

# Adjudicative Advice

## A Worker Is A Worker – Policy Clarification

Members of the Transportation Sector of the Operations Division, along with members of the Benefits Policy Branch, the Revenue Policy Branch and Legal Services, met to discuss ongoing challenges involving owner-operators and their relationship with their employers. Although this issue primarily involves the courier industry, it could arise with any employer that hires owner-operators as “workers.” It was agreed that the policy branches would provide a clarification on a number of different issues that arise from this working relationship.

### Background

#### *Owner-operators providing replacement workers, or helpers*

In the transportation industry, owner-operators may be assigned to transport goods within a defined route or geographic region. The owner-operator is paid a certain amount (say \$1400 per week) to maintain deliveries within the assigned region or route. Sometimes the employment agreement with the employer specifies that the owner-operator is required to provide a replacement driver or a helper. This may occur in situations where the owner-operator is not able to maintain the route due to sickness/vacation, or the owner-operator, as a result of a work injury, is physically unable to lift and carry the goods being delivered and needs assistance to perform this portion of the job.

The employer may reimburse the owner-operator, as an expense, a set amount (say \$80) for each day a replacement driver, or a helper is used.

The employer does not reimburse the owner-operator for any additional amount negotiated with the replacement driver, or a helper. Therefore, the owner-operator would be responsible to pay any amount over and above the daily amount that the employer agreed to (in this case \$80).

### General principles

A person the Workplace Safety and Insurance Board (the WSIB) considers a worker, cannot be both a worker and an employer at the same time while working for the same employer. The Workplace Safety and Insurance Act (the “Act”) does not contemplate “dual status”.

A person’s status as a worker, or independent operator is governed by specific criteria set out in the WSIB’s “organizational test”, the details of which may vary by industry.

In cases where the owner-operator is considered a worker, his/her employer is required to report and pay WSIB premiums on his/her behalf.

Replacement workers engaged (and paid) by a worker are workers of the employer, not of the worker engaging them. The employer is responsible for all the following reporting, financial, and health and safety obligations for both the worker and any replacement workers, or helpers:

- Reporting and paying premiums on their total earnings
- Reporting work-related injuries and the earnings basis for loss of earnings benefits

**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.

- Re-employment, suitable work or LMR
- Return to work
- Maintaining a safe workplace

### **Payment of premiums**

The employer is responsible to pay premiums for the owner-operator and any replacement driver or helper the owner-operator may arrange for. The premium payable is based upon the total earnings received by each of the owner-operator and the replacement driver or helper (e.g. this represents the total amount reimbursed by the employer, and the amount paid by the owner-operator above the amount reimbursed by the employer).

In some cases the employer may reimburse the owner-operator for an amount towards payment of the replacement driver or helper. The owner-operator may decide to pay the replacement driver or helper an amount over and above the amount being reimbursed by the employer. In these cases, the employer is responsible to pay premiums on the total amount paid to the replacement driver or helper.

### **If there is a work injury**

- If the owner-operator is injured, the company is responsible to fulfil its obligations under the Act (re-employment, early and safe return to work, and health and safety obligations, etc.). An owner-operator is not required to arrange or fund his/her own early and safe return to work (ESRTW) program.
- If a replacement driver or helper is hired, whether by the employer or the owner-operator, that replacement driver or helper is provided with similar protection under the Act if injured.
- The owner-operator may also be entitled to loss of earnings benefits if the injury prevents him/her from doing the regular job or requiring the provision of a replacement driver or helper.

### **Benefit entitlement**

- If the owner-operator is completely unable to work due to the work injury, the WSIB would pay the owner-operator full loss of earnings benefits (100% LOE).
- When the owner-operator has recovered sufficiently to return to work, further benefits will depend on the worker's actual earnings or the degree that worker is limited in performing the pre-injury job.
- If the owner-operator can return to full pre-accident work, LOE benefits would stop.
- If the owner-operator can return to driving, but requires assistance to load or unload, a helper could be hired. In such cases, the WSIB could pay the owner-operator to offset the cost of hiring the helper. Prior to January 1, 1998, this was called Temporary Partial Helper's Difference.

