

**Minor Revision to**  
***Policy 3.1.1R2 Calculation of Gross Earnings:***

**Final Program Policy Decision and Supporting Rationale**

**Date: January 07, 2014**

## **I - Introduction:**

In March 2014 the WCB Board of Directors added the topic of the minor revision to *Policy 3.1.1R2 – Calculation of Gross Earnings* to the Revolving Program Policy Agenda. As a result of a Nova Scotia Court of Appeal (NSCA) decision in March 2013, the WCB is required to make a minor revision to *Policy 3.1.1R2*. This change is necessary to comply with direction provided by the Court in the decision and ensure the policy is consistent with the *Workers' Compensation Act* (the "Act") and *Workers' Compensation General Regulations* (the "Regulations").

In the decision rendered March 7, 2013, *ECBC v. Hogan*, 2013 NSCA 33 ("*Hogan*"), the Court found clause 3 (viii) of *Policy 3.1.1R2* inconsistent with the Act. Clause 3 (viii) of *Policy 3.1.1R2* specifies that income reported on the "Employment Income" and "Other employment Income" lines of an individual tax return are regular salary or wages for WCB purposes. To paraphrase the Court, Clause 3(viii) of *Policy 3.1.1R2* is inconsistent with the *Workers' Compensation Act* because it could result in some income types being considered regular salary or wages that are not from active employment. Income that is not from active employment can only be considered earnings if it is specified in regulation.

On May 21, 2014, the document entitled "*Program Policy Background Paper: Minor revision to Policy 3.1.1R2 Calculation of Gross Earnings*" and a draft revision to the program policy was mailed to individuals on the key stakeholder mailing list and posted to the WCB website for a period of 132 days.

The income types most impacted by this decision, severance type payments<sup>1</sup>, have not been considered regular salary or wages by the WCB since December 2009. In effect, the WCB is bringing the wording of the policy in line with current practice. Given that this was a Court directed revision the WCB Board of Directors believed a 1 Stage policy consultation process was appropriate. In the paper the WCB explained that while *Policy 3.1.1R2* deals with a variety of topics, the policy consultation was limited to the proposed wording changes required to comply with the direction provided by the Court related to clause 3 (viii) of *Policy 3.1.1R2*.

The Policy Background Paper can be found on the WCB website at [www.wcb.ns.ca](http://www.wcb.ns.ca) under Policy in the Consultation Archive.

On December 18<sup>th</sup>, 2014 the WCB Board of Directors approved the revision to *Policy 3.1.1R2*. Please see Appendix B for the revised program policy.

The remainder of this report provides:

- key issues raised by stakeholders during consultation on the proposed policy revisions;
- analysis and WCB response to feedback from stakeholders;
- a summary of feedback received during consultation (see Appendix A); and
- the WCB's final policy decision as reflected in the final version of the program policy in Appendix B.

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<sup>1</sup> Generally, these are payments made to an employee when the employment relationship ends.

## **II - Suggested Policy Changes/Issues Raised During Consultation and WCB Response**

The WCB received three stakeholder submissions in response to the consultation on the minor revision to *Policy 3.1.1R2 Calculation of Gross Earnings*. Labour stakeholders made 1 submission, and 2 were received from employer stakeholders.

The labour stakeholder providing comment was supportive of the proposed revision, commenting that it was consistent with the *Hogan* decision. No changes were recommended and no issues were raised. One of the employer submissions focused on the need to ensure the reason for a worker's earnings loss is clearly understood.

The remaining submission, from the Office of the Employer Advisor (OEA), raised issues outside the scope of the policy consultation. Therefore the issues are not addressed in this paper. The issues dealt with the WCB's framing of costs associated with recent policy revisions, and a recommendation that the WCB seek regulatory change rather than policy change to address the *Hogan* decision.

For a detailed overview of input received from stakeholders, please see Appendix B – Minor Revisions to Contactor Policies - Consultation Summary.

