

## Impact On Benefits Of Bill 179 and New Entitlement Following Work Disruptions Policies

**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.

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### Introduction

The passage of The Government Efficiencies Act, 2002 (Bill 179) and the minuting of five new Entitlement Following Work Disruptions policies have impacted the benefits workers may be entitled to. Bill 179 was passed effective November 26, 2002 and allows a limited review of the worker's Future Economic Loss (FEL) benefit beyond the 60 month review, and the worker's Loss of Earnings (LOE) benefit beyond the 72 month review. Effective March 3, 2003, five new policies and one revised policy were introduced to provide guidelines on what benefits workers may be entitled to when their return to work is impacted by a work disruption. The revised policy is FEL Supplements for Programs and LMR Plans Before and After 24 Months. This T.I.P.S. article will review the impact these new initiatives may have on workers' entitlement to benefits.

### Bill 179

Prior to the passage of this bill, review of LOE benefits beyond 72 months from the date of accident or FEL benefits beyond the 60 month final review could not take place. The only exception to this was when issues of fraud occurred prior to these final reviews.

For Bill 99 claims it became a requirement that any approved Labour Market Re-entry (LMR) Plan must have a completion date prior to 72 months from the date of accident, as the LOE benefit could not be revisited beyond that date.

For Bill 162 claims a FEL Supplement could be paid up to the 60 month review as outlined in policy 18-04-11, FEL Supplements for Programs and LMR Plans Before and After 24 Months.

FEL Supplements are payable provided the worker is involved in an Early Safe Return to Work (ESRTW) program/ LMR plan that began:

- within 12 months of a significant deterioration;
- within 24 months after the initial FEL determination;
- or is a continuation of an ESRTW program/LMR plan that began prior to the 24 month date.

FEL Medical Supplements are payable at any time if the worker is involved in a WSIB-approved Medical Rehabilitation (MR) program as outlined in the policy FEL Supplement Following Significant Deterioration, 18-04-12.

However, with the passage of Bill 179, LOE reviews can occur beyond the 72 month date and FEL reviews can occur beyond the 60 month date in cases

where the LMR Plan extends beyond the final review date, or a significant deterioration of the permanent impairment occurs.

## **Guidelines**

The following guidelines on how to implement Bill 179 are a synopsis of the guidelines provided by Brock Horseman, Senior Vice-President, Operations Division and Jill Hutcheon, Vice-President, Policy and Research Division via a memorandum dated March 2, 2003.

### **1. LMR Plans that Extend Beyond the Final Review**

Generally all LMR Plans accepted prior to November 26, 2002 will have a completion date prior to the 72 month review noting the practice at that time. However should any LMR Plans extend beyond the 72 month review date, **the LOE benefit may be reviewed within 30 days of the completion of the plan.** This benefit will then be locked in to age 65.

Likewise for claims where a FEL benefit is payable. Should the LMR Plan extend beyond the 60 month final review date, **the FEL benefit can be reviewed within 30 days of the completion of the plan.**

If prior to November 26, 2002 the LMR Plan was adjusted so that it would not extend beyond the 72 month date, that plan can be revisited. However, sufficient evidence must exist to support that the plan was adjusted to accommodate the 72 month review date. And, of course, prior to any revising of an LMR Plan, all cost benefit analysis must be reviewed.

If LMR Plans were completed prior to the 72 month review (or 60 month review for FEL) these guidelines do not apply.

### **2. FEL and Significant Deteriorations After the 60 Month Review**

As of November 26, 2002 the FEL benefit may be reviewed after the 60 month date if the worker has a significant deterioration and the Non Economic Loss (NEL) benefit is redetermined and increased.

The FEL benefit can only be reviewed once the NEL is redetermined and the review must take place within 24 months of the NEL redetermination.

The MR Supplement continues to be paid until the worker stops participating in the WSIB approved MR program.

### **3. LOE and Significant Deteriorations after the 72 Month Review**

Similarly, the LOE benefit may be reviewed after the 72 month date, if the worker has a significant deterioration and the NEL benefit is redetermined and increased. The LOE benefit can only be reviewed once the NEL is redetermined and the review must take place within 24 months of the NEL redetermination.

### **4. LOE and Older Workers**

Workers who opted for the --no review --option of their LOE benefit cannot have their LOE reviewed under Bill 179.

#### **Entitlement Following Work Disruptions**

Effective March 3, 2003, five policies were introduced to provide direction on what benefits workers could be entitled to following an interruption in their return to work. These policies apply to workers:

- who have an ongoing impairment;
- who have returned to work; and
- whose work was subsequently interrupted either because they were laid off (short-/long-term, permanently or seasonally), or because of a strike or lockout.

These policies do not apply to workers who have completely recovered from a work-related impairment and are subsequently laid off.

