

POLICY REPORT

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Entitlement Following Work Disruptions

five new policies

Five new policies have been developed to assist decision-makers in determining whether an injured worker may be entitled to WSIB benefits and/or labour market re-entry (LMR) services when the worker has stopped working due to a “work disruption”. These policies, now available in the *Operational Policy* manual (OPM), cover all types of work disruptions, including:

- short-term or long-term—policy 18-01-08, *Entitlement Following Work Disruptions: Short-term and Long-term Layoffs*
- permanent—policy 18-01-09, *Entitlement Following Work Disruptions: Permanent Layoffs*
- seasonal—policy 18-01-10, *Entitlement Following Work Disruptions: Seasonal Layoffs*, and
- strikes or lockouts—policy 18-01-11, *Entitlement Following Work Disruptions: Strikes or Lockouts*.

Policy 18-01-07, *Entitlement Following Work Disruptions: General* is a general overview document that helps clarify elements and concepts that are common to all of the different types of work disruptions, such as: definitions, underlying entitlement principles, and general LMR considerations.

These new policies apply to all decisions made on or after March 3, 2003.

Focus of new policies

The new policies require decision-makers to focus on the concept of *employability* when determining whether further WSIB benefits and/or LMR services are in order following a work disruption. Essentially this means looking at whether an injured worker’s work-related impairment and associated medical restrictions present a clear obstacle to the worker obtaining alternate work with the accident employer or another employer. When a worker’s employability is clearly affected, the WSIB may provide:

- additional WSIB loss of earnings (LOE) benefits, temporary total disability benefits (TT), future economic loss (FEL) supplement, or s. 147(2) supplement, and possibly,
- LMR services.

The focus on employability is in keeping with the intent of the *Workplace Safety and Insurance Act* (WSIA) which is to facilitate workers’ return to work with the accident employer and, when this is not possible, their re-entry into the labour market.

Short-term layoffs

For short-term work disruptions, a worker’s benefit status at the time of the work disruption is generally maintained. However, the WSIB may provide additional benefits/services to workers whose employability is clearly affected by their work-related impairment and associated medical restrictions.

Typical indicators that further benefits/services may be in order are that the worker:

- is in the early phase of recovery, and
- is receiving WSIB-approved active health care treatment, i.e., physiotherapy on a frequent basis, such as three times a week.

In practical terms, these workers could not reasonably be expected to conduct a job search, and the likelihood of another employer hiring them is low. For a full list of the indicators/factors to be considered, see the relevant policy listed above.

Long-term or permanent layoffs

For long-term or permanent work disruptions, it is generally presumed that the worker will have to seek employment elsewhere.

Decision-makers, therefore, have to determine whether the worker:

- is labour market ready, or
- requires assistance to re-enter the labour market.

To make this determination, decision-makers have to consider whether the worker has a distinct disadvantage in finding suitable work as compared to an uninjured co-worker.



	Short-term Layoffs Policy 18-01-08	
Recall Date	A short-term layoff has: • a specific recall date, or • no specific recall date, but the work disruption lasts or is expected to last, three months or less. If the recall date is beyond the three-month mark, the decision-maker has to determine the following: 1 Was the recall date provided in writing? 2 If a recall date was provided, how certain is it that a recall will occur on the date specified. If the above criteria suggest that the recall is likely to occur on the date specified, the work disruption continues to be treated as a short-term layoff past the three-month mark.	
Entitlement to Benefits	Entire Work-force Layoff General rule: The worker's pre-layoff benefit status is maintained, i.e.: • if the worker is not receiving LOE/FEL or permanent disability (PD) benefits, additional benefits/services should probably not be allowed • if the worker is receiving partial LOE/FEL/PD benefits, the partial benefits should probably continue, or • if the worker is receiving full LOE/FEL/TT minus PD/TT benefits, the full benefits should probably continue. Likely exceptions to the general rule: The following factors suggest that the worker's employability is clearly affected by the work-related impairment and associated medical restrictions and that additional WSIB benefits/services may be in order. The worker: 1 is in the early phase of recovery 2 is still receiving WSIB-approved active (non-maintenance) health care treatment (e.g., physiotherapy) on a frequent basis 3 is on a graduated return to work (RTW) program 4 requires a high degree of accommodation, or 5 has an impairment that is a significant obstacle to finding alternate employment. The worker's benefits may be adjusted based on the worker's recovery. If the layoff is short (e.g., two weeks), and recurs every year (e.g., December or summer shutdown), the WSIB will not provide additional benefits to workers who only meet exceptions 4 and/or 5.	Partial Work-force Layoff General rule: 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 loss of earnings is primarily due to: • the employment situation, or • the worker's work-related impairment. *For the list of factors, please refer to the column on the left, "Likely exceptions to the general rule", items 1 to 5. The decision-maker must also consider whether the worker is unable to bump a co-worker with less seniority because of the work-related impairment. The worker's benefits may be adjusted based on the worker's recovery.
LMR Services (for additional guidelines, see "LMR services" on page 6 of this newsletter).	LMR services and the associated benefits are generally not provided if the worker is involved in a short-term layoff.	