After considering the feedback received, the Board of Directors has decided changes to the draft policy are not required.

### **Feedback received:**

*We question if including the word "but is not limited to the following" is the appropriate wording to achieve the goal of clarity in the Policy. This Employer believes the wording should reflect the reason the Loss of Earnings needs to be calculated. When the Employer/Employee relationship has been severed as a result of retirement, there is no actual loss of work and earnings unless the retirement is due to workplace injury or illness, clearly documented in the claim medical documents and Board Decisions.*

*Severance or retiring allowances should not be considered earnings from employment when the Board is calculating Earnings Loss Replacement Benefits; the ERIP payments do not reflect an Employer payment made for the action of Employee work, whether mental or physical.*

*Further, the ERIP amount should be deducted from any Benefits determined by the Board to be payable to the Worker as Extended Earnings Replacement Benefits if the Worker is precluded from any type of work with another Employer as a result of a Permanent Medical Impairment caused by the Employee's pre-retirement work with the Employer in the Employer's workplace.*

## Analysis and Response

In *Hogan*, the NSCA found that regular salary and wages (earnings) can only come from active employment. The Court also stated that *Policy 3.1.1R2 - Calculation of Gross Earnings*, as currently written, captures income types that may not be from active employment and is therefore inconsistent with the *Act*. In light of the Court's findings, the intent of the proposed wording change to *Policy 3.1.1R2* is to revise the policy so it does not capture income types that may not be from active employment and ensure the policy is consistent with the *Act*. This WCB believes the proposed changes achieve this objective.

The income types listed in clause 3 of the policy are the most common types of regular salary and wages paid to workers. But since the Court has clarified that regular salary and wages come from active employment, the WCB believes it makes sense to ensure the policy is flexible enough to deal with an income type that is from active employment, but is not listed in Section 3 of the policy. The WCB believes that if this approach is not taken, the policy runs an increased risk of being found inconsistent with the *Act* in the future.

The WCB does not believe it is appropriate to include a section in *Policy 3.1.1R2* that addresses the reason or cause of a worker's loss of earnings. *Policy 3.1.1R2* is used to calculate the amount of a worker's earnings replacement benefits, **after** the WCB has determined a worker has a loss of earnings due to their workplace injury. In some instances a worker may have a loss of earnings after a workplace injury that is due to causes other than the workplace injury. This includes retirement, layoff, or non-work related health conditions. Where there is evidence a workers' loss of earnings may be from non-work related causes, WCB decision makers weigh the evidence and make a decision on whether or not a worker is entitled to ERB.

Payments made to workers after their workplace injury that are not from active employment (confirmed in *Hogan*) nor listed in the *Regulations* cannot be considered earnings. Traditional retirement payments, severance payments, or Early Retirement Incentive Payments (ERIPS - the subject of the *Hogan* appeal) are not from active employment and therefore cannot, by law, be considered post-accident earnings (subtracted from WCB ERBs) – regardless of whether the earning loss benefit is Temporary Earnings Replacement Benefits (TERB) or Extended Earnings Replacement Benefits (EERB).

The WCB assumes the feedback submitted (in the final paragraph) is referring to a potential injury recurrence situation. A worker, who is retired from previous employment, is entitled to make a claim for compensation if they believe they have had a workplace injury at their current workplace. This includes workers who have a previous workplace injury that resulted in a permanent impairment. In these types of situations, if appropriate, the WCB will consider whether or not they have had a recurrence of their previous injury and apply policy *1.3.8 Recurrence of Compensable Injury*. If the WCB decides they have had a recurrence of their previous workplace injury, the claim costs associated with the recurrence will be assigned to their previous employer. If it is a new workplace injury, claims costs will be assigned to their current employer. In either situation, law and policy does not allow for an ERIP or similar payment to be subtracted from a worker's TERB or EERB.