In those instances, review the Employer's Reemployment Obligations under Sec. 41 of the Workplace Safety and Insurance Act (WSIA).

### **General Rule for Entitlement (15-06-01)**

Generally, the worker's benefit status prior to the layoff will continue during the layoff, i.e., if the worker is receiving a FEL benefit to mitigate a wage loss associated with the impairment, that FEL benefit will continue; if the worker is receiving a partial LOE benefit to mitigate a wage loss associated with the impairment, that LOE benefit will continue.

### **Exceptions**

The exceptions to the general rule confirm that when considering a worker's entitlement to benefits following a work disruption, regard should be had for the employability of the worker. To consider the worker's employability, determine what impact the work-related impairment has on the worker's ability to find a job with the accident employer or in the general labour market. Here are some factors that may impact workers' employability:

1. Are they still in the early stages of recovery?
2. Are they receiving WSIB approved active health care on a frequent basis?
3. Are they on a graduated Return to Work (RTW) program?
4. Are they in a highly accommodated job that does not exist in the general labour market?
5. Do they have an impairment that is a significant obstacle to finding alternate employment?

Note that the first three factors deal with the recovery of the worker either from the original accident or a recurrence, whereas the last two factors generally deal with a worker whose situation is permanent. And as always, each claim must be reviewed considering the individual circumstances.

If the worker's employability is impacted by the work-related impairment, the worker may be entitled to further benefits and services including LMR.

### **RTW Legislation and Partial Workforce Layoff**

Sections 40 -- Co-operation and 41 --Re-employment of the WSIA, outline the employer and worker obligations regarding RTW. When only part of the workforce is impacted by a work disruption, the adjudicator reviews whether the workplace parties have met the RTW obligations. The Policy Report, Entitlement Following Work Disruptions outlines that when there is a partial workforce layoff entitlement to benefits is determined by considering the following in sequential order:

1. Employer's re-employment obligations;
2. Workplace parties' co-operation obligations;
3. Primary cause of loss of earnings, i.e., do factors suggest that the loss of earnings is primarily due to the employment situation, or the worker's work-related impairment.

If the employer is in breach of the re-employment obligations and the worker was performing his/her pre-injury job or suitable work that exists in the general labour market, LOE is not restored but rather re-employment benefits are paid to the worker for the duration of the re-employment obligation.

If there is no breach of the workplace parties' co-operation obligation, the decision-maker considers whether the worker meets one of the five exceptions to the general rule for entitlement as outlined above including the worker's inability to bump a more junior worker. If this is the case, LOE benefits are restored.

### **Short-term Layoffs (15-06-02)**

Layoffs are considered to be short-term if they last three months or less or have a specific recall date. During a short-term layoff it is expected the worker will return to work and therefore the general rule applies. In these cases the worker's benefit status will generally be maintained during the layoff.

If the worker's impairment clearly impacts the worker's employability, i.e., the worker meets one of the five exceptions to the general rule as outlined, full benefits should be restored. The adjudicator continues to monitor the recovery of the worker and adjust the benefits when he/she is fit to return to the preinjury job or a suitable job with the accident employer available in the general labour market.

If the worker meets exceptions 4. and/or 5. only, and the layoff is a short recurring layoff, i.e., two week shutdown at Christmas or in the summer, full benefits will not be restored.

LMR services will not be offered to workers who are involved in a short-term layoff as it is anticipated they will return to work with the pre-layoff employer.

### **Long-term and Permanent Layoffs (15-06-02 + 15-06-03)**

When layoffs extend beyond three months, they become long-term layoffs from the three month mark onward unless there is a specific recall date. If the layoff is long-term or permanent, it is expected the worker will have to find work elsewhere, therefore the WSIB has to determine if the worker is labour market ready or requires assistance to re-enter the labour market. If the worker continues to be in the early stages of recovery, full benefits should be maintained and the recovery process monitored by the adjudicator. When the worker is fit to return to pre-accident or suitable work, entitlement to ongoing benefits is reviewed.

If the worker was working in a permanently modified capacity prior to the layoff, the adjudicator must determine whether the job the worker was doing is available in the general labour market. The Entitlement Following Work Disruptions -- SEB Identification Worksheet was developed to assist adjudicators in making this determination. If the job exists in the general labour market, the adjudicator decides if that job is the appropriate Suitable

Employment or Business (SEB) and, if so, adjusts LOE or FEL benefits to reflect SEB earnings. LMR services are not provided where the pre-layoff job is the appropriate SEB.

If the pre-layoff job is highly accommodated it is unlikely to exist in the general labour market, nor is it likely that another employer will provide the accommodation. Examples of accommodation include:

- workplace modifications and/or devices;
- wages paid are inflated and not in line with industry standards;
- productivity requirements are not imposed.