	Long-term Layoffs Policy 18-01-08	Permanent Layoffs Policy 18-01-09
Recall Date	A layoff is considered long-term when it has lasted three months or more, and: • it has no recall date, or • a recall did not occur on the date provided, or • it has a recall date, but the date is far in the future and the likelihood of an actual recall occurring on that date is low. At this point, it is generally presumed that the worker will have to seek employment elsewhere, and due to his/her work-related impairment and associated medical-restrictions, may require assistance from the WSIB to re-enter the labour market.	There is little or no chance of a recall (i.e., there is a plant closure, or the employer has ceased business).
Entitlement to Benefits	General rule: For workers who did qualify for additional benefits/services during the short-term layoff: • Additional benefits should probably continue to be paid beyond the three-month mark. • Medical monitoring of the claim file continues, with benefits adjusted when the worker is fit to do the pre-accident job or a suitable job and no longer requires active treatment and/or a graduated RTW program and the worker's medical restrictions are not an obstacle to finding a job. • If the suitable job is available in the general labour market, it would generally become the worker's SEB, with benefits adjusted accordingly. • If the decision-maker is unable to determine an appropriate SEB for the worker, and the worker meets the eligibility criteria for an LMR assessment, the WSIB offers an LMR assessment. For workers who did not qualify for additional benefits/services during the short-term layoff and who are still unable to do their pre-accident job after the three-month waiting period is up: • The decision-maker determines whether the worker's pre-layoff job is suitable and available in the general labour market. • If this is the case, then that suitable work would usually become the worker's SEB and, if appropriate, a partial benefit would be paid, based on the SEB. • If the decision-maker is unable to determine an appropriate SEB for the worker, and the worker meets the eligibility criteria for an LMR assessment, then the WSIB offers an LMR assessment. Please refer to "Assessing labour market readiness" and "SEB determination" on page 6 for additional details.	General rule: Guidelines for entitlement to benefits differ depending on whether: • the worker requires close medical monitoring, or • the worker's medical condition is stable. Workers requiring close medical monitoring: The presence of any of the following factors indicates that the worker requires ongoing close medical monitoring: 1 The worker is in the early phase of recovery. 2 The worker is still receiving WSIB-approved active (non-maintenance) health care treatment (e.g., physiotherapy) on a frequent basis. 3 The worker is on a graduated RTW program. The above factors also suggest: • that the worker's employability is clearly affected by the work-related impairment and associated medical restrictions, and • that additional WSIB benefits/services may be in order and may be paid/provided from the date the worker is permanently laid off. For the next steps, please refer to the column on the left (Long-term Layoffs) starting with: "For workers who did qualify for additional benefits/services during the short-term layoff". Workers whose medical condition is stable: For workers whose medical condition is stable but who are still unable to perform their pre-accident job because of their work-related impairment, please refer to the column on the left (Long-term Layoffs) starting with: "For workers who did not qualify for additional benefits/services during the short-term layoff".
LMR Services (for additional guidelines, see "LMR services" on page 6 of this newsletter).	Once the decision-maker determines that the criteria for a long-term or permanent layoff have been met and that he/she is unable to determine an appropriate SEB for a worker, the WSIB can offer an LMR assessment to a worker who: • has a likely permanent impairment (PI), and • is unable to perform their pre-accident job due to the work-related impairment, and • has not previously received LMR services.	