# Appendix A

## Consultation Summary

### Introduction

In March 2014 the WCB Board of Directors added the topic of the minor revision to Policy 3.1.1R2 – Calculation of Gross Earnings to the Revolving Program Policy Agenda. On May 21, 2014, the document entitled “Program Policy Background Paper: Minor revision to Policy 3.1.1R2 Calculation of Gross Earnings” and a draft revision to the program policy was mailed to individuals on the key stakeholder mailing list and initially posted to the WCB website for a period of 132 days. The deadline for submissions was September 30, 2014.

In total, the WCB received 3 submissions from stakeholders. Labour stakeholders made 1 submission, and 2 were received from employer stakeholders. The labour stakeholder providing comment was supportive of the proposed revision.

Both employer stakeholders provided feedback on issues outside the scope of the policy consultation. An employer submission focused on the need to ensure the reason for a worker’s earnings loss is clearly understood. The Office of the Employer Advisor (OEA) submission raised concerns with the WCB’s framing of recent policy revisions as having minimal cost impacts and also recommended the WCB Board of Directors seek a regulatory change rather than a policy change in response to the *Hogan* decision.

### **Overview of Stakeholder Submissions**

Outlined below is a summary of general comments submitted by stakeholders.

#### Labour

- The Nova Scotia Government and General Employees Union supports the proposed changes to the Policy as outlined in the Background Paper, especially in Appendix B. They seem to be in keeping with the Hogan Decision, and also, in allowing for other types of earnings in the future.
- More generally, they seem to be consistent with the general principle of workers having the right to be fully compensated if they are injured or become ill due to their work. This principle is outlined in the "The Stanhope Manifesto on Workers Compensation" of 2002, and in the "Principles of a Fair and Comprehensive Workers' Compensation System".

#### Employer

- We question if including the word “but is not limited to the following” is the appropriate wording to achieve the goal of clarity in the Policy. This Employer believes the wording should reflect the reason the Loss of Earnings needs to be calculated. An Earnings Loss only occurs, when the Work done by the Employee is interrupted. Should the Work and subsequent earnings be interrupted due to a workplace injury or illness, the Board may need to calculate an earnings loss benefit payable to the employee. When the Employer/Employee relationship has been severed as a result of retirement, there is no

actual loss of work and earnings unless the retirement is due to workplace injury or illness, clearly documented in the claim medical documents and Board Decisions.

- At page 5 of the Program Policy Background Paper, WCB states: The WCB believes the Hogan decision and this policy revision have very little impact. The OEA NS is concerned by the characterization of costs as having “little impact” or that costs are “not anticipated to have significant impact”. 18,800 employers are covered by workers’ compensation in Nova Scotia and each time a financial impact is associated with a policy decision 18,800 employers are required to cover the cost.
- The OEA NS conducted a review of archived WCB consultation papers. It is notable that when the WCB makes a policy decision with an assessment consequence for employers, it is described as having “little impact”. The last three policy consultations have entailed potential financial consequences for covered employers in Nova Scotia. WCB ought to acknowledge that a limited pool of financial and labour market capital is available for Nova Scotia businesses.
- The OEA NS recommends that the WCB cease to characterize costs as having little impact. The workers’ compensation regulatory and financial burden for covered employers in Nova Scotia is significant, and WCB is only one of many regulators making incremental demands on limited financial resources.
- The OEA NS takes the position that the Nova Scotia Court of Appeal did not direct WCB to change Policy 3.1.1R2. The Court held that the policy is inconsistent with the Act. Specifically, the Court found that clause 3(viii) of Policy 3.1.1R2 is inconsistent with the language found in section 20 of the Workers’ Compensation General Regulations. While the implication is that the inconsistency must be corrected, the Court did not direct WCB to change the Policy.
- The issue in this case is whether an ERIP (paid by the Employer) could be used to reduce entitlement to an earnings replacement benefit (under workers’ compensation). The Nova Scotia Court of Appeal determined that an ERIP is not a regular salary or wage from active employment and, as a result, it may not be used to reduce entitlement to an earnings replacement benefit. While the concept of a salary or wage from active employment underscores the analysis, it is important to understand that earnings, such as an ERIP, could be deductible if the legislation provided for such a deduction. For example, 50% of Canada Pension Plan benefits are deductible from WCB earnings replacement benefits because the Workers’ Compensation Act of Nova Scotia provides for such a deduction.
- By inference, when WCB offered no alternative solution, they adopted the position that a policy change is the only solution. The OEA NS respectfully disagrees. A regulatory change is also a legitimate option. The OEA NS urges the WCB to exercise Board authority, by making a recommendation to the Honorable Minister of Labour, to include collateral benefits as earnings under section 20 of the Workers’ Compensation General Regulations. If that approach is adopted, the policy would be consistent with the Act and the direction of the Court of Appeal in Hogan.

