

**POLICY 5.81**

<b>Section:</b>	<b>Time-loss Eligibility</b>	<b>Effective:</b>	<b>2/9/98</b>
<b>Title:</b>	<b>Policy 5.81 - Paying Loss of Earning Power Compensation</b>	<b>Cancel:</b>	<b>Policy 5.81, dated 5-7-93</b>

**See Also:** [RCW 51.32.090](#) (temporary disability benefits)  
[RCW 51.32.095](#) (voc rehab services)  
Policy 4.41 (wage definition)  
Policy 4.42 (wages for sole proprietors)  
Policy 4.71 (concurrent payment of time-loss)  
Policy 16.35 (time-loss compensation on reopenings)  
Hunter vs. Dept. of L&I, 43 Wn. 2d 696 (1953) (LEP compensation)  
Fochtman vs. Dept. of L&I, 7 Wn. App. 286 (1972) (loss of earning capacity and PPD)  
Davis vs. Bendix, 82 Wn. App. 267 (1996) (LEP and aggravation)

**Approved by:** \_\_\_\_\_  
**Ron Gray for the Insurance Services Policy Council**

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This policy applies when determining whether to pay partial time-loss compensation benefits called “loss of earning power” (LEP) compensation.

**1. Worker may be entitled to LEP compensation when earning power has decreased.**

A worker may be entitled to LEP compensation when the worker’s earning power has decreased as a result of an industrial injury or occupational disease. (See [RCW 51.32.090\(3\)](#).) The law defines earning power as the worker’s ability to earn income as a result of labor.

**2. Adjudicator determines whether worker qualifies for LEP compensation.**

Using the following criteria, the adjudicator determines if the worker is eligible for LEP compensation:

**For injuries on or after May 7, 1993:**

- The worker must have a loss of earning power exceeding five percent of wages at the time of injury; **and**
- Medical certification must indicate that the worker's loss of earning power is due to the industrial injury or occupational disease; **and**
- The worker must be working at any employment for income, salary, wages, or commission. Employment may include light, transitional, or modified duty work as well as on-the-job training in an approved vocational plan.

If the doctor approves a written light duty or transitional job description offered to the worker and the worker chooses **not** to accept the work, he or she **is not** entitled to LEP or time-loss compensation.

**Exception:**

- 2a. If the employer of injury **does not** reinstate all health and welfare benefits and the worker refuses the job, the adjudicator pays time-loss compensation. (See [RCW 51.32.090\(4\)\(k\)](#).) (Health and welfare benefits include, but are not limited to, medical, dental, life insurance and retirement benefits.) This provision **does not** apply when the worker returns to light duty with a new employer or when it is against the terms of the employer of injury's collective bargaining agreement or benefit program.

**For injuries prior to May 7, 1993:**

- The worker must have a loss of earning power exceeding five percent of wages at the time of injury; **and**
- Medical certification must indicate that the worker's loss of earning power is due to the industrial injury or occupational disease; **and**
- The worker must be either **working or able to return to work** at any employment for income, salary, wages, or commission. Employment may include light, transitional, or modified duty work as well as on-the-job training in an approved vocational plan.

If the doctor approves a written light duty or transitional job description offered to the worker and the worker chooses **not** to accept the work, the worker is only entitled to LEP based on the wages he or she would have earned at that work.

**3. Adjudicator pays LEP until medical fixity if worker remains eligible.**

As long as the worker remains eligible for benefits, the adjudicator pays LEP compensation until medical fixity. Medical fixity occurs when the doctor finds that the worker has reached maximum medical improvement. In most cases, the adjudicator discontinues LEP compensation at the time of medical fixity.

**Exception:**

3a. The adjudicator pays LEP compensation beyond medical fixity until “legal fixity” in the following situations:

- When the employer of injury returns the worker to light duty work (See [RCW 51.32.090\(4\)\(b\)](#)); **or**
- When the worker is participating in, or has recently completed, an on-the-job training or vocational rehabilitation training program. (See [RCW 51.32.095](#).)

