

# **WORKPLACE SAFETY & INSURANCE BOARD BENEFITS**

## **What You Need to Know When Your LTD Client Has Been Injured at Work**

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### **Introduction**

The WSIB provides many types of benefits to an injured worker, chief among them being:

- a) benefit for Loss of Earnings (LOE)
- b) Non-Economic loss (NEL) to workers who suffer a Permanent Impairment
- c) Loss of Retirement Income (LRI) benefit
- d) Health Care Benefits
- e) Labour Market Re-Entry Services (retraining)

Most LTD policies mandate repayment of the LTD benefits paid where the recipient receives WSIB income replacement benefits for the same time period under the “offset” or “co-ordination of benefits” provisions. The purpose of such provisions is to reduce, where possible, the amount of LTD benefits the insurer will be required to pay out.

The interplay between WSIB and Long Term Disability becomes complicated where pre-existing or other non-work related illnesses or disabilities manifest themselves. The LTD carrier may argue that the disability is work-related and not an LTD issue while WSIB makes the opposite argument. As well, given that not all benefits paid out by the WSIB are for Loss of Earnings, the implications for counsel become more significant when WSIB pays out a large retroactive award following a lengthy period of appeal. If the Claimant has been in receipt of LTD benefits for some time, LTD insurers may claim as against retroactive payments for things other than the Loss of Earnings benefits against which they are contractually entitled to. A careful review of the repayment and/or subrogation sections of any LTD policy is essential to advising clients also pursuing WSIB benefits.

### **Offset Generally**

The inability to “double dip” is written into most policies and should surprise no one. Difficulties can arise, however, when the Worker’s Comp benefits are awarded **after** an LTD

claim has been established. Counsel must be vigilant to ensure LTD insurers only claim as against awards for Income Replacement ie. Loss of Earnings Benefits

***Neves v. Mutual Life Assurance Company of Canada, [2002] N.S.J. No. 3 (C.A.)***

- For a portion of the claim, Worker's Comp monthly benefit of \$927 and CPP Disability monthly benefit of \$713.07 provided the claimant a combined monthly benefit of \$1,640.07 which exceeded the LTD benefit of \$1,485.53 by \$154.54 per month. The LTD claim was totally offset initially
- The Worker's Compensation temporary benefit was cut, however the CPP Disability benefit continued
- On appeal, the insurer argued that receipt of collateral benefits should be calculated cumulatively (so as to offset against future benefits) or monthly
- COURT HELD: combined value of the amount of the collateral benefits for those months when both Worker's Comp and CPP Disability were received could not be offset as against the claim for partial LTD benefits after the date the Worker's Comp benefit ended

**Offset of retroactive (vs. future) Income Loss payments of workers' compensation against LTD benefits**

***Sun Life Assurance Company of Canada v. Halla, [1994] I.L.R. par. 1 – 3012 (A.B.Q.B.).***

- Court considered the issue whether retroactive payments for pension and workers' compensation should be offset against disability insurance payments
- Sun Life commenced an action for alleged overpayments it had made to Halla pursuant to a Long Term Disability insurance policy
- Halla had three accidents at work – on April 9, 1987, January 12, 1988 and January 10, 1989.
- It was third injury that was relevant to this action
- Halla applied for LTD with Sun Life in January 1990
- In October 1992, Halla began receiving CPP benefits, including payment covering period from November 1989
- In February 1993, after an appeal, Halla recovered workers' compensation benefits including a payment covering the payment from May 1990
- Sun Life's policy provided that pension and workers' compensation benefits were to be offset against the disability insurance benefits
- COURT HELD: that Sun Life could offset both CPP and workers' compensation benefits
- Although Halla had not been receiving pension and workers' compensation benefits from January 1990 when the disability insurance benefits began, but received them later as a lump sum, both the workers' compensation benefits did apply to the time when the disability insurance was being repaid. Court said at p. 2637:

*The date of receipt by the defendant of a payment by Workers' Compensation or Canada Pension is not the relevant fact. What is relevant is the period of time which that payment is for. There must be a coincidence of the time periods for which LTD and Workers' Compensation and Canada Pension are paid. If there is a coincidence of time periods, there is a setoff.*