## Appendix B

### Final Board of Directors Approved Earnings Policy

**POLICY**

<b>NUMBER:</b> 3.1.1R3
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Effective Date: December 18, 2014  
Date Issued: January 08, 2015

**Topic:** Calculation of Gross Earnings  
**Section:** Short-Term and Long-Term Benefits  
**Subsection:** Earnings Profiles

Date Approved by Board of Directors: December 18, 2014

#### **Policy Statement** **Initial Earnings Profile**

1. Where a worker's loss of earnings results from an injury, the 'pre-LOE' average weekly gross earnings will initially be calculated based on the normal weekly earnings.
2. Normal weekly earnings means the worker's normal rate of pay prior to the injury, as calculated over the worker's normal pay period. This initial earnings profile will be used during the first 26 weeks the worker receives a Temporary Earnings Replacement Benefit (TERB).
3. Normal weekly earnings includes the worker's regular salary or wages, less earnings-related expenses. Regular Salary or wages includes, but is not limited to, the following:
  - i) regular overtime,
  - ii) commissions,
  - iii) bonuses,
  - iv) vacation pay,
  - v) a profit sharing arrangement with the worker's employer,
  - vi) tips and gratuities, and
  - vii) taxable benefits, if reportable on a worker's T4 slip.

**Note: Taxable benefits are included in the worker's earnings profile only for injuries occurring on or after January 1, 2000.**

4. For greater certainty, the types of income listed in clause #3 will be included in the initial earnings profile if they form part of the worker's regular pay.

#### **Long Term Earnings Profile**

5. Effective week 27 of the claim (i.e. after the worker has received TERB for 26 weeks), a **long-term earnings profile** will be set, which will usually be used for the purposes of any



further TERB payable, plus EERB (Extended Earnings-Replacement Benefit) where applicable.

6. For purposes of establishing the long-term earnings profile, and for all workers, the average weekly gross earnings will be calculated based on the worker's actual pre-accident earnings. The worker's pre-accident earnings will include all regular salary or wages, as listed in clause #3, plus federal employment insurance benefits and overtime which is not regular salary or wages.

Note: If the worker received EI maternity or parental benefits during the pre-LOE earnings period used, those benefits and the time period during which they were paid will be excluded from the calculation.

7. The Board will calculate the long-term earnings profile over a period up to three years immediately preceding the worker's loss of earnings. The Board may choose any period that, in the opinion of the Board, allows it to best represent the actual loss of earnings suffered by the worker as a result of the injury.
8. The long-term profile will also be used for establishing a worker's pre-LOE earnings for purposes of Permanent Impairment Benefits (PIB)<sup>1</sup> and Survivor Benefits. Also, if a worker is awarded an EERB prior to week 26 of the claim, the long-term earnings profile will be used.
9. **Workers Under 30 Years of Age** (Section 46)

For purposes of the long-term earnings profile, where the Board determines that the pre-LOE average earnings at the time of the accident do not represent the worker's probable earnings because of the worker's age, the probable increase in earnings may be included in the long term profile. This only applies to workers who have not reached the age of 30 by the time of the accident.

