Calculation of periodical payments and compensation for permanent incapacity

According to the Employees’ Compensation Ordinance (the Ordinance), the amount of employees’ compensation payable (including temporary and permanent incapacity) to the injured employee is calculated with reference to his ‘monthly earnings’.

Definition of ‘earnings’

According to the Ordinance, ‘earnings’ includes:

- cash wages;
- the value of any privilege or benefit which can be estimated in cash, e.g. food, fuel or quarters, if as a result of the accident he is deprived of any of them;
- overtime payments or other special remuneration, whether by way of bonus, allowance or otherwise, if it is of a constant nature; and
- customary tips.

But does not include:

- remuneration for intermittent overtime;
- casual payments of a non-recurrent nature, the value of traveling allowances or concession; or
- the employer’s contributions to provident funds.

Method of calculating monthly earnings

<table>
<thead>
<tr>
<th>Calculation Method</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>i.</td>
<td>the earnings for the month immediately preceding the date of the accident; or</td>
</tr>
<tr>
<td>ii.</td>
<td>the average monthly earnings for the previous 12 months of employment (or any lesser period if the employee has not been so long employed);</td>
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</table>

[Note: whichever calculation is more favourable to the employee.]

- Section 11 of the Ordinance provides that where an injured employee still suffers temporary incapacity beyond 12 months (and 24 months) after the date of accident, his monthly earnings should be adjusted for the purpose of calculating the periodical payments and compensation for permanent incapacity beyond the 12-month (and 24-month) period. The adjustment should be made in accordance with the average rate of increase in the earnings of other employees of similar earning capacity employed by the same employer in similar employment as at the end of the above mentioned 12-month (and 24-month) period. If the employer does not employ such other employees, the adjustment should be made in accordance with the rate of increase in the Consumer Price Index (A) at the end of the period concerned.

- The statutory minimum wage (SMW) comes into force on 1 May 2011. The SMW rate was $32.5 per hour for the period between 1.5.2015 and 30.4.2017. It is revised to $34.5 per hour with effect from 1.5.2017. Wages payable to an employee in respect of any wage period should be no less than the SMW rate on average for the total number of hours worked. If the wages payable to the employee in respect of the wage period are less than the minimum wage, he is entitled to be paid the difference (i.e. additional remuneration). The employer is required to include the amount of additional remuneration (if any) in calculating the monthly earnings for the purpose of employees’ compensation.

- For the purpose of assessing compensation payable, the minimum rate of earnings should not be less than $4,090 per month.

Other special circumstances such as short period of employment

- If it is impracticable to compute the earnings of such employee at the date of the accident due to the shortness of the time during which the employee has been in the employment, or the casual nature of the employment, or the terms of employment, the employer may make reference to the average monthly amount, during the 12 months previous to the accident, earned by a person of similar earning capacity at the same work employed by the company.

- If there is no such person in the company, the employer may make reference to the average monthly amount, during the 12 months previous to the accident, earned by other person of similar earning capacity employed in the same work in the same district.

- If there is any dispute, the employer and employee should work out a solution in joint hands, or the case shall be adjudicated by the Court. If there exists an employment contract which stipulates the amount of salary and the terms of employment are relatively regular in nature, the employer and employee may make reference to it despite the shortness of the time during which the employee has been in the employment.

**Full-time / part-time employment**

- In case an employee is in full time employment at the time of the accident, the earnings of such employee shall be his earnings in such full time employment.

- However, if the employee is in part time employment at the time of the accident, and he is incapacitated from performing the concurrent full time or part time contracts, the employer should compute his monthly earnings by including his earnings under all such contracts.

**Employee under the age of 18 or under a contract of apprenticeship**

For the purposes of assessing compensation payable in the case of death or permanent incapacity, the earnings should be computed as:

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1 “Month” refers to “calendar month”.

2 The minimum rate of earnings for assessing compensation payable before 1.4.2017 is $3,690.

3 Full time employment means employment for not less than 40 hours during a minimum period of 5 days in any 1 week.
• if the employee is under the age of 18, the amount he would have received upon attaining the age of 18; or
• if the employee is employed as an apprentice, the amount he would probably have received upon the completion of his contract of apprenticeship.

**Calculation of periodical payments**

• Section 10 of the Ordinance stipulates that during the period of temporary incapacity, the employer shall pay the injured employee periodical payments at the rate of 4/5 of the difference between the employee’s monthly earnings at the time of the accident and his monthly earnings during the period of temporary incapacity.

• In general, if there is/are rest day(s) in the sick leave period, the following approach is suggested in counting the number of sick leave:

<table>
<thead>
<tr>
<th>Rest Day</th>
<th>Fixed</th>
<th>With pay</th>
<th>Periodical payments</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓</td>
<td>✓</td>
<td></td>
<td>monthly earnings ÷ 30 x no. of sick leave (including rest day(s)) x 4/5</td>
</tr>
<tr>
<td>✓</td>
<td>x</td>
<td></td>
<td>monthly earnings ÷ no. of working days x no. of sick leave (excluding rest day(s)) x 4/5</td>
</tr>
</tbody>
</table>

• When the employee’s temporary incapacity lasts for more than 24 months or a further period that the Court may allow (that further period shall not be longer than 12 months), he shall no longer be entitled to periodical payments. The employee shall be regarded as having suffered total or partial permanent incapacity and compensation shall be assessed accordingly.

