

# **\*\*\*Proposed New Rule\*\*\***

## **4125-1-01 Wage loss compensation.**

### (A) Definitions:

The following definitions shall apply to the adjudication of applications for wage loss compensation:

- (1) "Adjudicator" means the administrator of the bureau of workers' compensation, a district hearing officer, a staff hearing officer, or the industrial commission. However, in the case of a wage loss application filed with a self-insuring employer, the self-insuring employer shall make the initial determination as provided in paragraph (H) of this rule.
- (2) "Comparably paying work" means suitable employment in which the injured worker's weekly rate of pay is equal to or greater than the average weekly wage of the injured worker.
- (3) "Employer of record" means the employer with whom the injured worker was employed at the time of the injury or on the date of disability in an occupational disease claim, or to the entity that is determined by the bureau of workers' compensation, or by industrial commission order, to succeed to the rights and responsibilities of the employer for workers' compensation claim purposes.
- (4) "Employment" means work performed or to be performed pursuant to a contract of hire between an employee and an employer as those terms are defined in divisions (A) and (B) of section 4123.01 of the Revised Code. "Employment" also includes work performed or to be performed as self-employment.
- (5) "Former position of employment" means the employment engaged in by the injured worker, including job duties, hours and rate of pay, at the time of the industrial injury or on the date of disability in an occupational disease claim allowed under Chapter 4123. of the Revised Code.
- (6) "Injured worker," for purposes of wage loss compensation, means an employee as defined in division (A) of section 4121.01 and division (A)(1) of section 4123.01 of the Revised Code, who asserts a right, demand, or claim for benefits pursuant to division (B) of section 4123.56 of the Revised Code.
- (7) "Injured worker's weekly wage loss" means his or her working wage loss or non-working wage loss during a calendar week or the injured worker's work week.
- (8) "Non-working wage loss" means the dollar amount of the diminishment in wages sustained by an injured worker who has not returned to work because he or she has been unable to find suitable employment (as described in paragraph (C) of this rule.) However, the extent of the diminishment must be the direct result of physical and/or psychiatric restrictions caused by the impairment that is causally related to an industrial injury or occupational disease in a claim allowed under Chapter 4123. of the Revised Code.
- (9) "Present earnings" means the injured worker's actual weekly earnings which are generated by gainful employment except as provided in paragraph (A)(9)(b) of this rule. It is a rebuttable presumption that earnings from paid leave provided by the employer will be included in present earnings.
  - (a) Earnings generated from commission sales, bonuses, gratuities, and all other forms of compensation for personal services customarily received by an injured worker in the course of his or her employment and accounted for by the injured worker to his or her employer will be included in present earnings for the purposes of computing the wage loss award. In instances where sales commission, bonuses, gratuities, or other compensation are not paid on a weekly or biweekly basis, their receipt will be apportioned over the number of weeks it is determined were required to initiate and consummate the sale or earn the bonus, gratuity, or other compensation.

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(b) In the case of an injured worker engaged in self-employment, "present earnings" means gross income minus business-related expenses. For purposes of calculating present earnings, there shall be a rebuttable presumption that an injured worker engaged in self-employment has a gross income of at least fifty percent of the statewide average weekly wage or such other compensation that the bureau of workers' compensation shall impute to self-employed persons for purposes of determining premium payments. Income derived from self-employment shall be reported on at least a quarterly basis.

(10) "Restriction" means any physical and/or psychiatric limitation directly resulting from the allowed conditions in the claim.

(11) "Statewide average weekly wage" has the same meaning as set forth in division (C) of section 4123.62 of the Revised Code.

(12) "Suitable employment" means work which is within the injured worker's restrictions, and which may be performed by the injured worker subject to all physical, psychiatric, mental, and vocational limitations to which the injured worker was subject on the date of the injury, or on the date of disability in occupational disease claims.

(13) "Voluntary retirement" means voluntary termination of employment by an injured worker such that the injured worker is completely removed from the active work force based on factors that are not causally related to the allowed conditions in the claim.

(14) "Wages" means the amount upon which the injured worker's average weekly wage is calculated pursuant to section 4123.61 of the Revised Code.

