B. PIP Benefit #2: Work Loss Benefits

Section 3107(1)(b) provides that where an injured victim cannot work as a result of an auto accident, work loss benefits are payable for up to a maximum of three (3) years. The statute defines work loss benefits as compensation for ***"loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured."*** Under the statute, work loss benefits are payable at the rate of 85 percent of gross pay, including overtime. However, the work loss benefit cannot exceed a ***monthly maximum*** which is adjusted in October of every year to keep pace with the cost of living. These COLA adjustments, however, only apply to accidents occurring after each adjustment date. Therefore, the monthly maximum applicable at the time of the injured victim's accident is the monthly maximum that continues to apply for the remainder of that person's three (3) year benefit period. Set forth below is an itemization of the monthly maximum benefit levels that have been in effect for the last five (5) years:

10/1/03.....$4,156.00
10/1/04.....$4,293.00
10/1/05.....$4,400.00
10/1/06.....$4,589.00
10/1/07.....$4,713.00

In addition, other important principles regarding work loss benefits are summarized below:

1. The Applicable Disability Standard and the Duty to Mitigate — Under the statute, it is not necessary to prove that the injured person is completely disabled from performing any type of employment. On the contrary, the statute requires payment of work loss benefits if the injured person cannot perform the work the injured person "*would have performed*" had the accident not occurred. In addition, the courts have held that wage loss benefits must include salary increases, overtime and other merit raises that would have been received during the person's disability. See *Lewis v DAIIE*, 90 Mich App 251 (1979) and *Farquharson v Travelers Ins Co*, 121 Mich App 766 (1982). Any income earned by the injured person during a period of disability reduces the wage loss benefit otherwise payable for that same period. See *Snellenberger v Celina Mutual Ins Co*, 167 Mich App 83 (1988). The courts have also imposed an obligation on the injured person to "*mitigate damages*" by seeking alternative employment if such employment was available and if it was otherwise "*reasonable*" under the circumstances for the injured person to accept it. See *Bak v Citizens Ins Co*, 199 Mich App 730 (1993).

2. The Interplay Between Work Loss Benefits, Sick Leave, Vacation and Wage Continuation Benefits — Our courts have held that a no-fault insurance company cannot reduce wage loss benefits by an injured person's sick leave,

vacation time or employer provided wage continuation benefits. Therefore, if an injured person is receiving sick pay or is drawing on vacation time during a period of disability, the no-fault insurer must pay full wage loss benefits. See *Orr v DAIIE*, 90 Mich App 687 (1979). Similarly, where an employer continues paying wages under a wage continuation plan, the no-fault insurer must pay full no-fault wage loss benefits without regard to the wage continuation payments. See *Brashear v DAIIE*, 144 Mich App 667 (1985); *Spencer v Hartford Accident & Indem Co*, 179 Mich App 389 (1989); and *Wesolek v City of Saginaw*, 202 Mich App 637 (1993).

3. Temporarily Unemployed Persons — The statute also contains a special provision for those persons who are considered "*temporarily unemployed*" at the time of an auto accident injury. Such individuals are entitled to no-fault wage loss benefits based upon the last month of full time employment. This provision appears in §3107(1)(a) which states: ***"Work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident."*** The statute does not define "*temporarily unemployed*." Court decisions however, have focused on a variety of factors including the length of time of the unemployment, the reasons for the unemployment, the injured person's work history, and the subjective and objective evidence of the person's intention to return to employment. The courts have stated, however, that a person who is completely physically disabled from working for reasons unrelated to a car accident is not entitled to no-fault work loss benefits. See *MacDonald v State Farm Mutual Ins Co*, 419 Mich 146 (1984) and *Williams v DAIIE*, 169 Mich App 301 (1988).

4. Self-Employed Persons — Self-employed accident victims are entitled to recover wage loss benefits but oftentimes experience great difficulty with insurance companies in establishing the appropriate level of benefits. The courts have held that a self-employed person's business expenses should be deducted from his or her gross receipts in order to determine the proper work loss benefit level. The courts, however, have rejected the principle that all business expenses reported on Schedule C of the individual's tax returns are fully and automatically deductible from gross receipts. The question of which business-related expenses should be deductible from the gross receipts of a self-employed person is a question of fact that is typically determined on a case-by-case basis. See *Adams v Auto Club Ins Ass'n*, 154 Mich App 186 (1986).