

**Operational
Policy**

Section
Average Earnings

Subject
Determining Average Earnings - Exceptional Cases

Policy

The guidelines for calculating short-term and long-term average earnings are not applicable for those workers classified by the WSIB as

- dependent contractors
- workers with optional insurance
- apprentices
- learners
- students
- pupils
- volunteer force members
- emergency workers, or
- Ontario Works participants.

In these exceptional cases, the WSIB recognizes the specific requirements of the *Workplace Safety and Insurance Act, 1997* (WSIA) and the unique nature of some industries regarding employment relationships and method of payment.

In these exceptional cases, the WSIB does not use some of the rules normally followed to determine a worker's average earnings.

Purpose

The purpose of this policy is to outline the method to determine average earnings in exceptional cases.

Guidelines

Dependent contractor

The *Labour Relations Act, 1995* defines a **dependent contractor** as a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

In general, dependent contractors are remunerated based on the gross earnings received for performing a certain contract of work, sometimes referred to as piecework, for a contractor. The contractor does not issue a T4 statement since payroll taxes are not deducted at the source. A dependent contractor may report as a self-employed individual for income tax purposes with the Canada Revenue Agency (CRA). To be considered a dependent contractor, the worker must be covered under the contractor's WSIB account at the time of injury.

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When an injury occurs, the gross earnings reported may include payment amounts not related to wages, such as materials, tool rentals, or gas. The reported gross earnings of a dependent contractor are similar to the earnings of a self-employed individual. In these cases, the average earnings are calculated in accordance with the guidelines found in document 12-03-02, Optional Insurance.

Criteria for dependent contractors

Prior to calculating the worker's average earnings the decision-maker considers

- if the dependent contractor would be more properly considered an independent operator
- if the principal contractor insured the dependent contractor and paid premiums accordingly, and
- if the dependent contractor hired workers. If the dependent contractor hired workers this would suggest an employer status.

Period of calculation

The period of calculation is the 12 months prior to the date of accident, or a lesser period. The calculation period may be shortened by a break in the employment pattern.

Break in the employment pattern

A break in the employment pattern is a change in the dependent contractor's employment significant enough to make the period before the break irrelevant to the determination of the dependent contractor's average earnings. This may include a change in status from

- employer to dependent contractor
- worker with optional insurance to dependent contractor, or
- worker to dependent contractor.

A break in the dependent contractor's employment pattern shortens the calculation period.

Earnings information

The decision-maker uses the **net** business income during the calculation period based on the income reported to CRA or an audited financial statement of earnings prepared by a chartered accountant. The decision-maker then overestimates the net business income by including items such as

- pension plan and RRSP contributions
- depreciation and amortization
- charitable donations
- expenses arising out of the individual's use of personal home or vehicle for business purposes
- dividends from the business, and/or
- other items as appropriate.

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NOTE

The calculation of benefits for dependent contractors does not affect, nor is it the same as, the method that employers use to calculate insurable earnings for dependent contractors who are not paid a stated wage for labour, but are instead paid labour including material and/or equipment.

Any earnings information submitted may be subject to a WSIB audit.

Workers with optional insurance

For workers who the WSIB considers sole proprietors, partners, independent operators, or executive officers of a corporation, and covered by optional insurance, see 12-03-03, Who Can Obtain Optional Insurance?, the average earnings are calculated using the optional insurance amount or the actual employment earnings at the time of injury, whichever is less.

To determine the average earnings for sole proprietors, partners, and independent operators, decision-makers must obtain earnings information for the year preceding the injury. Decision-makers use the **net** business income during the calculation period based on the income reported to CRA or an audited financial statement of earnings prepared by a chartered accountant. The decision-maker then overestimates the net business income by including items such as

- pension plan and RRSP contributions
- depreciation and amortization
- charitable donations
- expenses arising out of the individual's use of personal home or vehicle for business purposes
- dividends from the business, and/or
- other items as appropriate.

The average earnings for an executive officer are the earnings reported on the previous year's CRA income tax return.

Any earnings information submitted may be subject to a WSIB audit.

Where the earnings information submitted supports the level of optional insurance requested, the average earnings are determined using the optional insurance requested.

Where the earnings information submitted supports a lower level of actual earnings, the average earnings are calculated using the lower level of actual earnings.

For more information see 12-03-02, Optional Insurance.

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Exception - Construction

In the construction industry, independent operators, sole proprietors, partners of a partnership and the executive officers of a corporation, with certain exceptions are deemed workers. See, 12-01-06, Expanded Compulsory Coverage in Construction.