***Confederation Life Insurance Co. v. Waselenak, [1997] A.J. No. 1204 (A.B.Q.B.).***

- Confederation provided LTD benefits to Waselenak when he became totally disabled in 1985
- He claimed benefits under the policy and from WCB
- Board accepted W's claim for medical expenses only; W appealed seeking income replacement
- Policy entitled Confederation to deduct benefits by the amount of benefits received by W however, since it appeared the appeal to WCB would not be done for some time, Confederation made full payments under the LTD policy; a reimbursement agreement was signed
- Five years later (1990), W informed Confederation that the Board had awarded him money and it could discontinue disability payments however did not inform of retroactive award
- Confederation requested return of overpayment; no action was taken by W; W declared bankruptcy in 1995
- COURT HELD: parties had a mutual understanding that monthly LTD benefit would be reduced if W received government benefits.
- COURT HELD: any ambiguity in the wording of the offset clause was resolved in favour of the insurer by virtue of the repayment agreement
- COURT HELD: W owed Confederation a Fiduciary Duty to inform it of the retroactive award. W owed Confederation retroactive payments of \$64,802.09; debt was NOT relieved by the bankruptcy given W's defalcation

**Other Worker's Compensation benefits**

Under the WSIB legislation, there are many benefits available to injured workers which are not meant to be an income replacement. For example, the Non-Economic Loss (NEL) payment is awarded if the compensable injury results in a Permanent Impairment. Similarly, any payments made under the WSIB regime for therapy, prescriptions, medical rehabilitation, and labour market re-entry services are NOT to reimburse for Loss of Income. A careful review of the Offset provision of the insurance policy is required as well as any Repayment Agreement proffered to ensure the Insurer does not seek repayment of WSIB benefits to which it is not entitled.

***Cameron v. Criminal Injuries Compensation Board, [2000] O.J. No. 1054 (S.C.J.)***

- Claimant injured while employed as a Corrections Officer; received both LTD and WSIB benefits
- Claimant elected to receive his NEL benefit (awarded for Permanent Impairment) as a monthly benefit as opposed to a one-time lump sum payment

- CICB deducted from its award amounts which Cameron received from WCB for Non-Economic Loss
- Cameron wrote the Board advising that its benefits (NEL award of \$12,000) from WCB were already being deducted from his LTD benefits and he argued he was therefore losing his benefits twice
- the collective agreement between OPSEU and the Government of Ontario contained articles that allowed the Long Term Income Protection (LTIP) insurance carrier to deduct the NEL in monthly increments. Deduction by the insurance carrier, marked "\$87.33 (WCB NEL award)", took place every month until Claimant attained retirement age of 65 when the LTIP stopped and so, too, the monthly deduction of \$87.33.
- \*\* Case did not reproduce contractual provisions upon which the LTD insurer based its claim for repayment. Case is significant in that it appears to permit evidence from documents extraneous to the Policy (ie. Collective Agreement) in support of the insurer's repayment claim \*\*

### **Contentious areas in interplay between WSIB and LTD benefits**

#### **a) Multiple Injuries/illnesses (ie. Combination of Worker's Comp and non-Worker's Comp injuries giving rise to Long-Term Disability) and their "Work-Relatedness"**

Another difficulty in sorting out the interplay between WSIB and LTD benefits is that WSIB benefits are frequently denied based on the injury or illness not having arisen in the course of employment. In obvious cases, causation will not be difficult to sort out e.g. injury that clearly occurs during a workplace accident such as worker falling off a scaffold or being struck by forklift at work

For LTD carriers, the significance is if WSIB does not recognize injury or illness as being work related, no LOE (loss of earnings) will be payable and claimant will be looking to LTD carrier for payment of disability benefits. When the WSIB subsequently approves a claim, disputes can arise not only over whether retroactive benefits received coincide to the time period for which LTD benefits have been paid, but whether they relate to the "same disability", therefore triggering a repayment

