



***IMPORTANT  
EMPLOYER INFORMATION***

***CAMBRIDGE INTEGRATED SERVICES VICTORIA PTY LTD***

**CAMBRIDGE**



## **EMPLOYER INFORMATION ON LINE**

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## 1. *Who is a worker?*

The Accident Compensation Act (“the Act”) has a wide definition of who is a worker. The intention is to ensure that all persons who are injured whilst working receive compensation under the Act.

Therefore a person may be classified as a worker by the Act even though they are not employed as such by an organisation.

The basic definition of a worker is somebody working under a contract of service. The contract need not be written and can include apprenticeships. If the contract of employment is not written, other state law implies basic rights and obligations into the contract.

Extended definitions in the Act classify some independent contractors as workers.

In determining whether there is a contract of service, it is relevant to consider how the parties themselves have characterised their relationship. The following are relevant considerations:

- Degree of control
- Mode of remuneration
- Provision of and maintenance of equipment
- Obligation to work
- Hours of work
- Provision of leave
- Deduction of tax
- Delegation of work
- Nature of the task
- Degree of skill required
- Freedom of action given
- Who provides direction and the extent of the direction
- Power to hire and fire
- Ability to delegate work
- Amount and manner of payment or reward
- Health and injury insurance responsibility
- Method of income tax deductions
- Provision of tools and equipment
- Whether defined or regular hours of work are required
- Whether the person working can decide hours of work and method of performance
- Expressed intention of the parties
- Right to exercise control over the manner by which the tasks are performed
- Intended length of relationship
- Whether the person performing the work is able to carry out work for other persons, particularly of the same kind

These matters will not determine the issue but can act as a guide to assist in making the determination.

Natural persons who operate as sub-contractors may also be workers. A contract must be between a principal (whether a company, individual or other legal entity) and a contractor (who



must be a natural person) for the performance of work by a contractor. The work must not be incidental to the regular trade or business of the contractor and the contractor must perform at least part of the work personally.

Where a sub-contractor is a company they may also be deemed to be under a contract of service. However, relevant contracts do not include circumstances where:

- The work under the contract is performed by 2 or more persons employed by (or working for) the contractor in the course of a business carried on by the contractor
- The contractor performing the work is a partnership of 2 or more natural persons, and the work is performed by at least 2 people at least one of whom is a partner, and such work is in the course of a business carried on by the partnership;
- The contractor is a natural person, but the work is performed by the contractor and an employee of (or other person engaged by) the contractor, and such work is in the course of a business carried on by the contractor;
- The contract is one under which the contractor supplies services for the door-to-door sale of goods, unless the contract was entered in to for the purpose of evading the payment of premium.

Share farmers are only deemed workers if the share farmer is employed under a contract with the owner of the land under which the share farmer is entitled to receive less than one-third of the income derived from the land. This can be in cash or in kind or partly in cash and partly in kind;

A share farmer can contract with the owner of the land for the land owner to be liable to pay compensation for any injury resulting from any work done by the share farmer in performing the contract.

Although Jurors are not deemed workers, they do have an entitlement to compensation if they suffer a personal injury arising out of or in the course of jury service, in accordance with the *Accident Compensation Act 1985*.

An offender can be deemed a worker if they are required or directed by or under a correctional order, a provision of the **Sentencing Act 1991**, or Part 9 of this Act to work or to take part in a programme of activities; or is a volunteer who is working in a prison or at a location; or is a person who is required or directed by or under a diversion program under section 128A of the **Magistrates' Court Act 1989** to work or to take part in a program of activities is deemed, for the purpose of the Accident Compensation Act 1985, to be a worker employed by the Crown

If a volunteer school worker suffers a personal injury arising out of, or in the course of engaging in, school work or travelling to or from a place where school work is to be or been engaged in, the worker is entitled to be paid compensation under the Accident Compensation Act 1985.

If a volunteer student worker suffers a personal injury arising out of or in the course of approved community work, the worker is entitled to be paid compensation under the Accident Compensation Act 1985.

They are not workers under the Act.

If any of these workers die, the workers partner or any child or dependent of the worker is entitled to be paid compensation under the Accident Compensation Act 1985.

A Volunteer School Worker is a person who without remuneration or reward, voluntarily engages in school work. School work is defined as –

- The carrying out of the functions of the council of any State school
- The carrying on of any activities for the welfare of any State school by the council thereof or any parents' club or association (whether an association or club for one only or both sexes) or other body organisation to promote the welfare thereof or at the request of the principal or council thereof or of any such body
- The giving of assistance in the work of any State school or the provision of a preschool program by the council of any State school
- Attendance at meetings in relation to State schools in any region being meetings convened by the Secretary.

