

# Adjudicative Advice

## Practice Guidelines For Ordering LOE Benefit Arrears Under WSIA

Where the worker's LOE benefits have been reduced or discontinued as a result of an operating area decision but an ARO finds that the worker is entitled to further benefits for part or all of the arrears period, the following practice is suggested when ordering retroactive LOE benefits.

Generally, AROs will direct the payment of LOE benefits under s.43(2) of the WSIA after having fully assessed the following factors:

- whether the worker's impairment prevented a return to pre-injury employment
- whether the employer made a bona fide offer of suitable employment
- whether WPPs had sufficient understanding of the worker's functional abilities to be able to assess whether the employment offered was suitable
- whether the worker's activities and efforts have been reasonable during ESRTW & LMR

Circumstances warranting different levels of LOE benefits are as follows:

**1. 100% LOE** is payable where an impairment exists that prevents the worker from returning to pre-injury employment and no suitable employment has been offered, but the worker is making reasonable efforts to secure suitable employment or engaging in other activities (e.g. active health care treatment) reasonably aimed at improving employability and minimizing LOE.

**2. Partial LOE** (equivalent to 85% of the difference between the pre-accident earnings and the amount the worker is able to earn in the SEB) is payable where an impairment exists that prevents the worker from returning to pre-injury employment, no suitable employment has been offered to the worker, but the worker has not made reasonable efforts either to secure suitable employment or improve his/her employability. The post-accident earnings are to be based on the SEB identified through an LMR assessment as achievable without training. In the event an offer of suitable employment is made after the arrears order but before the completion of the LMR assessment, the 'SEB-equivalent earnings' for the arrears period should be determined as if no such offer had occurred.

**3. Partial LOE** (equivalent to 85% of the difference between the pre-accident earnings and the current, post-accident earnings) is payable where an impairment exists that prevents the worker from returning to pre-injury employment and no suitable employment has been offered to the worker, but the worker has found a job and is currently earning. Where the worker has attempted to mitigate the wage loss by actually finding a job, current earnings will be used. An LMR assessment may or may not be ordered depending on such factors as whether the worker has a PI and the significance of the partial LOE.

**Notice:** This document is intended to assist WSIB decision-makers in reaching consistent decisions in similar fact situations and to supplement applicable WSIB policies and guidelines as set out in the Operational Policy Manual (OPM). This document is **not a policy** and in the event of a conflict between this document and an OPM policy or guideline, the decision-maker will rely on the latter.

4. **Partial LOE** (equivalent to 85% of the difference between the pre-accident earnings and the amount the worker would have earned in the suitable job) is payable where the worker has refused to accept an offer of suitable employment at a wage loss.
5. **Partial LOE** is payable where an impairment exists that prevents the worker from returning to pre-injury employment, but the worker has refused to accept an offer of suitable employment at a wage loss and has obtained an alternate job at a wage loss. In these cases, an LMR assessment is required to determine the SEB. The partial LOE payable is equivalent to 85% of the difference between the pre-accident earnings and either the amount the worker would have earned in the SEB or the actual wages of the job, whichever is higher.
6. **Zero LOE** is payable where an impairment exists that prevents the worker from returning to pre-injury employment but the worker has refused to accept an offer of suitable employment at no wage loss.

It should be noted that for prospective benefits, the ARO should:

- Order full LOE benefits from the date the worker begins to cooperate in an LMR assessment or the date the ARO becomes satisfied of the worker's commitment to participate in an LMR assessment (example – date of hearing).

- The duration and level of LOE benefits following the assessment are to be determined by the Adjudicator based on the results of the assessment and the worker's employment situation.

Providing clear direction on the payment of benefit arrears will ensure that the Adjudicator is in a position to arrange relatively quickly for payment of at least part of the arrears.

It is important to emphasize that each case is to be determined on its own merits. It is, however, important that any order made on benefit arrears respects the legislative scheme created by the WSIA.

Director, Appeals Branch

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