

**Operational  
Policy**

## Section

Loss of Earnings (LOE) (Accidents from 1998)

## Subject

**Final LOE Benefit Review**

## Policy

The WSIB shall not review a worker's loss of earnings (LOE) benefit more than 72 months after the date of the worker's injury unless

- before the 72-month period expires, the worker fails to notify the WSIB of a change in circumstances or engages in fraud or misrepresentation in connection with his or her claim for benefits under the insurance plan, or
- the worker was provided with a work transition (WT) plan and the plan is not completed when the 72-month period expires, or
- after the 72-month period expires, the worker suffers a significant deterioration in his or her condition that
  - results in a redetermination of the degree of permanent impairment
  - results in an initial determination of a permanent impairment
  - is likely, in the WSIB's opinion, to result in a redetermination of the degree of permanent impairment, or
- after the 72-month period expires, the worker suffers a significant temporary deterioration in his or her condition that is related to the injury, or
- when the 72-month period expires,
  - the worker and the employer are co-operating in the worker's work reintegration (WR) activities, or
  - the worker is co-operating in health care measures.

## Purpose

The purpose of this policy is to outline when and how the final LOE benefit review is conducted, and to outline when and how exceptional cases after the 72 months post-injury review period expires may be reviewed.

## Guidelines

Except where noted (see "Final review deferred" below), the final LOE benefit review must occur before the end of the 72nd month post-injury (i.e., prior to the start of the 73rd month). In preparation for the final review, the WSIB initiates a review at 67 months post-injury by requesting that the worker provide information relating to his or her

- earnings/income including Canada/Quebec Pension Plan (CPP/QPP) disability benefits paid because of the work-related injury/disease, see 18-01-13, Calculating CPP/QPP Offsets from FEL/LOE Benefits
- employment status, and
- health (medical) status.

If the worker fails to respond after one follow-up, the LOE benefit is suspended at 70 months post-injury. The WSIB sends the worker a final follow-up letter at 71 months post-injury. The LOE benefit is not restored until a full review occurs. If the worker responds and the final

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review is conducted by 72 months post-injury, the LOE benefit may be paid retroactively to the point it was suspended. If the final review does not occur by the 72nd month post-injury, the LOE benefit cannot be restored retroactively (unless the WSIB is satisfied the failure to respond was not willful and intentional). Rather, it is paid from the date the review is conducted.

**Post-injury earnings at final review****Actual employment earnings from suitable occupation**

If a worker is employed in a suitable occupation (SO) identified job, the WSIB uses the worker's actual employment earnings to pay the LOE benefit, even if the earnings are not consistent with the most recent labour market wage information for the SO. The only exception would be where the worker is voluntarily under-employed, see 18-03-02, Payment and Reviewing LOE Benefits (Prior to Final Review).

**Actual employment earnings from job not identified in the SO**

If the worker has co-operated in a WT plan and returns to work in a job not identified in the SO, the WSIB uses actual employment earnings if the WSIB is satisfied

- the earnings come reasonably close to the SO-identified earnings, and
- represent the same or similar future earnings potential.

**When final review occurs before the worker returns to employment**

If the final review occurs before the worker returns to employment, the WSIB uses the available wage information for the identified SO as of the WT plan completion date. If the WSIB originally used

- entry-level wages to determine the post-injury earnings, updated entry-level wages are used to pay the LOE benefit. This generally occurs if the WT plan was designed to provide the worker with new skills or if the worker would have entered a new field, or
- mid-range wages to determine the post-injury earnings, updated mid-range wages are used. This generally occurs if the WT plan was designed to improve a worker's existing or transferable job skills, see 19-03-03, Determining Suitable Occupation.

**Exception - adjusting earnings to that of an experienced worker**

The WSIB uses updated wage information and the amount *an experienced worker* would earn in the identified SO if the worker

- has never returned to work despite being able to do so and has chosen not to co-operate in his or her WR activity with the injury employer and/or WT plan activity, or
- returned to work, but is voluntarily under-employed.

Where a worker has co-operated in WR activity and is not working at the time of the final review, the LOE benefit will not be calculated based on 'experienced worker earnings', but will be paid based on SO-identified earnings.

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The earnings of an *experienced worker* should reflect the level of earnings most likely achieved by those workers in the SO that had a full experience doing the job (e.g., had several years of experience in the job).

In selecting earnings to reflect those of an experienced worker, the WSIB considers factors such as

- the age of the worker (movement into the high-end wages may take many years)
- level of education and training provided by a WT plan
- the nature of the job (e.g., in some jobs, few workers are able to earn the high-end wages), and
- any other information that may identify wage levels (job rate).

**Recalculating LOE benefits at final review**

If the WSIB determines there is a change to account for in the LOE benefit (e.g., post-injury earnings have changed), the LOE benefit is recalculated prior to being locked in. Otherwise, it is locked in as is.

**Exceptional cases - post 72 months**

The WSIB may review the LOE benefit post 72 months in the following exceptional circumstances:

1. The final review may be deferred if the worker is co-operating in health care measures, WR activities with the injury employer, or is involved in a WT plan for re-entry into the labour market and the measures, activities, or plan are/is not completed by 72 months post-injury, or
2. The LOE benefit may be reviewed after the 72 month final review if the worker experiences a significant deterioration in the work-related injury/disease.