(15) "Working wage loss" means the dollar amount of the diminishment in wages sustained by an injured worker who has returned to employment which is not his or her former position of employment. However, the extent of the diminishment must be the direct result of physical and/or psychiatric restriction(s) caused by the impairment that is causally related to an industrial injury or occupational disease in a claim allowed under Chapter 4123. of the Revised Code.

### (B) Applications for wage loss compensation

Applications for wage loss compensation shall be filed on forms provided by the bureau of workers' compensation or equivalent forms. In cases involving self-insuring employers, a copy of the application shall be filed with the self-insuring employer. No payment of compensation shall be approved by the administrator, or by a self-insuring employer in a self-insured claim, unless the request is filed on the appropriate form or equivalent form that provides the required information as described in paragraph (B)(1) through (B)(6) of this rule. Upon the earlier of a determination not to pay wage loss compensation by the administrator, or by the self-insuring employer in a self-insured employer claim, or upon expiration of thirty days of the filing of the application for wage loss compensation, in the absence of payment of wage loss compensation, the application for wage loss compensation will be referred to the industrial commission.

(1) The injured worker must certify that all the information that is provided in the application is true and accurate to the best of his or her knowledge and further certify that he or she served a copy of the application, with copies of supporting documents, on the employer of record unless the employer of record is out of business.

(2) A medical report shall accompany the application. The report shall contain:

(a) Identification of the restrictions of the injured worker;

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(b) An opinion on whether the restrictions are permanent or temporary;

(c) When the restrictions are temporary, an opinion as to the expected duration of the restrictions. Temporary restrictions cannot be certified for a period to exceed ninety days without a new examination of the injured worker

(d) When the restrictions are permanent, the report must be based on an examination or treatment conducted within ninety days prior to the initial date of wage loss compensation requested on the application for wage loss compensation;

(e) The date of the last medical examination;

(f) The date of the report;

(g) The name of the physician who authored the report; and

(h) The physician's signature.

(3) Supplemental medical reports regarding the ongoing status of the medical restrictions causally related to the allowed conditions in the claim must be submitted to the bureau of workers' compensation or the self-insuring employer in self-insured claims once during every ninety day period after the filing of the initial application, if the restrictions are temporary. If the restrictions are permanent, the bureau of workers' compensation or the self-insuring employer may request a supplemental medical report once during every one hundred eighty day period subsequent to the filing of the initial application. If such a request is made, both the medical examination shall be completed and the medical report resulting from the supplemental medical examination shall be submitted to the bureau of workers' compensation, or to the self-insuring employer in self-insured claims, within ninety days of the date of the request for the supplemental medical report. The supplemental medical reports shall comply with paragraph (B)(2)(a), (b), (c), (e), (f), (g), and (h) of this rule.

Paragraph (B)(3) of this rule shall not prohibit the employer's authority to require the injured worker to be examined by a physician of the employer's choice pursuant to Section 4123.651 of the Revised Code and 4121-3-09 of the Administrative Code.

(4) The application shall contain an employment history. The employment history shall include a description of each position which was held by the injured worker.

### (C) Non-Working Wage Loss Compensation

An injured worker applying for or receiving non-working wage loss compensation shall supplement his or her wage loss application with job search statements describing the search for suitable employment, in accordance with the following:

(1) Job search statements shall be submitted for every week where non-working wage loss compensation is sought;

(2) The completed job search statements shall be submitted with the wage loss application and/or any subsequent request for non-working wage loss compensation;

(3) An injured worker who receives non-working wage loss compensation for periods after the filing of the application for wage loss compensation shall submit the job search statements completed pursuant to

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paragraphs (C)(1), (C)(4) and (C)(5) of this rule, at a minimum, every four weeks to the bureau of worker's compensation or the self-insuring employer in self-insured claims during the period when non-working wage loss compensation is requested;

(4) Job search statements shall include the name and address of each employer contacted, the employer's telephone number, the position sought, a reasonable identification by name or position of the person contacted, the date and method of contact, for on-line job searches, a copy of the on-line posting and verification of the application submission, the result of the contact, and any other information requested by the bureau of workers' compensation job search statement; and

(5) Job search statements shall be submitted on forms provided by the bureau of workers' compensation or equivalent forms.