If the job is highly accommodated or if the impairment will create a significant obstacle to finding alternate employment, the worker will likely require the assistance of an LMR Plan to re-enter the workforce.

To determine if a worker is entitled to an LMR Plan, he/she must meet the eligibility requirements for an LMR assessment:

- has a likely permanent impairment (PI)
- is unable to perform the pre-accident job due to the impairment
- has not previously received LMR services.

### **Seasonal Layoffs (15-06-04)**

Certain industries have predictable periods where workers will be laid off work for a period of time with the expectation that they will return to work when the work season begins again. As it is expected that seasonal workers will return to work, the general rule applies, e.g., the worker's benefit status prior to the layoff will generally continue during the seasonal layoff.

The exceptions to the general rule also apply. If the exceptions indicate that the worker's employability is clearly affected, he/she will generally be entitled to full benefits.

However, if the impaired worker is or has been able to find work in the off-season, exceptions 4. and 5.

listed earlier will not likely apply. LMR will generally only be offered if the worker is not recalled at the beginning of the work season, the adjudicator cannot identify an appropriate SEB and the criteria for LMR referral are met.

### **Strikes or Lockouts (15-06-05)**

During a strike or lockout, it is expected that the worker will return to work. Therefore the general rule for entitlement applies, e.g., worker's benefit status will generally continue throughout the strike or lockout. The exceptions to the general rule also apply.

During a strike or lockout, LMR will generally not be offered.

### **Scenarios**

**What would the worker be entitled to in each one of these scenarios? Answers follow.**

1. Jim is a welder for ABC Welding. On February 16, 2003 he burned his left forearm in a welding accident. His arm is in a special dressing and once the burn heals he may require physiotherapy. On March 3, 2003 Jim returned to modified work in the office, answering the phone and doing light paperwork at no wage loss. Jim had to visit the burn clinic daily to clean and change his dressing but was able to do that during his lunch. He is scheduled to attend daily physio as of April 4, 2003. On March 16, 2003 the plant shut down for four weeks to overhaul all the machines, and Jim was laid off.
2. Marcie is a 43 year old registered nurse. She hurt her back in 1997 and was awarded a 20 per cent NEL for the permanent impairment (PI). She was unable to return to her pre-injury job so her employer offered her the job of emergency room admissions clerk. She accepted the job and received a 12 per cent FEL in January 1999 due to a partial wage loss. In January 2003 she was notified that her union was in a strike position and would be going on strike as of

midnight January 19, 2003.

3. Jennifer is a 29 year old maintenance worker working for The Big Plastics Company. After several months on the job she noticed her skin was severely chapped. She saw her doctor who diagnosed contact dermatitis and related it to exposure to the chemicals used to manufacture the plastics. She remained off work for three months and her dermatitis cleared up. She could no longer work in the factory but as she was a good worker her employer offered her a job as a shipper/receiver away from the manufacturing plant. She received a NEL rating of 2 per cent. She continued working as a shipper/receiver for two years but in January 2003 she received a layoff notice confirming that half the workforce was to be permanently laid off due to a shortage of work.
4. Mike was a 26 year old roofer in 1995 when he fell 12 feet off a roof and suffered multiple breaks and fractures. Both his legs required surgery to repair as did his left elbow. After months of rehabilitation he was able to consider returning to work. He could not return to his pre-injury job as a roofer, but his employer also owned a construction company and offered Mike a job as a cement truck driver. In 1996, the Workers' Compensation Board approved the Vocational Rehabilitation Plan that allowed Mike to obtain the appropriate licenses. Mike was awarded a 38 per cent NEL and a 10 per cent FEL in June 1996. In June 2001 the 10 per cent FEL was confirmed to age 65. In August 2002 Mike noticed the pain in his legs and back was getting worse. He saw his specialist who confirmed that arthritis was spreading in his legs and low back as a result of the accident. He recommended the removal of the hardware in the legs and confirmed that Mike could no longer continue working as a cement truck driver as it was too physically demanding.

5. Peter, a 38 year old auto worker, worked for New Auto Manufacturing Inc. for 20 years. As a result of years on the assembly lines Peter eventually developed bursitis in both shoulders. The most recent accident date being February 2000. He could not return to his pre-injury job but was able to bid on the lightest job in the plant --driving the finished cars off the assembly line and into the parking lot. He began working at this job in November 2001 however when the job bidding occurred in October 2002, he lost the job to a more senior worker. His employer could not accommodate his significant impairment in any other department and after 20 years Peter was now out of a job.
6. Henry is a 59 year old bricklayer who on May 15, 2001 sustained a crush injury to his right hand. He required extensive surgical repairs of the digits and it was expected that he would have limited use of his dominant right hand. He returned to work in April 2002 at no wage loss when the new construction season began. He was called by his employer to do odd jobs around the construction site that would be within his permanent restrictions of minimal use of the right hand. His duties entailed directing drivers as they unloaded materials, directing traffic of vehicles, checking to ensure the cement mixture was the right consistency and anything else that was needed on the site. On November 22 he was laid off as the construction season came to an end and he was to be recalled in March 2003. Typically Henry does not work in the off-season and has no plans to look for work during this off-season.
7. Debbie is a 29 year old tobacco picker in southern Ontario. Her job is a seasonal job and she has been doing this work for the past 10 years. In the off- season Debbie always worked as a cashier in the local grocery store. Due to the