#### ***Teamsters (Local 213) Health and Welfare Trust (Trustees of) v. Worthing, [2005] B.C.J. No. 1759 (B.C.S.C.).***

- The Claimant, Worthing, worked for many years as a truck driver. He suffered a knee injury which took him off work
- Initially he received Worker's Compensation benefits for approximately 2 years which benefits were then terminated
- He applied for and received STD (52 weeks) and then LTD benefits (ongoing). Aware W had received Worker's Comp in the past, the insurer awarded LTD and forwarded W correspondence reminding him they expected repayment should Worker's Comp award any future lump retroactive benefits

- W did repay some \$4,500 of benefits received from Worker's Comp paid following recuperation from a knee surgery but denied further benefits; W pursued an appeal for further Worker's Comp benefits and received LTD benefits for a further 10 years (from April 1991 to October 2001)
- In January 1992 W injured his back while receiving treatment for the compensable knee injury – the Worker's Comp Board did NOT recognize the back injury as part of his Worker's Comp claim
- After pursuing the Worker's Comp appeal for 11 years, W was ultimately awarded further Worker's Comp, including over \$91,000 for retroactive benefits from 1991 to 2001, plus \$67,000 in interest; the insurer sought repayment of \$91,000 in LTD benefits it paid out over the same period of time
- At Trial the Insurer relied on two grounds for repayment: 1) a Repayment Agreement W signed, and 2) a clause in the contract which provided as follows:

*Benefits will be reduced by any benefit or income the Member receives or is entitled to apply for and receive in respect of himself for the same Disability from the following sources which are considered first payor:-*

*(i) The Worker's Compensation Act or any legislation of similar purpose ...*

(Emphasis added)

- COURT HELD: Repayment Agreement only applied to the 52 weeks of STD benefits. Due to Worker's Comp award, W obliged to repay benefits received from insurer pursuant to contractual clause; however, W only obliged to repay 50% of benefits received from August 2003 onward being the date both the knee and back injuries were diagnosed
- from August 1993 onward the insurer did not pay benefits solely *for the same disability* as the Worker's Comp related disability upon which the claims was initially established
- Obiter Dicta: the Court noted in the contract the absence of a clause such as that found in *Sun Life Assurance Co. of Canada v. Halla*, noted above, obliging repayment where LTD benefits are paid to the Claimant by reason of the "*same or subsequent disability*"

**b) Concurrent entitlement to Worker's Comp or Civil action – consequences of Elections to pursue civil tort remedies**

- Sections 26 to 30 of the *Workplace Safety & Insurance Act*, reproduced in the Appendix, include the provisions whereby many rights of action are extinguished and also establishes the procedure whereby an injured worker can elect to received Worker's Comp or pursue a civil action where he has a concurrent entitlement
- Question: whether an election by a claimant to pursue tort claim (as opposed to a WSIB claim) entitles an LTD insurer to deduct WSIB benefits in any event because Claimant was "entitled" to receive Worker's Comp

***Abdulrahim v. Manufacturers' Life Insurance Co., [2003] O.J. No. 2592 (S.C.J.)***

- Following injury at work, Claimant received Loss of Earnings (LOE) benefits from the WSIB; shortly after establishing this claim, Claimant also applied for LTD benefits from the Employer's Group insurer
- After receiving LOE for 4 months, Claimant advised WSIB of intention to "de-elect" to receive LOE and commenced a tort claim against a Third party. Upon advising the WSIB of the intention to pursue the tort action, WSIB benefits ceased
- In approving the LTD claim, insurer nonetheless advised it would offset the quantum of the WSIB LOE benefit both retroactively and ongoing, even though Claimant no longer receiving LOE from WSIB
- insurer relied on an offset provision in the contract which provided as follows:

*The Amount of Disability Benefit payable is the Benefit Amount shown in the Benefit Schedule, less any amount of benefits the Employee receives, or is entitled to receive, from the following sources for the same or related Disability:*

*a) Workers' Compensation or similar coverage;*

- The LTD Policy also contained a Subrogation clause which provided as follows:

*If an insured suffers personal injury or loss for which he has a right to bring action for damages against a third party, Manulife Financial shall be subrogated to the insured person's rights to recover damages to the extent that it may be obligated to pay benefits to the insured person. In such case, Manulife Financial will require the insured person to complete a subrogation reimbursement agreement. Manulife Financial has the right to suspend payment of benefits until the completed agreement is received.*

Upon judgement or settlement for damages, the insured person shall reimburse Manulife Financial for benefits paid or payable.