### (D) Working Wage Loss Compensation

Except as otherwise provided in paragraphs (D)(4) and (D)(5) of this rule, an injured worker applying for or receiving working wage loss compensation shall supplement his or her wage loss application with a job search statement describing the injured worker's search for comparably paying work unless excused by the bureau of workers' compensation, the industrial commission, or the self-insuring employer in self-insured employer claims.

(1) Unless a job search has been excused by the bureau of workers' compensation, the industrial commission, or the self-insuring employer in self-insured employer claims, the job search statements shall comply with the following requirements:

(a) Job search statements shall be submitted for every week where working wage loss compensation is sought;

(b) The completed job search statements shall be submitted with any subsequent request for working wage loss compensation;

(c) An injured worker who receives working wage loss compensation for periods after the filing of the application for wage loss compensation shall submit the job search statements completed pursuant to paragraph (D)(1) of this rule, at a minimum, every four weeks to the bureau of workers' compensation or the self-insuring employer in self-insured employer claims during the period when working wage loss compensation is requested;

(d) Job search statements shall include the name and address of each employer contacted, the employer's telephone number, the position sought, a reasonable identification by name or position of the person contacted, the date and method of contact, for on-line job searches, a copy of the on-line posting and verification of the application submission, the result of the contact, and any other information required by the bureau of workers' compensation job search statement;

(2) Job search statements shall be submitted on forms provided by the bureau of workers' compensation or equivalent forms.

(3) Failure to perform a job search as required by paragraph (D) of this rule will be construed as a voluntary limitation of income in accordance with paragraph (G)(2) of this rule.

(4) When an injured worker qualifies for compensation for temporary total disability pursuant to division (A) of section 4123.56 of the Revised Code, working wage loss compensation may be payable, but no job search

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is required, when the injured worker returns to alternative employment with the same employer, or another employer at the direction of the employer of record, as provided in division (A) of section 4123.56 of the Revised Code and rule 4121-3-32 of the Administrative Code.

(5) Working wage loss compensation may be payable, but no job search is required, when the injured worker must miss work in order to obtain treatment for the allowed conditions that cannot be obtained outside of work hours. Under paragraph (D)(5) of this rule, an injured worker must file an application for wage loss compensation in addition to providing documentation that:

(a) the treatment was medically necessary for the injured worker to perform his or her job;

(b) the injured worker could not continue to work full time without the treatment; and

(c) the treatment was available only during the injured worker's hours of employment.

(E) Factors to consider in the adjudication of an application for wage loss compensation

The injured worker is responsible for and bears the burden of producing evidence regarding his or her entitlement to wage loss compensation. Unless the injured worker meets this burden, wage loss compensation shall be denied. A party who asserts, as a defense to the payment of wage loss compensation, that the injured worker has failed to meet his burden of producing evidence regarding his or her entitlement to wage loss compensation is not required to produce evidence to support that assertion. However, any party asserting a defense to the payment of wage loss compensation, for a reason other than the injured worker's failure to produce evidence, through motion, appeal, or otherwise is solely responsible for and bears the burden of producing evidence to support those defenses. If there is insufficient evidence to support a defense to the payment of wage loss compensation, that defense shall not be used as a grounds to deny such compensation. In no case shall this rule be construed as placing on the industrial commission any burden to produce evidence.

In considering an injured worker's eligibility for wage loss compensation the adjudicator shall give consideration to, and base the determinations on, evidence in the file, or presented at hearing, relating to:

(1) The injured worker's search for suitable employment when required under the provisions of this rule.

(a) As a prerequisite to receiving non-working wage loss compensation, and working wage loss compensation unless excused under paragraph (D) of this rule, for any period during which such compensation is requested, the injured worker shall demonstrate that he or she has:

(i) Complied with paragraph (B)(2) of this rule and, if applicable, with paragraph (B)(3) of this rule;

(ii) Sought suitable employment with the employer of record at the onset of the first period for which wage loss compensation is requested unless the injured worker establishes that it would be futile to seek suitable employment with the employer of record. (e.g. The injured worker was discharged or the employer of record is out of business.); and

(iii) In the case of non-working wage loss, the injured worker must register with the Ohio Department of Job and Family Services or, if the injured worker is an out-of-state resident, must register with the equivalent of the Ohio Department of Job and Family Services in the state of residence and begin or continue a job search if no suitable employment is available with the employer of record. Proof of registration with the applicable agency is required for both in-state and out-of-state residents to demonstrate compliance with this rule.