A Volunteer Student Worker is a person who without remuneration or reward, voluntarily engages in approved community work. Approved Community work is defined as community work that is engaged in by a pupil of a State school or a school registered under the Education Act 1958 and approved by the principal of the school as school community work.

A place of pick-up is a pre-arranged place where people customarily attend to be selected and engaged for employment. While at a place of pick-up, any such persons are deemed to be working under a contract of service.

Prior to 1 July 1994 such persons were also deemed to be working under a contract of service whilst travelling to a place of pick-up from a place of residence (or vice versa).

People engaged to participate as contestants in sporting or athletic activities are not covered. There is no coverage while they are travelling to or from, or engaged in training for, or participating in a sporting activity.

Semi professional sports persons may be covered in circumstances such as:

- A footballer that is engaged by the club to play football, who is also engaged as the clubs administrator and for marketing or promotional activities. They would be covered if injured whilst they are performing those other activities. i.e. when not playing football

Coaches or paid officials are covered if a contract of service exists.

Umpires are usually controlled and directed by an association, which also sets the fees for service. Therefore, the association would commonly be the employer

Professional Jockeys employed by the Victorian Racing Club are covered. For the purpose of the Act, a person is deemed to be a worker solely employed by the VRC if they:

- Are engaged to participate as a rider in a horse race at a race meeting; or
- Hold a licence, permit or approval to ride and they agree to do ride work on a horse at, or in the environs of, any racecourse or training track

This excludes an apprentice or the owner or trainer of the horse to be ridden.

- Riders at Sprint horse races are not deemed workers as they are not covered by the VRC rules of racing
- They maybe able to establish that they have an entitlement if they:
  - hold a licence, permit or approval to ride and
  - Can establish themselves as a worker under a *contract of service* or deemed to be a worker



## 2. Entitlement to compensation

The basic entitlements under the Act are prefaced on the worker establishing that an injury occurred arising out of or in the course of employment and, in some cases, that employment was a significant contributing factor to the injury.

In the event that a worker dies as a consequence of a compensable injury the workers' dependants are entitled to compensation under the Act.

Injury is defined under the Act as follows:

"injury" means any physical or mental injury and, without limiting the generality of that definition, includes-

- (a) industrial deafness;
- (b) a disease contracted by a worker in the course of the worker's employment (whether at, or away from, the place of employment);
- (c) a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease;

For all primary injuries, an example would be a cut, broken arm from a fall, muscle strain or tear; the injury need only arise out of or in the course of employment. For injuries due to an underlying cause, examples would be diseases and aggravations of pre-existing or congenital conditions, employment needs to also be a significant contributing factor. For injuries after 3 December 2003 this category specifically includes heart attack and stroke injuries.

Where a worker claims that a stress injury has occurred, compensation is not payable where the stress is wholly and predominantly caused by:

- reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; or
- a decision of the employer, on reasonable grounds, not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or
- an expectation of the taking of such action or making of such a decision.

Further compensation is not payable where the workers injury was deliberately or willfully inflicted or is caused as a result of the worker's serious and willful misconduct. If death or serious disablement follows from a worker's serious and willful misconduct however, the worker and/or dependants of the worker will be entitled to compensation.

The Act also offers some protection for employers by placing an obligation on a worker to reveal previous injuries that may affect the worker's ability to perform the work duties.

If the employer, *prior to the worker commencing*:

- Advised the worker in writing of the nature of the employment
- Requested that the worker provide details of any injury that may impact on his/her ability to perform the work functions; and
- Advised the worker that a failure to provide this information may result in the inability to claim compensation for any subsequent injury

And the worker does not provide the information; the worker cannot claim compensation for any subsequent injury to that previously affected body function/part.

### **Out of or in the Course of Employment**

To establish that an injury arose out of or in the course of employment a worker needs to establish a causal connection between the activity being performed and employment. This has been very widely interpreted.

The Act also deems injuries in defined circumstances to arise out of or in the course of employment. They include:

- a. Travelling for the purpose of employment
- b. While the worker is temporarily absent from work duties on an authorized recess (unless while on the authorized recess the worker places him or herself at any abnormal risk of injury
- c. while the worker is in attendance at any school for the purpose of any trade, technical or other training which the worker is required to attend by the terms of his or her employment or as an apprentice or which the worker is expected to attend by the employer; and
- d. while the worker is in attendance at any place for the purpose of obtaining a medical certificate, receiving medical, surgical or hospital advice, attention or treatment, receiving a personal and household service or an occupational rehabilitation service or receiving a payment of compensation in connection with any injury for which the worker is entitled to receive compensation or for the purpose of submitting to a medical examination required by or under this Act.