### **Helper's Difference**

Although not identified in the Loss of Earnings (LOE) policies, the concept of helper's difference could still be applied to accidents on or after January 1, 1998. That is, an injured worker (owner-operator) returns or continues to work but hires a helper to assist and pays the helper accordingly. The WSIB will reimburse the worker based on what is being paid to the helper (verified by statements or receipts), provided it does not exceed 85% of the worker's net average earnings (NAE). The benefit would be calculated using the gross wage of the helper and the net claim code of the claim to generate a NAE. The amount paid is then 85% of the difference between the pre-injury and helper NAE's.

Of course, since the owner-operator is also working, it is not expected that the helper's earnings would result in an LOE payment of close to 100%. The higher the helper's difference payment is, the more likely entitlement to the benefit would have to be reconsidered.

Once the level of benefit is determined, the

second issue could be who pays for the helper. If the employer pays the helper, rather than the owner-operator, this can be treated as an advance and the WSIB can reimburse the employer. However, based on the 1996 employer advances clarification, the employer in this case could choose to refuse the reimbursement. In such cases, there would be benefit entitlement, but no payments made as long as the employer refuses reimbursement.

### **Practical scenarios**

Jason owns and operates a truck. He has not completed the WSIB's test as an independent operator, and is reported as a worker by his employer. He is paid \$1400 a week to deliver goods on his assigned route.

#### ***Suitable work offered by the employer after a work-related injury***

In view of the fact Jason has not fully recovered from his injury, and has restrictions, his employer offers him suitable work in the employer's warehouse and he accepts this offer.

If there is no loss of earnings doing this job, Jason is not entitled to further LOE benefits.

If there is a loss of earnings, partial LOE benefits can be paid. Regardless of the benefit entitlement, how the delivery route is maintained, or if Jason accepts the warehouse job, is not a WSIB matter.

#### ***Regular work available but helper required***

If Jason was capable of performing most of his pre-injury job (e.g. Jason can drive the truck, but is unable to lift and carry packages weighing 25 pounds or more), he could hire a helper to assist with the lifting. This enables Jason to maintain his route (and the \$1400 it pays), but he incurs the additional cost of paying the helper. As a result, Jason's net employment income has been reduced.

In this case, the WSIB needs to determine how much Jason is paying the helper. If it is determined that the helper is paid \$80 per day, then the WSIB may pay Jason partial LOE benefits to compensate him for hiring the helper at that rate. If the employer decides to reimburse Jason \$30 per day for the helper, then this can be considered a partial advance and the WSIB splits the payment. The employer could refuse the reimbursement. However, the entitlement to pay the wages of the helper still exists.

The replacement driver is considered a worker of the employer (the company), not Jason. The company is responsible for reporting and paying premiums on the replacement driver's earnings (\$80 per day).

#### ***What happens if the helper's payments are significant?***

Returning to the driving job may be the owner-operator's preference, in order to protect his route, but how significant is the cost of hiring a helper or a replacement, versus the warehouse job? For example, if the earnings of the warehouse job are lower than the driving job, but are not low enough to generate an LOE benefit (by virtue of the over maximum pre-injury earnings), decision-makers may have difficulty justifying the payment of LOE benefits should the owner-operator return to the driving job and expects payment for the helper. In this case, the owner-operator may have to accept the warehouse job or, alternatively, absorb the costs of the helper, if he/she is really intent on returning to the driving job.

However, if the warehouse job was initially provided and accepted by the owner-operator and if some time later he/she fully recovers, the employer may then have to allow the owner-operator to return to the pre-injury delivery job.

### ***Long-term suitable work required***

Regardless of whether the owner-operator returned to driving with a helper, or returned to suitable work in the warehouse, and the WSIB agreed to pay benefits, that entitlement could continue for the long-term.

If at any point the employer could not continue to provide this work, then the WSIB may have to consider an LMR assessment, particularly if the employer was forced to lay the owner/operator off. Also, if the employer had been advancing all or part of the payments for a helper, and stopped the advance, the owner-operator would be directly entitled to receive the LOE benefit.

*Benefits Policy / Revenue Policy Branch*

*July 2001*