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- (b) An injured worker may first search for suitable employment which is within his or her skills, prior employment history, and educational background. If within sixty days from the commencement of the injured worker's job search, he or she is unable to find such employment, the injured worker shall expand his or her job search to include entry level and/or unskilled employment opportunities.
- (c) A good faith effort to search for suitable employment that is comparably paying work is required of those seeking non-working wage loss compensation pursuant to paragraph (C) of this rule and of those seeking working-wage loss compensation pursuant to paragraph (D) of this rule, who have not returned to suitable employment that is comparably paying work, except for those injured workers who are receiving public relief and are defined as work relief employees in Chapter 4127. of the Revised Code. A good faith effort necessitates the injured worker's consistent, sincere, and best attempts to obtain suitable employment that will eliminate the wage loss. In evaluating whether the injured worker has made a good faith effort, attention will be given to the evidence regarding all relevant factors including, but not limited to:
- (i) The injured worker's skills, prior employment history, and educational background. These factors may be considered a positive or negative asset to securing suitable employment;
  - (ii) The number, quality (e.g., in-person, internet / e-mail, telephone, U.S. mail, with resume), and regularity of contacts made by the injured worker with prospective employers, public and private employment services;
  - (iii) Except as provided in paragraph (E)(1)(c)(v) of this rule, for an injured worker seeking any amount of non-working wage loss compensation, the amount of time devoted to making prospective employer contacts during the period for which non-working wage loss compensation is sought as compared with the time spent working at the former position of employment or number of hours able to work due to the restrictions; while the adjudicator shall consider this comparison in reaching a determination of whether there was a good faith job search, the fact that an injured worker did not search for work for as many hours as were worked in the former position of employment shall not necessarily be dispositive;
  - (iv) Except as provided in paragraph (E)(1)(c)(v) of this rule, for an injured worker seeking any amount of working wage loss compensation, the amount of time devoted to making prospective employer contacts during the period for which working wage loss compensation is sought as well as the number of hours spent working; and any non-claim related limitations on the injured worker's opportunity to make prospective employer contacts because of his or her working; while the adjudicator shall consider this comparison in reaching a determination of whether there was a good faith job search, the fact that the sum of the hours the injured worker spent searching for work and working is not as many hours as were worked in the former position of employment shall not necessarily be dispositive;
  - (v) Where the injured worker, in the former position of employment, worked a variable number of hours per week, the adjudicator shall determine, with respect to the former position of employment, for the period of fifty-two calendar weeks preceding the injury, or in occupational disease cases, the date of disability, the minimum, maximum, and average number of hours per week the injured worker worked. If the injured worker worked less than fifty-two calendar weeks in the former position of employment, the determination shall be based on the number of weeks the injured worker actually worked. The adjudicator shall consider these determinations in relation to:

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- (a) The amount of time devoted to making prospective employer contacts during the period for which working wage loss is sought as well as the number of hours spent working, for an injured worker seeking any amount of working wage loss; and
  - (b) The amount of time devoted to making prospective employer contacts during the period for which non-working wage loss is sought as compared with the time spent working at the former position of employment, for an injured worker seeking non-working wage loss; while the adjudicator shall consider the determinations arrived at pursuant to paragraph (E)(1)(c)(v) of this rule in reaching a conclusion as to whether there was a good faith job search, the number of hours per week, in and of itself, shall not necessarily be dispositive.
  - (vi) Any refusal without good cause by the injured worker to accept assistance from the bureau of workers' compensation in finding employment;
  - (vii) Any refusal by the injured worker to accept the assistance, where such assistance is rendered free of charge to the injured worker, of any public or private entity or the assistance of the employer of record in finding employment;
  - (viii) Labor market conditions including, but not limited to, the numbers and types of employers located in the geographical area surrounding the injured worker's place of residence;
  - (ix) The injured worker's restrictions;
  - (x) Any recent activity on the part of the injured worker to change his or her place of residence and the impact such a change, if made, would have on the reasonable probability of success in the search for employment;
  - (xi) The injured worker's economic status as it impacts on his or her ability to search for employment including, but not limited to, such things as access to public and private transportation and telephone service and other means of communications;
  - (xii) The self-employed injured worker's documentation of efforts undertaken on a weekly basis to produce self-employment income;
  - (xiii) Any part-time employment engaged in by the injured worker and whether that employment constitutes a voluntary limitation on the injured worker's present earnings;
  - (xiv) Whether the injured worker restricts his or her search to employment that would require him or her to work fewer hours per week than he or she worked in the former position of employment. However, the injured worker shall not be required to seek employment which would require him or her to work a greater number of hours per week than he or she worked in the former position of employment; and
  - (xv) Whether, as a result of the restrictions arising from the allowed conditions in the claim, the injured worker is enrolled in a rehabilitation program with the rehabilitation services commission whereby the injured worker attends an educational institution approved by the rehabilitation services commission.
- (2) The injured worker's failure to accept a good faith offer of suitable employment.
- (a) Offers of employment by the employer of record will not be given consideration by the adjudicator

