consideration at reviews

### Changes in wage information

In cases where a worker is either not working or is working in the SEB but is under-employed, if the WSIB originally used

- entry-level wages to determine the post-injury earnings, updated entry-level wages are used
- mid-range wages to determine the post-injury earnings, updated mid-range wages are used.

### Examples of cases where a worker would be considered to be under-employed

#### Example #1 - Part-time work in SEB

Louise begins working in the SEB that was identified for her but decides to work part-time. For the purposes of reviewing the LOE benefit, is Louise employed in the SEB-identified job? What earnings should be used to pay the LOE benefit - SEB-identified or actual part-time?

If Louise was working full-time before the injury, the SEB identified for her is likely to be full-time as well. As a result, Louise can only be considered to be "working in the SEB-identified job" if she is working full-time. As Louise's earnings would be determined based on the full-time job, benefits would be paid using the SEB earnings, and would not be adjusted if she began working part-time.

#### Example #2 - Self-employment

Bill completed a LMR program in dog grooming. Although he had no previous experience in this field and was not self-employed prior to the accident, Bill decides to open his own dog grooming salon. The amount of Bill's LOE benefit was based on entry level wages identified for the SEB (\$15/hr). Bill reports to be earning \$8/hr as a self-employed dog groomer. Which earnings are used to calculate the LOE benefit?

The earnings used to calculate Bill's LOE benefit are based on the earnings for the identified-SEB (i.e., \$15/hr). Quite often, workers' wages, when self-employed, will not match the SEB-identified earnings at the outset and may not even match them at the time of the final review due to expenses incurred in running one's own business. However, decision-makers are required to establish a SEB and determine the level of earnings that the worker could reasonably achieve in the labour market based on his or her skills and abilities. In this case, the SEB-identified earnings, not the actual wages, are used to calculate the LOE benefit.

#### Example #3 - Relocation

At the time of the accident, and throughout the LMR plan, Joe resided in Sudbury. As the SEB did not fully restore his pre-injury earnings, Joe was granted a partial LOE benefit based on entry-level wages for a pastry chef as confirmed by Human Resources and Skills Development Canada wage information for the Sudbury region. Labour market information sources confirm that pastry chef is an occupation that has good employment potential in Joe's local labour market. Joe decides to move to his cottage in Killarney and requests a recalculation of his LOE benefit based on the wage information for Killarney. Should Joe's LOE benefit be adjusted to reflect the wage information for his new place of residence?

The LOE benefit compensates workers for his or her loss of earnings resulting from the work-related injury. The LOE benefit should not be increased if reduced earnings are related to the economic conditions of the new region.

#### **Example #4 - Working at reduced wages**

After successfully completing a LMR program, Mary begins working for her brother-in-law in the SEB-identified job as a bookkeeper earning \$12/hr. Two years later, at the time of a periodic review, Mary reports that she is still earning \$12/hr. What earnings should be used to calculate the LOE benefit, actual or SEB-identified?

Updated wage information confirms that bookkeepers in Ottawa, where Mary resides, earn \$20/hr. However, Mary says she likes the flexibility of working for a family member, and despite the fact that her earnings do not even come reasonably close to those listed in wage information sources, does not want to look for work elsewhere.

While Mary is capable of earning \$20/hr, there are other reasons, besides wages, why she wishes to remain working for her brother-in-law. While Mary is employed in a SEB-identified job, she is obviously under-employed. Therefore, the LOE benefit would be calculated based on the SEB-identified wages of \$20/hr; not Mary's actual wages of \$12/hr.

### **LOE benefit duration**

#### **No review option**

Workers who are 55 years of age or older at the time of the injury, have reached MMR, and have completed an LMR plan, may elect the "no review" option. Once a worker directs the WSIB not to review the LOE benefit, the LOE benefit is locked in until age 65. For further information, see [18-03-04, Older Workers and LOE Benefits](#).

#### **No impairment**

LOE benefits are paid as long as there is a work-related impairment. If the WSIB determines that a worker no longer has a work-related impairment (based on information provided by the health professional), or if the health professional advises the worker to return to pre-accident employment in view of a complete recovery, the LOE benefit is terminated the following day.

#### **No further wage loss**

If the worker returns to work and is no longer incurring a wage loss, LOE benefits end.

#### **0% NEL**

In some cases, a NEL review may result in a 0% rating which indicates there is no evidence of an assessable permanent impairment. LOE benefits continue for a maximum of two weeks until the worker is notified in writing about limited entitlement.

#### **Age 65**

Workers who are **under** 63 years of age at the time of the injury are entitled to LOE benefits until they reach age 65. The LOE benefit is payable until the day after the worker's 65th birthday.

#### **Older workers**

Workers who are 63 years of age or **older** at the time of the injury are entitled to receive LOE benefits for up to two years from the date of injury, see [18-03-04, Older Workers and LOE Benefits](#). The LOE benefit ends the day after the two year period expires.

## Application date

This policy applies to all decisions made, with respect to wage loss entitlement periods on or after July 1, 2007, for all accidents on or after January 1, 1998.

## Document history

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5.5 dated January 1, 1998.

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## References

### Legislative authority

*Workplace Safety and Insurance Act, 1997*, as amended  
Sections 2.1, 23, 43, 42(3), 44, 47(13)

### Minute

Administrative  
#3, June 21, 2007, Page 438

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