Travelling for the purpose of employment does not include travel to and from work or from home and return to the places referred to in paragraph c and d above.

In some cases a person's workplace can be hard to define so it is not always possible to determine if a worker is at work. In some cases a worker's home could be considered a workplace.

Some interesting examples have occurred in relation to the interpretation of this section.

Examples of accepted claims are:

*A taxi driver was returning his vehicle to the owner after completion of his shift. He stopped to get a newspaper. He was struck by a motor vehicle crossing the road from where he was parked.*

*A worker attended a camp with his employer. On a day off the employees were encouraged to spend time together. They went four-wheel driving. The worker was injured in an accident.*

*A nurse was staying at a residence on the premises of the hospital that she was working at. In between shifts she returned to her room and was injured slipping in the shower.*

*Maree was a care worker. One morning she rose, had breakfast and drove to her first appointment. Before she had entered the property she slipped on some loose gravel and was injured.*

Mario was sitting in the lunchroom cutting an apple. He cut his finger.

### 3. Employer obligations

- (a) On receipt of a claim
- (b) To re-employ (including return to work plans)
- (c) Claiming reimbursement
- (d) Paying the worker

#### Responding to a claim for compensation

Under the new legislation effective 1 July 2005 there is now no distinction between standard and minor claims where the worker is claiming weekly benefits.

***Under changes to the Act effective 1 July 2005 employers are required to submit all claims for weekly payments to Cambridge Integrated Services Victoria Pty Ltd within 10 days of receipt or risk penalties.***

The penalties come in the form of fines from the VWA and the increase of the employer excess.

If an employer submits to Cambridge a claim for weekly benefits after the 10 days allowed, the employer will be liable to meet any weekly payments made to the worker from commencement of incapacity until the claim was received by Cambridge. This may not be significant if the worker lodged the claim on time but consider this scenario:

*A worker suffers injury in March 2005 and ceases work. The worker lodges the claim for compensation in May 2005. The employer serves the claim on Cambridge 13 days after the claim is received. The employer is liable for the first ten days excess, plus the balance of the weekly payments from day 11 to the date the claim form is received by Cambridge. The employer is then liable to a potential penalty from the VWA.*

**Furthermore, if the claim is received by Cambridge 39 days or more after the employer receives it liability is deemed accepted and the employer cannot then argue that the claim should not be accepted.**

***The message therefore is clear. Get your claims in early.***

The following is a summary of the new changes to the legislation that affect the dealing with claims:

#### ***Employer action when receiving a claim for compensation***

When an employer receives a valid *Worker's Claim Form* they must sign the claim form and return worker's copy to worker, keep the employer copy for own records, accept or reject the claim and forward the *Worker's Claim Form*, WorkCover certificate of capacity (where there is a claim for weekly compensation) and *Employer's Claim Report* to the agent within 10 calendar days.



An employer must as soon as practicable, acknowledge in writing to the worker that a claim for compensation (not limited to weekly payments) has been given or served on the employer. The new claim forms will allow this to be done through the employer signing the claim form and returning part thereof to the worker.

Within 10 days of receiving a claim for weekly compensation from a worker, the employer must forward the claim to the Authority, regardless of whether or not the employer's threshold has been met. Claims for medical expenses only which remain under the employer's threshold will continue to be submitted to the Authority within three months of being served or given.

An employer who fails without reasonable cause to forward a claim for weekly payments within 10 days is liable for weekly payments to the worker during the period commencing:

- no buy-out option: after the employer's threshold has been reached and ending when the claim for weekly payments has been received by the Authority; or
- buy-out option: after the Authority has met the employer's threshold and ending when the claim for weekly payments has been received by the Authority.

In addition to this variable liability, the Authority may impose a penalty for late lodgement of a claim for weekly payments. Provisions are available to recover the additional liability and penalty from the employer in a court of competent jurisdiction. The additional liability and penalty do not apply to any uninsured employers or to an employer in relation to the employment of a student worker.

A worker is permitted to now serve a copy of the claim on the Authority after it is served on the employer through the "early notification" provisions. There will be a part of the claim form that the worker will forward to the Authority together with a copy of the certificate of capacity served with the claim form (If a claim for weekly payments).

If a worker gives to the Authority a claim for weekly payments as early notification but has not lodged the claim on the employer, the claim is deemed not to have been made if within 14 days of the claim being lodged is returned to the claimant with a notice. The notice must specify the following:

- the claim for weekly payments must be given or served on the employer; and
- any period within which the claim is to be dealt with does not commence until the claim has been given to or serviced on the employer.

The worker also has a further right to serve the claim on the Authority in the event that the employer refuses to comply with its obligations to forward the claim to the Authority within 10 days if the worker considers that the employer is unlikely to do so. The rules relating to this right are located in section 106.