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unless they are made in writing and contain a reasonable description of the job duties, hours, and rate of pay.

- (b) The adjudicator shall consider employment descriptions of any jobs offered to the injured worker by employers other than the employer of record.
- (c) Although the injured worker's refusal to accept a good faith offer of suitable employment may be considered by the adjudicator as a reason for denying, reducing, or eliminating wage loss compensation, the injured worker may not be required, as a precondition to the receipt of wage loss compensation, to accept a job offer which would require the injured worker to work a greater number of hours per week than the former position of employment except as provided in paragraph (E)(2)(d) of this rule. The adjudicator may consider an employer's requirement that the injured worker work different shifts or relocate as factors in determining whether the injured worker failed to accept a good faith offer of suitable employment.
- (d) Where the injured worker, in the former position of employment, worked a variable number of hours per week and the injured worker is offered a job which would require the injured worker to work a variable number of hours per week, the offer of variable hour employment shall not be considered an offer of unsuitable employment solely because the minimum or maximum number of hours per week to be worked by the injured worker in the position offered is insubstantially greater or less than the minimum or maximum number of hours per week which the injured worker worked in the former position of employment. In determining whether, pursuant to this paragraph, an offer of employment is suitable, the adjudicator shall:

  - (i) Determine, for the period of fifty-two calendar weeks preceding the date of the industrial injury or, in occupational disease cases, the date of disability, the maximum, minimum, and average number of hours per week which the injured worker worked in the former position of employment. If the injured worker worked less than fifty-two calendar weeks in the former position of employment, the determination shall be based on the number of weeks the injured worker actually worked; and
  - (ii) Compare the maximum and minimum number of hours per week which the injured worker could be required to work in the position of employment offered to the injured worker to the determinations made in paragraph (E)(2)(d)(i) of this rule to assist in determining whether the offer is one of suitable employment.
- (3) Other actions of the injured worker which result in a wage loss not causally related to the allowed conditions in the claim, including, but not limited to, the voluntary retirement of the injured worker, provided that where an injured worker has secured employment which will likely extend beyond the short term and which will likely become comparably paying work and/or will likely provide other employment-related benefits, the injured worker's lack of a search for comparably paying work may not bar his or her receipt of wage loss compensation but is a factor that may be considered in a broader based analysis as to whether the injured worker has voluntarily limited his or her income.

### (F) Orders issued by the Industrial Commission and its Hearing Officers

The industrial commission and its hearing officers in issuing orders granting or denying wage loss compensation shall comply with the requirements of division (B) of section 4121.36 of the Revised Code. To comply with division (B) of said section, the commission and/or hearing officer shall recite in those orders that they have considered and weighed the evidence, as required by paragraph (E) of this rule.

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- (1) In the event of a denial of compensation for a week or period of weeks for which an application has been made, the commission or hearing officer shall recite in the order that the injured worker has not met his or her burden of proving compliance with this rule for that week or period of weeks and shall state the evidence relied upon to support the denial of wage loss for that week or period of weeks.
- (2) If the commission or hearing officer grants any amount of wage loss compensation for a week or period of weeks for which an application has been made, the commission or hearing officer must find and recite in the order that:
  - (a) The injured worker's present earnings are less than the injured worker's wages;
  - (b) The difference between the injured worker's wages and present earnings is the result of medical restrictions that are causally related to an industrial injury or an occupational disease allowed in a claim which was filed under Chapter 4123. of the Revised Code and in which wage loss is requested;
  - (c) The injured worker has made a good faith effort to search for suitable employment which is comparably paying work, when required by paragraphs (C) or (D) of this rule, but has not returned to suitable employment which is comparably paying work; and
  - (d) The injured worker has otherwise complied with the requirements of this rule.