- COURT HELD: that the contract in question was a "private contract of adhesion" and, as such, established principles of interpretation of insurance contracts should apply, namely that entitlement to coverage be interpreted broadly and exclusionary clauses be interpreted narrowly (*Contra Proferentum* applied – Court distinguished the finding of the Supreme Court of Canada in *Madill v. Chu 71 D.L.R. (3d) 295* where *Contra Proferentum* was NOT applicable as the impugned Policy clauses were statutorily mandated and NOT drafted by the Insurer)
- At para. 63 of the decision Court found: ***"Having elected to pursue a tort claim before the courts, Mohamed will have no legal right to WSIA benefits (at least until judgment or settlement, in accordance with the "top-up" provisions in s. 30(14) of the WSIA). He is precluded from claiming benefits while pursuing his action"***

- once the claimant had exercised the right to sue in tort, he was no longer “entitled” to receive those benefits and thus, the insurer was not entitled to offset those benefits pursuant to the exclusionary clause
- the subrogation clause served to fully protect the insurers repayment of benefits paid from any damages awarded in the tort action

***Richer v. Manulife Financial, (2007), 85 O.R. (3d) 598 (C.A.)***

- offers a different analysis of the phrase “entitled to receive”
- Claimant was injured in a motor vehicle accident while in the course of his employment employed as a truck driver and loader with City of Toronto
- Claimant also sought LTD benefits provided through the employer. The policy included a benefit plan that provided that if a city employee became totally disabled and met the criteria set out in the plan, the administrator would pay a monthly benefit on behalf of the city
- following the accident, the Claimant made application for WSIB benefits, was advised by WSIB of his Concurrent Entitlement, and then Elected to proceed with a civil action having received no benefits at the time of Judgment
- Manulife denied coverage relying on Contract provisions which included the following:

*The amount of Monthly Benefit payable to the Employee shall be reduced by any payment to which the disabled Employee is entitled for that month:*

*(a) for loss of time under any Workers' Compensation Act other than amounts received for medical expenses and prosthetic appliances, or under a comparable legislative or insurance provision;*

*(b) under the disability benefit provisions of the Canada or Quebec Pension Plan, excluding any benefit that the Employee is entitled to receive for dependent children;*

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*...*

***A disabled Employee, in order to receive benefits under this Plan must make application***

***for any disability payments for which he may be eligible under any Workers' Compensation Act or comparable legislative or insurance provision or under the Canada***

***or Quebec Pension Plan, and any other benefits for which he may be eligible under (c)***

***or (d) above, and until the amount of those payments has been established the Administrator reserves the right to make the reductions described above on the basis of***

***the estimated amount of those payments. Such estimated amounts must be mutually***

***satisfactory to the City Treasurer of the Employer and the Administrator. When the***

*amount of such disability benefits has been established, the Administrator will adjust the reductions previously made to correct the amount. [Emphasis added.]*

- Manulife brought a motion for determination of the plaintiff's entitlement to LTD benefits after electing to proceed with a civil action and any offset amounts of WSIB benefits the plaintiff would have received had he not elected to sue
- MOTIONS JUDGE HELD: the Claimant was not entitled to receive any LTD benefits; he distinguished *Abdulrahim* with *Richer*, concluding that subrogation rights did not exist in the latter by reason of s. 267.8 of the *Insurance Act*, R.S.O. 1990, c.I.8
- MOTIONS JUDGE FURTHER HELD: held that extending *Abdulrahim* to the policy would result in the insurer funding an unrecoverable liability which the policy was not designed to cover
- COURT OF APPEAL: reversing Motions Judge, HELD: i) Claimant was in fact, eligible to receive LTD benefits under the policy AND ii) Manulife entitled to deduct value of benefits to which Claimant may be entitled
- Wording in Insurance Contract that Employee "*must make application for any disability payments (under) Worker's Compensation*" was a Condition Precedent for consideration of entitlement under the LTD contract
- By applying for benefits from WSIB, then electing to pursue civil remedy, Claimant satisfied the Condition Precedent
- With respect to the issue of whether the LTD benefits were subject to an offset of the amount of WSIB benefits the plaintiff would have received, the Court of Appeal understood the Supreme Court of Canada's interpretation of the phrase "entitled to receive benefits" in *Madill v. Chu (1976)*, [1977] 2 S.C.R. 400 (S.C.C.) to mean:

... that the amount of reduction of payments under the plan for WSIB benefits which the [plaintiff] is "entitled to receive" is not the amount of WSIB benefits that the [plaintiff] receives but the amount of such benefits that the [plaintiff] could have received had he exercised his entitlement for them. In this case, the amount by which the monthly benefit payable to the employee is reduced "by any payment to which the disabled Employee is entitled for that month" refers to the amount of WSIB benefits to which the appellant would have been entitled had he not elected to proceed with his civil action. This interpretation gives effect to the observation of Ritchie J. in *Madill v. Chu*, at 410, that an insurer's obligation under the policy should not be "varied adversely to its interest after the happening of the event insured against by the independent act of the insured". [emphasis in original]

- **In light of the provisions of s. 30(14) of the Workplace Safety & Insurance Act (see appendix below), by applying for benefits from WSIB, then electing to pursue civil remedy, Claimant remains "entitled" to Worker's Compensation benefits. After a Court Judgment or a settlement of the tort claim (with WSIB approval) the Claimant still has right to further Worker's Comp benefits**

## APPENDIX

### Workplace Safety and Insurance Act, 1997

#### S.O. 1997, CHAPTER 16 SCHEDULE A

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#### RIGHTS OF ACTION

##### **No action for benefits**

[26. \(1\)](#) No action lies to obtain benefits under the insurance plan, but all claims for benefits shall be heard and determined by the Board. 1997, c. 16, Sched. A, s. 26 (1).

##### **Benefits in lieu of rights of action**

[\(2\)](#) Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer. 1997, c. 16, Sched. A, s. 26 (2); 1999, c. 6, s. 67 (6); 2005, c. 5, s. 73 (6).

##### **Application of certain sections**

[27. \(1\)](#) Sections 28 to 31 apply with respect to a worker who sustains an injury or a disease that entitles him or her to benefits under the insurance plan and to the survivors of a deceased worker who are entitled to benefits under the plan. 1997, c. 16, Sched. A, s. 27 (1).

##### **Same**

[\(2\)](#) If a worker's right of action is taken away under section 28 or 29, the worker's spouse, child, dependant or survivors are, also, not entitled to commence an action under section 61 of the *Family Law Act*. 1997, c. 16, Sched. A, s. 27 (2); 1999, c. 6, s. 67 (7); 2005, c. 5, s. 73 (7).

##### **Certain rights of action extinguished**

[28. \(1\)](#) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

### **Same, Schedule 2 employer**

(2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.
2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

### **Restriction**

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

### **Exception**

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment. 1997, c. 16, Sched. A, s. 28.

### **Liability where negligence, fault**

**29. (1)** This section applies in the following circumstances:

1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.
2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

### **Same**

(2) The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.

### **Determination of fault**

(3) The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.

**Same**

(4) No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action. 1997, c. 16, Sched. A, s. 29.

**Election, concurrent entitlements**

30. (1) This section applies when a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease. 1997, c. 16, Sched. A, s. 30 (1).

**Election**

(2) The worker or survivor shall elect whether to claim the benefits or to commence the action and shall notify the Board of the option elected. 1997, c. 16, Sched. A, s. 30 (2).

**Same**

(3) If the worker is or was employed by a Schedule 2 employer, the worker or survivor shall also notify the employer. 1997, c. 16, Sched. A, s. 30 (3).

**Same**

(4) The election must be made within three months after the accident occurs or, if the accident results in death, within three months after the date of death. 1997, c. 16, Sched. A, s. 30 (4).