Legal fixity occurs when the department issues an Order closing the worker’s claim. A protest to the department’s closing Order does not extend the period of payment for LEP benefits if the department later affirms the Order.

**4. Adjudicator calculates LEP compensation by comparing updated wages to the current wage or earning potential.**

There is one method for calculating LEP when the date of injury is **prior to** May 7, 1993, and an additional method when the date of injury is **on or after** May 7, 1993. (See Attachment 5.81-A for these methods.)

**For injuries prior to May 7, 1993**, LEP compensation is a percentage of the difference between the wage the worker earned at the time of injury and the wage the worker is earning or capable of earning.

**For injuries on or after May 7, 1993**, LEP compensation is based on 80 percent of the actual difference between the workers present wages and earning power at the time of injury. For injuries on or after May 7, 1993, the adjudicator does **both calculations** and uses the method that gives the larger LEP benefit to the worker.

For both methods, the adjudicator must use updated wages to accurately measure loss of earning power. (Attachment 5.81-A shows the formulas for these methods.)

**5. Worker may be entitled to LEP when missing work due to an unrelated condition.**

**When employer pays sick leave** - When a worker who is receiving LEP compensation misses work due to an **unrelated condition** and the employer pays sick leave, the adjudicator **includes** sick leave pay in the worker's earnings for the period of LEP eligibility.

**When employer does not pay sick leave** - When a worker who is receiving LEP compensation misses work due to an **unrelated condition** and the employer **does not** pay sick leave, the adjudicator calculates LEP using the wages that the worker would have received if he or she had worked during the period of LEP eligibility.

**6. Worker is not entitled to LEP while on sick leave due to the industrial injury.**

If the worker misses work **due to the industrial injury** and the employer pays full wages in the form of sick leave, the adjudicator **does not** pay LEP or time loss compensation for that period of time. (See [RCW 51.32.090\(8\)](#) and Policy 5.12, "Paying Time-Loss Compensation When Employer Also Pays Worker.")

**Exception:**

- 6a. If the worker misses work **due to the industrial injury** and the employer pays less than full wages in the form of sick leave, the adjudicator pays LEP using sick leave as earnings for the period of eligibility.
- 6b. If the worker misses work **due to the industrial injury**, and the employer pays full or partial wages in the form of sick leave and has a **buy back policy**, the adjudicator pays full time-loss compensation.

**NOTE:** A "buy-back" policy means that the employer has a contract with the worker where the worker can buy back used sick leave with LEP or time-loss compensation. (See Policy 5.12, "Paying Time-Loss Compensation When Employer Also Pays Worker.")

**7. Adjudicator does not consider vacation pay part of LEP wages.**

When a worker receives vacation pay during a period of LEP compensation eligibility, the adjudicator does not consider vacation pay part of the LEP wages.

**Exception:**

7a. If vacation pay is provided for a period of time when the worker was capable of working (and the status of the industrial injury has not changed), the vacation pay should be included in the LEP calculation.

**8. Adjudicator may pay provisional LEP compensation.**

When addressing claim validity or when reopening a claim, the adjudicator may pay provisional LEP compensation on an interlocutory Order. (See Policy 16.35, "Payment of Provisional Time-loss on Reopening Applications.")

**9. Adjudicator does not use LEP compensation when calculating wages for new claim.**

When a worker receiving LEP compensation sustains a new injury, the adjudicator does not consider LEP compensation paid to the worker when calculating gross monthly wages on the new claim. [See [RCW 51.08.178](#) (computing wages), Policy 4.41 (wage definition), and Policy 4.71 (concurrent time-loss).]

**10. When reopening a claim closed with a PPD award, base LEP compensation on earning power at claim closure.**

If the department reopens a claim that was closed with a PPD award, the adjudicator pays LEP compensation based on the earning power of the worker at the time of the most recent claim closure. The adjudicator **does not** use the earning power of the worker's job at the time of the original injury.

For further information about this or other workers' compensation policies, you may contact the Insurance Services' policy program at (360) 902-6932.