10. If the Board has not received sufficient earnings information to establish a long-term earnings profile within 26 weeks, the earnings used to determine the initial profile may be reduced. An adjustment for any difference between this amount and the long-term earnings profile will be made when the earnings information has arrived. The adjustment will be retroactive to the end of the initial 26 week period.

#### **Learner (Section 45)**

11. For a learner [i.e. "an apprentice, or any person who, although not under a contract of service, becomes subject to hazards...as a preliminary to employment" - s. 2(q)]:

For purposes of establishing the long-term earnings profile (which is set after 26 weeks), the Board will generally deem the learner's earnings at the level they would have achieved within the next 12 months.

For purposes of calculating the EERB, the Board will generally deem the learner's earnings at the level of the probable annual earnings of the learner in the learner's home area had they become qualified in their trade or occupation.

#### **Concurrent Employment: (Section 44)**

12. For purposes of both the initial and long-term earnings profile, when a worker is employed by more than one employer, the pre-LOE average earnings will be computed based on what the worker was earning from all employers. The word 'employers' is defined as per Section 2(a) of the Act - i.e. employers covered by the Act.

### **Self-Employed Workers with 'Special Protection' Personal Coverage (s.4(7))**

13. For purposes of both the initial and long-term earnings profile, pre-LOE average earnings for a self-employed worker with Special Protection will be based on normal weekly earnings, except where personal coverage is less than the worker's normal weekly earnings. In these cases, the Earnings Replacement Benefit will be based on the amount of Special Protection in place at the time of the injury, as verified by the Board's Assessment Department. This will be achieved via Section 4(7) by the Board setting appropriate terms of admission for self-employed workers.

### **Determination of contractor's earnings**

14. To determine the contractor's gross average earnings the WCB will calculate the labour portion of the contract. The labour component is determined by subtracting a proxy amount for materials and equipment from the gross amount of the contract.
15. The following percentages are to be used to calculate the labour portion of a contractor's earnings:
- ii) Labour and Materials: 50%
  - ii) Logging (Chain Saw): 75%
  - iii) Courier Service: 50%
  - iv) Trucking and Leased Equipment: 25%
  - v) all others: 100%

**Note: The WCB may use a percentage based upon actual labor expenses if actual figures are submitted by the worker.**

### **Recurrences and Reopenings (Section 40(2))**

16. Where there is a recurrence of a loss of earnings from an injury more than 12 months after the end of the original loss of earnings from that injury, the worker's average earnings for purposes of the recurrence shall be based on the worker's average earnings before the original loss of earnings, or the worker's average earnings before the recurrence of the loss of earnings, whichever appears to the Board to best represent the worker's actual loss of earnings from the injury.

### **Loss of Earnings More Than 12 Months After Injury (Section 40(3))**

17. Where a worker's loss of earnings from an injury begins more than 12 months after the injury, the worker's average earnings shall be based on the average earnings before the injury, or the average earnings before the loss of earnings, whichever represents the worker's actual loss of earnings from the injury.

### **Maximum Insurable Earnings (Section 41)**

18. A worker's average earnings may not exceed the maximum insurable earnings in place at the time of the injury/initial loss of earnings/recurrence of loss of earnings (whichever is applicable).

<sup>1</sup> Where a worker suffers an injury and is awarded a PIB but never had any earnings loss related to the injury (e.g. this may arise in some occupational disease cases, such as hearing-loss), the key date for rate-setting purposes is the date of injury, not the date when the loss of earnings commenced. In occupational disease cases where there is no earnings loss, the date of injury is the date on which the Board determines the worker has a permanent impairment caused by the occupational disease (per Section 12(2) of the Act).

### **Application**

This Policy applies to all decisions made on or after December 18, 2014. It replaces Policy 3.1.1R2 issued on December 4, 2000 and effective December 1, 2000.

### **References**

*Workers' Compensation Act* (Chapter 10, Acts of 1994-95) (as amended), Sections 37-48.

*Workers' Compensation General Regulations*, Section 20.