exposure to tobacco, Debbie has developed asthma. She is no longer able to work in the tobacco fields. Her claim was allowed with an accident date of October 15, 2002 being the date she was first diagnosed. Her employer accommodated Debbie's restrictions by providing her with a general office job. Debbie continued to work the regular picking season in the office and was laid off when the picking season ended but was told she would be rehired next season to work in the office again.

### Answers

1. Jim's work disruption is considered a short-term since it has a recall date. Noting the exceptions to the general rule Jim would be entitled to full LOE following the plant shutdown as he is still in the early stages of recovery. He must attend the burn clinic daily to change his dressing and will attend daily physio as of April 4, 2003. The impairment is the cause of Jim's inability to work as he could not be expected to seek and find employment in the general labour market noting his impairment.
2. Marcie's work disruption is considered a strike. In reviewing Marcie's employability it would appear as though none of the exceptions applied, therefore the general rule applies. Marcie's benefit status prior to the strike will continue during the strike. Therefore Marcie will continue to receive her 12 per cent FEL award.
3. Jennifer's work disruption is permanent. In reviewing the RTW legislation applicable it would appear that the re-employment provision does not apply as Jennifer did not meet one year of continuous service prior to the accident nor is there indication that the employer did not meet its Co-operation obligations. To determine if the impairment impacted Jennifer's employability, the adjudicator examined the job Jennifer was performing prior to the layoff and completed an Entitlement Following

Work Disruptions -- SEB Identification Worksheet. The adjudicator was able to confirm that the pre-layoff job is available in the general labour market and determined a SEB with SEB earnings. The LOE benefit was adjusted to reflect SEB earnings. Full LOE benefits were not restored nor were LMR services offered.

4. Mike's work disruption was caused by a recurrence. Mike is entitled to a FEL medical rehabilitation supplement while undergoing the further surgery. Once he recovers from the surgery the adjudicator must determine whether a permanent deterioration of his impairment occurred. If so, then Mike would be entitled to a NEL Redetermination and if the NEL benefit is increased, to an LMR Reassessment if he could no longer perform the job of cement truck driving. If the NEL award were increased, Mike would also be entitled to a FEL review as outlined in Bill 179.
5. Peter's work disruption is considered permanent. In reviewing the employer's Re-employment obligations, the obligation period ended as of February 2002, therefore no breach occurred. The adjudicator had to determine Peter's employability and completed the Entitlement Following Work Disruptions -- SEB Identification Worksheet. However the adjudicator was not able to determine a SEB. The pre-layoff job was a job that did not exist in the general labour market. As the adjudicator could not identify a SEB and as the worker met the referral criteria for LMR, full LOE benefits were restored from the date that Peter was laid off and he was referred for LMR services immediately. If Peter had recall rights under his Collective Agreement, he could have deferred the start of his LMR plan for up to one year. If he chose to defer the LMR Plan, benefits would be paid based on Peter's SEB. Once Peter begins the LMR Plan, full benefits are restored.
6. Henry's work disruption is seasonal. In reviewing the exceptions to the general rule for entitlement it would appear as though Henry would qualify for further full LOE benefits based on the fact that he returned to a highly accommodated job that does not exist in the general labour market. The adjudicator completed the Entitlement Following Work Disruptions -- SEB Identification Worksheet and could not identify a SEB. As well the adjudicator took into consideration the fact that Henry's impairment would be a significant barrier to his finding work in the off-season, even though he typically did not work in the off-season. Should the employer not offer to re-employ the worker in March 2003, entitlement to an LMR assessment and services will have to be considered. In the meantime Henry is entitled to full LOE during the seasonal layoff.
7. Debbie's work disruption is seasonal. It would appear as though Debbie does not meet any of the exceptions to the general rule for entitlement as the adjudicator can clearly identify the SEB of general office help by using the Entitlement Following Work Disruptions -- SEB Identification Worksheet. Debbie also worked as a cashier in the off-season, and her work-related impairment would not impact her ability to do this work. Therefore the general rule for entitlement applies and Debbie's benefit status at the time of her layoff would be maintained during the work disruption.