**Final review deferred**

The final LOE benefit review may be deferred if the worker is co-operating in

- health care measures the WSIB considers appropriate
  - WR activities with the injury employer, or
  - a WT program for re-entry into the labour market
- at the time the 72-month period is reached.

**Co-operating in health care measures at 72 months**

In some cases, a worker will not be working but co-operating in health care measures at the time of the final review. Quite often the worker will be involved in a medical rehabilitation (MR) program.

A MR program is any course of medical or paramedical treatment or care for a work-related injury. The purpose of a MR program is to bring the worker to a state of maximum medical recovery so that the worker may return to suitable and available employment. For additional

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information on MR programs, see 18-04-11, Supplements for Programs and Work Reintegration Activities Before and After 24 Months and 18-06-03, Definitions for Adjudicating Pre-1998 Claims.

Generally, a MR program does not simply consist of the continued use of prescription medication and/or maintenance physiotherapy or chiropractic treatments. A worker is considered to be in a MR program if any of the following situations occur but is not limited to

- receiving active treatment due to a recurrence of the work-related injury/disease
- attending a WSIB arranged specialist consultation, or
- having a prosthesis repaired or replaced.

The WSIB assesses active or planned health care at the 72-month period to decide if the final review should be deferred.

**Co-operating in WR at 72 months**

The WSIB defines the workplace parties' co-operation in WR activities to include

- the injury employer and worker initiating and maintaining communication with each other throughout the worker's recovery and impairment
- identifying and securing suitable and available work (injury employer attempting to provide suitable work/worker assisting the injury employer to identify suitable work)
- providing relevant worker's information to the WSIB concerning the worker's return to work, and
- notifying the WSIB of any difficulty or dispute concerning return to work, see 19-02-02, Responsibilities of the Workplace Parties in Work Reintegration.

The WSIB generally considers the workplace parties to be co-operating in WR at the 72-month period if

- the employment relationship between the workplace parties has been maintained
- the workplace parties are actively attempting to identify suitable and available work or are in the process of arranging a return to work consistent with the worker's functional abilities, and
- neither workplace party is refusing to abide by their co-operation obligations.

**NOTE**

If the worker returns to accommodated employment and a significant change in circumstances related to the worker's impairment or labour market occurs at the time of the final review, the WSIB may refer the worker for appropriate WR services, see 19-03-05, Work Transition Plans.

**Co-operating in a WT plan at 72 months**

If a worker is co-operating in a WT plan for re-entry into the labour market that is not completed by the 72nd month, the final review may be deferred. This would include any situation where the current WT plan had to be amended given changed

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circumstances. There may also be cases where a WT assessment has been arranged or even completed, with the intention to provide the worker with a WT plan that would allow for the deferral.

**Conducting the final review****Benefit duration**

LOE benefits can continue to be paid beyond the 72-month period if a worker is participating and co-operating in health care measures or WR activities. In some cases, a worker who completes a MR program may become involved in the WR process with the injury employer. If WR activities do not result in a return to suitable work, the WSIB may then provide the worker with a WT assessment and, if necessary, a WT plan. The worker is entitled to full LOE benefits providing the worker continues to participate and co-operate in health care measures, or WR activities, see 22-01-03, Workers' Co-operation Obligations.

**Time for review**

The WSIB may review the LOE benefits up to 24 months after the expiry of the 72-month period, if the worker is involved in health care measures and/or WR activities. The final review must be completed by the end of the 24-month period, or sooner if either the health care measures or WR activities have been completed.

If the worker is involved in a WT plan through the 72-month period, LOE benefits can continue. The final review must occur within 30 calendar days of the WT plan completion (i.e., by the 31st day post-WT plan completion). If the worker is not working at that point, see "When final review occurs before the worker is able to find a job" above.

**Significant deteriorations post 72 months**

The WSIB may review the LOE benefit after the 72nd month final review if the worker suffers a significant deterioration in his or her work-related condition (whether or not the work-related condition resulted in a permanent impairment). When a worker sustains a secondary condition post 72 months that is causally related to the work-related condition, this may also be considered a significant deterioration of the work-related condition for which LOE benefits may be reviewed post 72 months, see 15-05-01, Resulting from Work-Related Disability/Impairment.

A significant deterioration refers to a marked degree of deterioration in the work-related impairment that is demonstrated by a measurable change in the clinical findings.

To determine if there is evidence of a significant deterioration, the WSIB considers factors such as

- the need for further active medical/health care intervention to improve the worker's condition (e.g., surgery)
- establishment of clinical evidence to support a significant deterioration

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- evidence of increased clinical restrictions or whether functional abilities have changed (e.g., evidence of an increase in restricted activities may support a finding of significant temporary deterioration), or
- job change impacts.

For additional information, see 15-02-05, Recurrences.

**Temporary deterioration**

Where the information supports the worker has a significant temporary deterioration, and if the individual experiences a loss of earnings, LOE benefits may be reviewed from the start of the deterioration until the worker recovers from the significant temporary deterioration as supported by clinical evidence, see "Further review of the LOE benefit" below.