### (G) Computation of wage loss

- (1) Unless otherwise provided in paragraphs (G)(2) and (I)(2) of this rule, diminishment of wages shall be calculated based on the:
  - (a) Injured worker's average weekly wage at the time of the injury or at the time of the disability due to occupational disease in accordance with the provisions of section 4123.61 of the Revised Code; and
  - (b) The injured worker's present earnings as defined in paragraph (A)(9) of this rule.

### (2) Voluntary Limitations of Income

- (a) The wage loss compensation to be paid an injured worker who voluntarily fails to accept a good faith offer of suitable employment shall be calculated as sixty-six and two-thirds percent of the difference between the injured worker's average weekly wage in the former position of employment and the weekly wage the injured worker would have earned in the employment he or she refused to accept.
- (b) ) If the adjudicator finds that the injured worker has returned to employment but has voluntarily limited the number of hours which he or she is working, or has accepted a job which does not constitute comparably paying work, and that the injured worker is nonetheless entitled to wage loss compensation, the adjudicator, for each week of wage loss compensation requested by the injured worker, shall determine: the number of hours worked by the injured worker in the employment position to which he or she has returned, and the hourly wage earned by the injured worker in the employment position to which he or she has returned. In such a case, the adjudicator shall order wage loss compensation to be paid at a rate of sixty-six and two-thirds percent of the difference between: the injured worker's average weekly wage in the claim and the weekly wage the injured worker would have earned had the injured worker not voluntarily limited his or her hours.
- (c) Where the adjudicator finds that the injured worker has returned to employment and has voluntarily limited the number of hours which he is working, and that the injured worker is nonetheless entitled to

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wage loss compensation, but that paragraphs (G)(2)(a) and (G)(2)(b) of this rule is not directly applicable, the adjudicator shall have the discretion to establish the manner to be utilized in the calculation of wage loss compensation that is not unreasonable, unconscionable or arbitrary.

- (3) If an injured worker applies for wage loss compensation for a period during which he received amounts from a wage replacement program fully funded by the employer, such amounts shall be considered as present earnings for purposes of wage loss calculation.
- (4) An injured worker's wage loss compensation shall not be reduced by any amounts the injured worker receives from unemployment compensation, social security disability benefits, or public or private retirement plans. The wage loss compensation of an injured worker who is receiving public relief shall not be reduced by any monies received by the injured worker from work relief.
- (5) If any wage loss compensation has been paid for the same period or periods for which temporary non-occupational accident and sickness insurance is or has been paid pursuant to an insurance policy or program to which the employer has made the entire contribution or payment for providing insurance or under a non-occupational accident and sickness program fully funded by the employer, wage loss compensation paid for the period or periods shall be paid only to the extent by which the payment or payments exceeds the amount of the non-occupational insurance or program paid or payable. Offset of the compensation shall be made only upon the prior order of the bureau or industrial commission or agreement of the claimant

(H) Where the employer of record is a self-insuring employer it shall:

- (1) Adjudicate the initial application for wage loss compensation and inform the injured worker of its decision no later than thirty days after a request for wage loss compensation is received;
- (2) Adjudicate all issues which arise with respect to the ongoing entitlement to wage loss compensation and inform the injured worker of its decision no later than thirty days after the issue arises; and
- (3) Ensure that a copy of any decision described in paragraphs (H)(1) and (H)(2) of this rule is filed with the bureau of workers' compensation or the industrial commission for placement in the claim file.

(I) Prospective application

- (1) This rule shall apply to the adjudication of all applications for wage loss compensation filed on or after the effective date of this rule.
- (2) Notwithstanding paragraph (I)(1) of this rule, if an injured worker files an application for wage loss compensation in a claim in which the injury occurred or the date of disability arose prior to May 15, 1997, the wage loss compensation paid shall be calculated based on the greater of the full weekly wage or the average weekly wage.