Apprentices

For workers who are apprentices, the decision-maker determines the average earnings by using the average earnings of a journeyman employed by the employer in the same trade as the worker.

If the employer did not employ a journeyman in the same trade as the worker, the worker's average earnings are determined by using the average earnings of a journeyman employed in the same geographical area as the employer and employed in the same trade as the worker.

Once established, the average earnings remain the same for the life of the claim, with no recalculation.

Learners

For workers who are learners, the decision-maker calculates the average earnings by determining if, on the date of injury, the worker was receiving any income, including

- training allowances
- social assistance benefits
- insurance benefits, and/or
- employment insurance benefits,

that would terminate when the worker receives loss of earnings payments, the worker's average earnings are determined using the total amount of the worker's income;

or

- if, on the date of injury, the worker was not receiving any of the income described in the previous paragraph, the worker's average earnings are determined using the minimum wage in Ontario on the date of injury;

or

- if the worker was employed under a contract of service concurrent with the probationary work program or training program, the decision-maker also takes into account earnings from the concurrent employment;

or

- if the worker accepted an offer of employment that was to start at the completion of the probationary work program, the training program, or a similar program, the worker's

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average earnings are determined using the average earnings the worker would earn in that employment.

The average earnings of a worker who is a learner are recalculated

- when the worker has completed the training program or probationary work, or
- if the worker is unable to complete the training program or probationary work as a result of the injury when the worker would have completed the training program or probationary work if the injury had not occurred.

The recalculated average earnings of a worker, who is a learner, are determined by using the average earnings of another worker employed by the employer in the same trade as the worker.

If the employer does not employ another worker in the same trade, the worker's average earnings are determined by using the average earnings of another worker employed by a similar employer in the same trade and geographical area as the employer.

If a worker in the same trade and in the employer's area cannot be found, the decision-maker will use the average earnings of a worker employed in similar employment as the worker and the same geographical area as the employer.

In determining the recalculated average earnings, the decision-maker considers what the worker's level of education, aptitude, and skills would likely have been at the completion of the training program.

Students

For workers who are students, the average earnings are calculated by taking into account

- the worker's earnings from all of the employers the worker was employed with at the time of injury
- any pattern of employment that resulted in a variation in the worker's earnings, and
- other information considered appropriate.

The average earnings of a worker, who is a student, are recalculated

- if the worker is unable to complete his or her education as a result of the injury, when the worker would have completed his or her education if the injury had not occurred, or
- in any other case, when the worker has ended his or her education.

The recalculated average earnings of a worker, who is a student, are determined by using the average earnings of a worker employed in a job in which the injured worker would likely be employed if the injury had not occurred.

If this is not possible, the recalculated average earnings are based upon the

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- average industrial wage for the year in which the worker's injury occurred
- worker's level of education, and
- worker's aptitude and skills at the time of the injury.

Pupils

The average earnings of a pupil, deemed to be a worker under the *Education Act*, and enrolled in a Ministry of Education program, are calculated in accordance with the guidelines for learners.

Members of volunteer forces

The average earnings for members of a volunteer force (i.e. ambulance, fire brigade, auxiliary police) is the amount selected by the municipality and is not subject to review or recalculation. For more information, see 12-04-02, Volunteer Forces.

Emergency workers

The average earnings of an emergency worker who has employment earnings at the time of injury are calculated with reference to 18-02-02, Determining Short-term Average Earnings. If a long-term average earnings recalculation is necessary, the decision-maker considers the worker's employment pattern at the time of injury in the regular employment and applies either 18-02-03, Determining Long-term Average Earnings - Workers in Permanent Employment, 18-02-04, Determining Long-term Average Earnings - Workers in Non-Permanent Employment, or 18-02-05, Determining Average Earnings - Concurrent Employment.

Where the worker does not have actual employment earnings at the time of injury, the average earnings are calculated with reference to the Average Industrial Wage for Ontario which is published and available on July 1 of the year preceding the injury.

In this case, the average earnings are not recalculated, as the deemed earnings remain the same for the duration of the claim. For more information, see 12-04-03, Emergency Workers.

Ontario Works participants

For workers who are placed with employers as part of the Ontario Works program, the average earnings are calculated in accordance with the guidelines for learners.

For more information, see 12-04-06, Coverage for Ontario Works Participants.

Application date

This policy applies to all decisions, for all accidents occurring on or after January 1, 2023.

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Document History

This document replaces 18-02-08 dated January 2, 2013.

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References

Legislative Authority

Workplace Safety and Insurance Act, 1997, as amended.

Sections 2(1), 12.2, 53, 54(2), 70, 71, 78(3)

O. Reg. 175/98

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Minute

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