**NOTE**

While a worker may take an occasional day off from work, this is generally not indicative of a significant deterioration.

**Likely permanent impairment or redetermination**

At the time a significant temporary deterioration is accepted (see "Significant deteriorations post 72 months" above), it may not be apparent that the worker requires a permanent impairment review. The WSIB continually monitors and assesses the health care information to decide if an initial determination or redetermination of the worker's permanent impairment should be arranged, see 11-01-05, Determining Permanent Impairment and 18-05-09, NEL Redeterminations.

If an initial determination or redetermination of the worker's permanent impairment is likely required, payments can be reviewed up to the point that this takes place. Based on the result of the initial determination or redetermination, the review period may be extended further, see "Further review of the LOE benefit" below.

However whenever the WSIB determines that an initial determination or redetermination is not required, the review period ends. The WSIB must complete this review and fully notify the worker of ongoing wage loss entitlement within five business days from the date it is decided that an initial determination or redetermination is not required.

If at any point it is determined that the worker no longer has an impairment, the benefit is terminated the following day, see 18-03-02, Payment and Reviewing LOE Benefits (Prior to Final Review). If a worker undergoes an initial determination that results in a zero percent non-economic loss (NEL) rating, LOE benefit entitlement continues for a maximum of two weeks until the worker is notified in writing, see 18-03-02, Payment and Reviewing LOE Benefits (Prior to Final Review).

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**Final LOE Benefit Review****Eligibility despite a zero percent NEL rating**

A “zero percent NEL rating” means that prior to the final review, a worker does not have a permanent impairment and, therefore, is not entitled to a NEL benefit. Such a worker cannot request a redetermination of his or her zero percent NEL benefit.

However, where a worker, previously assessed at a zero percent NEL rating, suffers a significant deterioration following the final review, that worker may be eligible for a review of LOE benefits. If the significant deterioration is temporary, the review period ends when the worker recovers. If it is eventually determined that the worker may likely have a permanent impairment, the WSIB may conduct a new permanent impairment determination.

**Further review of the LOE benefit**

Although the LOE benefit may be paid or recalculated at the outset when the worker has suffered a significant deterioration, the WSIB must conduct a further review of the locked in benefit, and if warranted, recalculate the benefit before that review opportunity ceases. This review should normally take place

- when a significant temporary deterioration ends
- whenever the WSIB determines that a NEL determination or redetermination of the worker’s permanent impairment is not required, or
- within 24 months of the NEL processing date if the NEL determination or redetermination confirms a significant deterioration of the permanent impairment resulting in a NEL or an increased NEL benefit, based on the facts of the case.

**Extension of the 24-month period following determination/redetermination of permanent impairment**

If the WSIB

- determines the worker's degree of permanent impairment and awards a NEL benefit, or
- redetermines the worker’s degree of permanent impairment and increases the NEL benefit,

and if that worker is co-operating in a WT plan that is not completed by the end of the 24-month period, the review period is extended until the WT plan has been completed. The WSIB then has 30 calendar days to conduct a review of the LOE benefit from the WT plan completion date.

**Increase/decrease in post-injury earnings**

In cases where the WSIB conducts a further review of the LOE benefit after the final review, the benefit may be confirmed, varied, or discontinued to take into account any increases or decreases in post-injury earnings.

If there is a significant change in the post-injury net average earnings (NAE), usually 10 per cent or greater, it is considered “material” and the WSIB recalculates the LOE benefit

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accordingly, see 22-01-02, Material Change in Circumstances - Worker for further information about material change.

**Requirement to report material change in circumstances**

The worker is responsible for reporting any material change in circumstances that occurs prior to 72 months. When there is a material change in circumstances prior to 72 months and it was not reported on time, the WSIB may review and adjust the LOE benefit retroactive to the date of the change.

When the WSIB reviews the LOE benefit after 72 months (in cases where the final review has not taken place by the 72nd month or there is a significant deterioration after 72 months), the worker is responsible for reporting any material change in circumstances. When there is a material change in circumstances, whether reported on time or not, the WSIB may review and adjust the payments for any time during the review period. Multiple reviews may be conducted during the review period, if warranted, see 22-01-02, Material Change in Circumstances - Worker.

**Annual indexing**

On January 1 every year, the WSIB indexes ongoing LOE benefits, including locked-in LOE benefits, by applying the indexing factor to the amount payable, see 18-01-14, Annual Indexing.

**Application date**

This policy applies to all decisions made for entitlement periods on or after January 1, 2018, for accidents on or after January 1, 1998.

**Policy review schedule**

This policy will be reviewed within five years of the application date.

**Document history**

This document replaces 18-03-06 dated January 2, 2015.

This document was previously published as:

18-03-06 dated February 15, 2013

18-03-06 dated July 15, 2011

18-03-06 dated December 1, 2010

18-03-06 dated July 3, 2007.

**References****Legislative authority**

*Workplace Safety and Insurance Act, 1997*, as amended

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Sections 2.1, 23, 42(3), 43, 44, 47(13), 49, 52

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