	Seasonal Layoffs Policy 18-01-10	Strikes or Lockouts Policy 18-01-11
Recall Date	Seasonal layoffs usually have predetermined/predictable start and end dates. The loss of earnings during a seasonal layoff is generally due to the nature of seasonal employment, but may also be affected by a worker's inability to obtain other work due to the work-related impairment and associated medical restrictions.	Strikes and lockouts have unpredictable recall dates. The loss of earnings during a strike or lockout is generally due to an employment situation, but may also be affected by a worker's inability to obtain other work due to the work-related impairment and associated medical restrictions.
Entitlement to Benefits	General rule: The worker's pre-layoff benefit status is maintained, i.e.: - if the worker is not receiving LOE, FEL, or PD benefits, additional benefits/services should probably not be allowed - if the worker is receiving partial LOE/FEL/PD benefits, the partial benefits should probably continue, or - if the worker is receiving full LOE/FEL/TT minus PD/TT benefits, the full benefits should probably continue. Likely exceptions to the general rule: The following factors suggest that the worker's employability is clearly affected by the work-related impairment and associated medical restrictions and that additional WSIB benefits/services may be in order. The worker: 1 is in the early phase of recovery 2 is receiving WSIB-approved active (non-maintenance) health care treatment (e.g., physiotherapy) on a frequent basis 3 is on a graduated RTW program 4 requires a high degree of accommodation, or 5 has an impairment that is a significant obstacle to finding alternate employment. The worker's benefits may be adjusted based on the worker's recovery. Note: Factors 4 and 5 would likely not apply in cases where the injured worker has been able to find employment with another employer during the off-season.	General rule: The worker's pre-layoff benefit status is maintained, i.e.: - if the worker is not receiving LOE, FEL, or PD benefits, additional benefits/services should probably not be allowed - if the worker is receiving partial LOE/FEL/PD benefits, the partial benefits should probably continue, or - if the worker is receiving full LOE/FEL/TT minus PD/TT benefits, the full benefits should probably continue. Likely exceptions to the general rule: The following factors suggest that the worker's employability is clearly affected by the work-related impairment and associated medical restrictions and that additional WSIB benefits/services may be in order. The worker: 1 is in the early phase of recovery 2 is receiving WSIB-approved active (non-maintenance) health care treatment (e.g., physiotherapy) on a frequent basis 3 is on a graduated RTW program 4 requires a high degree of accommodation, or 5 has an impairment that is a significant obstacle to finding alternate employment. The worker's benefits may be adjusted based on the worker's recovery.
LMR Services (for additional guidelines, see "LMR services" on page 6 of this newsletter).	Generally, injured workers affected by a seasonal layoff will be assessed for LMR services when: - the employment season has restarted, and - it is determined that the employer is unwilling or unable to provide suitable work. Please refer to policy 18-01-10 for additional details regarding entitlement to LMR services.	LMR services are generally not provided to a worker who is affected by a labour dispute unless exceptional criteria set out in this policy are met. Please refer to policy 18-01-11 for additional details regarding entitlement to LMR services.

Examples of Work Disruptions

Example 1 — Short-term layoff/partial workforce

Scenario : On February 11, 2003, David strains his lower back while working on the VROOM company's assembly line. David has re-employment rights under s. 41 of the Act.

On February 24, 2003, David returns to a modified job at VROOM, at no wage loss, with restrictions against heavy lifting, prolonged standing, and repetitive bending. To accommodate these restrictions, VROOM places David on the parts order desk. Following his doctor's instructions, David continues with physiotherapy treatments three times per week while doing the modified job.

On March 7, 2003, VROOM announces that 50 percent of their workforce is being laid off because of a general economic downturn. A recall date of April 21, 2003, is provided. David is one of the people laid off due to his relatively low seniority. David contacts his adjudicator with a request for further benefits/services.

Q : Is David entitled to further WSIB benefits/services?

A : Because this short-term work disruption involves only part of the workforce, the adjudicator first looks to whether the parties have complied with their re-employment and co-operation obligations under the Act. Finding no evidence of a breach of these obligations, the adjudicator then considers whether David's employability is clearly affected because of his work-related impairment and associated medical restrictions.

Using the factors in the chart on page 5 of policy 18-01-08, *Entitlement Following Work Disruptions: Short-term and Long-term Layoffs*, the adjudicator notes that:

- David is still receiving regular, active health care treatment on a frequent basis
- his date of accident is fairly recent, and
- he is in the early phase of recovery.

Based on these factors, the adjudicator finds that the primary cause of David's loss of earnings following the lay-off is his work-related impairment. Therefore, the adjudicator restores David's full LOE benefits from the date of lay-off and continues to monitor David's recovery and adjusts benefits as needed.

Example 2 — Seasonal layoff

Scenario: Elma drives a dump truck for the Salting For You company. She has been with the company for the last six years. Her work with this company is seasonal in that the company's operations are normally shutdown in April of every year and re-opened in November when the weather gets colder again. Elma typically plants trees in northern Ontario between April and November.

On February 25, 2003, Elma strains two fingers on her left (non-dominant) hand while adjusting the tailgate of her dump truck. Elma is off work entirely until March 3, 2003, when her doctor indicates that she can return to modified work as long as she does not have to use her left hand. Medical evidence on file shows that Elma will likely be able to resume full use of her left hand by April 5, 2003.