**Calculation of compensation for permanent incapacity**

• Compensation payable for permanent total incapacity resulting from a work injury is calculated with reference to the age and monthly earnings of the injured employee:

<table>
<thead>
<tr>
<th>Age of injured employee</th>
<th>Amount of compensation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 40</td>
<td>96 months’ earnings(^4) or minimum amount of compensation(^5), whichever is higher</td>
</tr>
<tr>
<td>40 to under 56</td>
<td>72 months’ earnings(^4)</td>
</tr>
<tr>
<td>56 or above</td>
<td>48 months’ earnings(^4)</td>
</tr>
</tbody>
</table>

5 Minimum amount of compensation payable for permanent total incapacity:
• Work injuries caused by accidents happening or prescribed occupational diseases contracted on or after 1 April 2017: $464,360
• Work injuries caused by accidents happening or prescribed occupational diseases contracted on any date between 5 March 2015 to 31 March 2017: $426,880

• Where permanent partial incapacity results from the injury, the amount of compensation is a percentage of the compensation payable for permanent total incapacity as is proportionate to the loss of earning capacity caused by the injury:

<table>
<thead>
<tr>
<th>Amount of compensation due to permanent total incapacity</th>
<th>Percentage of permanent loss of earning capacity</th>
</tr>
</thead>
</table>

**Examples of calculating periodical payments**

(Note: the examples below are for illustration of calculating compensation under the Ordinance)

**Example 1**:
- Monthly earnings at the time of accident: $9,000
- No. of work injury sick leave granted: 40 days
- During the sick leave: did not work and had no earnings

The periodical payments are calculated as: $(9,000 ÷ 30 x 40 - 0) ÷ 4/5 = 9,600

**Example 2**:
- Monthly earnings at the time of accident: $3,200
- No. of work injury sick leave granted: 30 days
- During the sick leave: took the first 20 days sick leave and returned to work during the last 10 days sick leave period and earned $1,000

The periodical payments are calculated as:

\[ \frac{(4,090 \times 20 - 0) \times 4/5 + (4,090 \times 10 - 1,000) \times 4/5}{30} = 2,472 \]

**Example 3**: The employee had an accident 4 months after working with the employer,
- Earnings received in the past 4 months: $6,500, $5,800, $6,900 and $6,300
- No. of work injury sick leave granted: 15 days
- During the sick leave: did not work and had no earnings

The periodical payments are calculated as: $(6,375\times 30 \times 4/5 = 2,550

- As the employee was employed for less than 12 months, 4 months’ earnings would be used to calculate the average and the average monthly earnings is more favourable to the employee.

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\(^4\) Monthly earnings are subject to a maximum for the purpose of calculating compensation for permanent total incapacity:
- Work injuries caused by accidents happening or prescribed occupational diseases contracted on or after 1 April 2017: $28,360
- Work injuries caused by accidents happening or prescribed occupational diseases contracted on any date between 5 March 2015 to 31 March 2017: $26,070

\(^5\) Minimum amount of compensation payable for permanent total incapacity:
Example 4: Similar to the situation of example 3, the employee received $5,800, $6,900 and $6,300 in the last 3 months. But for the first month of employment, he only worked 2 days and received $400. The periodical payments are calculated as: 

\[
\frac{6,333.33 \times 30 \times 15}{45} = \frac{2,533.33}{4} = 2,533.33
\]

* Based on the principle of using the amount which can best reflect the monthly earnings of the employee at the time of the accident, the employer may consider disregarding the first month with only 2 working days when calculating the employee’s average monthly earnings. The monthly earnings becomes \(\frac{5,800 + 6,900 + 6,300}{3} = 6,333.33\).

Example 5: The employee was engaged in an industry with unfixed working days and was daily paid (e.g. construction industry). The number of working days for the month preceding the accident was 19 days. The daily wages was $600. The monthly earning of the employee preceding the date of accident was: 

\[
$600 \times 19 = 11,400
\]

Assuming the employee had been employed for 4 months before the accident and the number of working days were 20, 21, 12 and 19 days respectively. The average working day is 18 days per month. The less than 12 months average monthly earnings is calculated as:

\[
$600 \times \left( \frac{20 + 21 + 12 + 19}{4} \right) = 10,800
\]

If the employee was granted 60 days sick leave, during which he did not work and had no earnings, the periodical payments are calculated as:

a) for rest day is fixed and no pay: 

\[
\frac{11,400 \times 26 \times 52}{4} = 18,240
\]

*based on monthly earnings ÷ no. of working days x no. of sick leave (excluding 8 no pay rest days)*

b) for rest day is with pay or unFIXED and without pay: 

\[
\frac{11,400 \times 30 \times 60}{4} = 18,240
\]

*based on monthly earnings ÷ 30 x no. of sick leave (including 8 rest days)*

Example 6: In determining whether bonus, commission or end of year payment etc should be counted in the average monthly earnings, the employer should refer to the agreed time of payment under the employment contract. If the end of year payment is scheduled to be paid in February of next year, assuming the employee injured at work on 31.1.2011, the end of year payment to be included in his 12 months average monthly earnings is the end of year payment for 2009 which was paid in February 2010.

Example 7: The monthly earnings of an employee immediately preceding the date of accident was $5,100 and does not meet the minimum wage of the Minimum Wage Ordinance (MWO) (assuming the total working hours are 208 hours and the SMW rate is $34.5, the minimum wage should be $7,176). In addition to paying the arrears of wages to the employee, the employer should also add the additional remuneration of $2,076 in the monthly earnings up to $7,176 for meeting the requirement of the MWO for the purpose of assessing compensation payable.

Note: The above information is for reference only. The Employees’ Compensation Ordinance remains the sole authority for the provisions of the law explained. In case of dispute, final adjudication rests with the court.

Employees’ Compensation Division
Labour Department

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