**Same**

(5) The Board may permit the election to be made within a longer period if, in the opinion of the Board, it is just to do so. 1997, c. 16, Sched. A, s. 30 (5).

**Same**

(6) If an election is not made or if notice of election is not given, the worker or survivor shall be deemed, in the absence of evidence to the contrary, to have elected not to receive benefits under the insurance plan. 1997, c. 16, Sched. A, s. 30 (6).

**Same, minor**

(7) If the worker or survivor is less than 18 years of age, his or her parent or guardian or the Children's Lawyer may make the election on his or her behalf. 1997, c. 16, Sched. A, s. 30 (7).

**Same, incapable person**

(8) If a worker is mentally incapable of making the election or is unconscious as a result of the injury,

- (a) the worker's guardian or attorney may make the election on behalf of the worker;
- (b) if there is no guardian or attorney, the worker's spouse may make the election on behalf of the worker; or

- (c) if there is no guardian or attorney and if no election is made within 60 days after the date of the injury, the Public Guardian and Trustee shall make the election on behalf of the worker. 1997, c. 16, Sched. A, s. 30 (8); 1999, c. 6, s. 67 (8); 2005, c. 5, s. 73 (8).

### **Same**

- (9) If a survivor is mentally incapable of making the election,
  - (a) the survivor's guardian or attorney may make the election on behalf of the survivor; or
  - (b) if there is no guardian or attorney and if no election is made within 60 days after the death of the worker, the Public Guardian and Trustee shall make the election on behalf of the survivor. 1997, c. 16, Sched. A, s. 30 (9).

### **Subrogation, Schedule 1 employer**

(10) If the worker or survivor elects to claim benefits under the insurance plan and if the worker is employed by a Schedule 1 employer or the deceased worker was so employed, the Board is subrogated to the rights of the worker or survivor in respect of the action. The Board is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms. 1997, c. 16, Sched. A, s. 30 (10).

### **Same, Schedule 2 employer**

(11) If the worker or survivor elects to claim benefits under the insurance plan and if the worker is employed by a Schedule 2 employer or the deceased worker was so employed, the employer is subrogated to the rights of the worker or survivor in respect of the action. The employer is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms. 1997, c. 16, Sched. A, s. 30 (11).

### **Surplus**

(12) If the Board or the employer pursues the action and receives an amount of money greater than the amount expended in pursuing the action and providing the benefits under the insurance plan to the worker or the survivor, the Board or the employer (as the case may be) shall pay the surplus to the worker or survivor. 1997, c. 16, Sched. A, s. 30 (12).

### **Effect of surplus**

(13) Future payments to the worker or survivor under the insurance plan shall be reduced to the extent of the surplus paid to him or her. 1997, c. 16, Sched. A, s. 30 (13).

### **If worker elects to commence action**

(14) The following rules apply if the worker or survivor elects to commence the action instead of claiming benefits under the insurance plan:

1. The worker or survivor is entitled to receive benefits under the insurance plan to the extent that, in a judgment in the action, the worker or survivor is awarded less than the amount described in paragraph 3.
2. If the worker or survivor settles the action and the Board approves the settlement before it is made, the worker or survivor is entitled to receive benefits under the insurance plan to the extent that the amount of the settlement is less than the amount described in paragraph 3.
3. For the purposes of paragraphs 1 and 2, the amount is the cost to the Board of the benefits that would have been provided under the plan to the worker or survivor, if the worker or survivor had elected to claim benefits under the plan instead of commencing the action. 1997, c. 16, Sched. A, s. 30 (14).

### **Determining amount**

[\(15\)](#) For the purpose of determining the amount of benefits a worker or survivor is entitled to under subsection (14), the amount of a judgment in an action or the amount of a settlement shall be calculated as including the amount of any benefits that have been or will be received by the worker or survivor from any other source if those benefits,

- (a) have reduced the amount for which the defendant is liable to the worker or survivor in the action; or
- (b) would have been payable by the defendant but for an immunity granted to the defendant under any law. 1997, c. 16, Sched. A, s. 30 (15).