On March 3, 2003, through the co-operative efforts of Elma and her employer, Elma returns to a suitable job as an office clerk at her regular rate of pay. Elma's outpatient physiotherapy treatments end on March 14, 2003, at which point she is to begin a series of at-home strengthening and conditioning exercises.

On March 24, 2003, Elma returns to her pre-accident job at her regular rate of pay. On April 4, 2003, Salting for You closes its operations for the season and Elma contacts her adjudicator requesting further benefits/services.

Q : Is Elma entitled to further WSIB benefits/services?

A : The adjudicator notes that the general rule for seasonal work disruptions is that the benefit status at the time of the lay-off is normally maintained, i.e., if the worker was not in receipt of benefits at the time of the lay-off, further benefits are normally not in order. The adjudicator also notes that none of the exceptional factors (see "Likely exceptions to the general rule" on page 2 of policy 18-01-10, *Entitlement Following Work Disruptions: Seasonal Layoffs*) pointing to further benefits are present.

Based on this information, the adjudicator concludes that the seasonal lay-off is the primary cause of Elma's loss of earnings after April 4, 2003, and not her work-related impairment. Therefore, Elma's claim for further benefits/services is denied.



Questions about entitlement following work disruptions? Call...

Steve Densmore, Policy Analyst,
Benefits Policy Branch at (416) 344-4349,
or toll-free at 1-800-387-5540 Ext. 4349,
or via e-mail at steve_densmore@wsib.on.ca

Entitlement Following Work Disruptions (continued from page 1)

Assessing labour market readiness

When determining whether a worker requires assistance to re-enter the labour market, decision-makers examine the work the worker was doing at the time of the work disruption and consider the following questions:

- Is the worker unable to perform the pre-accident job due to the work-related impairment?
- Is it likely that the worker's impairment is permanent?
- How different is this work from the worker's pre-injury job (e.g., tasks, responsibilities, and rate of pay)?
- How long has the worker been doing this work?
- Is the work available in the general labour market and, if so,
 - are the wages comparable to what the worker was receiving, and
 - is the required productivity level the same as that being provided by the worker at the time of the work disruption?
- Does the pre-layoff work involve some form of accommodation?
- What is the likelihood that another employer will provide the required accommodation?

SEB determination

Based on the answers to these questions, the decision-maker decides whether:

- the suitable work that the worker was doing at the time of the layoff (or is capable of doing), is an appropriate suitable employment or business (SEB), or
- a formal LMR assessment is needed to determine an appropriate SEB for the worker, and if necessary, an appropriate LMR plan.

LMR services

Generally, the WSIB does not offer an LMR assessment to workers who have previously received LMR services unless they meet the eligibility criteria in policy 19-03-08, *LMR Re-assessments*. Workers may, however, be entitled to LMR services if they only received the early and safe return to work (ESRTW) component of vocational rehabilitation (VR) services in the past — see policies 19-01-01, 19-01-02, 19-01-03, and 07-03-09.

For those workers who meet the eligibility criteria for LMR services set out in the various work disruptions policies, the offer of an LMR assessment includes an explanation stating that:

- should the worker choose to accept the offer, the WSIB generally provides only one opportunity for the worker to receive an LMR assessment, and if required,
- an LMR plan.

Workers who have recall rights under a collective agreement can defer participating in an LMR plan for up to twelve months from the date that it is determined that an LMR plan is necessary. This deferral is possible only if the LMR plan can be started before the final review of the worker's FEL/LOE benefits. If a worker chooses to defer the LMR plan, benefits are paid based on the worker's suitable employment or business (SEB). Once the worker begins the LMR plan, full benefits are restored.

Workers who are participating in LMR assessments/plans and are co-operating are generally entitled to full benefits.

LMR services and the associated FEL supplement can be provided only when specific eligibility criteria are met (see policy 18-04-11, *Supplement for Programs and LMR Plans Before and After 24 Months*).

More information

For policy highlights, and case-specific examples, please refer to the chart on pages 2 to 4 of this newsletter. For complete details, refer to the actual policies as listed above.

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If you have any comments or questions about this issue, please contact the editor at:

Policy Report

Knowledge Services Branch,
Policy and Research Division
Workplace Safety and Insurance Board,
200 Front Street West, 20th floor
Toronto, ON, M5V 3J1

Telephone: (416) 344-4355

Fax: (416) 344-5500

E-mail: km@wsib.on.ca

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