**Time period to Accept or reject the claim**

If the worker notifies the Authority of a claim for weekly payments under section 103(1B) and it complies with section 103, the Authority must determine liability and advise the worker within 28 days of:

- receipt of the employer's claim form; or
- the 11<sup>th</sup> day after the Authority received notice of the claim

whichever occurs first.

If no early notification has been utilised by the worker and the Authority receives a claim for weekly payments from the employer more than 28 days after the expiry of 10 days (obligation under section 108), the claim is deemed accepted by the Authority.

In the case of a claim lodged directly on the Authority, because the employer refused to forward the claim to the Agent, the Authority has 28 days to accept liability from the day the claim is received by the Authority. If no decision has been made the claim is deemed accepted.

A deemed decision is binding on the employer and the employer is liable for all weekly payments commencing on the first day of incapacity and ending on the day the claim for weekly payments was received by the Authority from the employer.

In a case where an employer refuses to make payments to a worker, the Authority will assume this liability and seek recovery from the employer.

**Further Obligations in relation to injuries**

Employer acknowledges notice of injury	When an employer receives notice of an injury they must ensure the required particulars of the injury are recorded in the register of injuries and acknowledge the notice in writing.
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Employers must not refuse a claim for compensation or dismiss <u>worker</u> for claim lodgement	An employer must not refuse to receive a claim for compensation. The employer cannot dismiss a worker from employment because the worker has: <ul style="list-style-type: none"> <li>- given the employer notice of an injury</li> <li>- taken steps to pursue a claim for compensation</li> <li>- given or attempted to give a claim for compensation to the employer, agent or the <u>VWA</u>.</li> </ul>
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Uninsured employers to forward claims within 5 days	Employers who are not insured or are exempt must forward any claims they receive to the VWA within 5 days.
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Employer's Claim Report	The <i>Employer's Claim Report</i> provides basic details that are required to process a claim, including the employer's view about whether the claim should be accepted or rejected.
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If an employer does not accept a claim and there is not enough room on the *Employer's Claim Report* to provide all the reasons for non-acceptance, they should attach a covering letter to the form, setting out the reasons in full.

### **Employer to re-employ worker**

All employers have a responsibility to re-employ an injured worker when there is a time lost claim. The obligation commences from the initial incapacity of the worker and extends for a period of 12 months. Whilst there is some scope to claim an exemption from this requirement if the re-employment of a worker would place undue hardship on the employer, the exemption will be applied sparingly. Therefore employers should prepare in advance for the possibility of an injury to an employee and possible scope for re-employment.

### ***Do you have a plan to get your injured worker back to work? Prepare and lodge them NOW!***

It is compulsory for all employers to lodge a return to work plan with Cambridge within 10 days of incapacity of a worker. There are even greater obligations on larger employers with rated remuneration above one million dollars.

The return to work plan must contain at least:

- ✓ The name of the worker
- ✓ An estimate of when the injured worker might be fit to return to work
- ✓ An offer of suitable employment
- ✓ Details of steps to be taken to facilitate the worker's return to work

This plan needs to be updated regularly.

Returning injured workers to suitable employment is a significant way to reduce claims costs, promote a return to health for the injured worker and motivate other staff. The earlier this is completed the better.

A return to work plan needs to be submitted even if the worker is to have surgery or if there are certificates stating that the worker is unable to return to work. The plan is to address immediate and future return to work. It can be updated as regularly as necessary in order to take into consideration the worker's changing capacity.

### **Payment of weekly payments**

There are specific procedures for the payment of compensation to a worker and seeking recovery of those payments. *The general message is that payments should be made and reimbursement sought as soon as possible.*

Once a worker provides a valid certificate the procedure for payment is as follows:

- The employer pays the worker
- The employer sends to Cambridge the certificate of capacity for reimbursement
- Cambridge sends reimbursement to the employer

Payments to the injured worker should be made within 7 days of the end of the week to which payment is made or, if the worker is paid less frequently, on the day that the worker is normally paid.

***Do not risk missing reimbursement for weekly benefits paid to workers. Lodge your reimbursement form NOW!***

Cambridge Integrated Services Victoria Pty Ltd is not required to reimburse an employer for weekly payments to a worker where reimbursement is sought more than 3 months after the payment is made.

Therefore if an employer makes a weekly payment in March 2005 and claims reimbursement in July 2005 Cambridge is not obliged to reimburse the employer for that payment.

Cambridge advises all employers to submit claims for reimbursement as soon as the payments are made to ensure prompt payment.

Cambridge may however provide reimbursement if satisfied that there is a reasonable explanation for the delay.

There are other rules that relate to the payment of compensation to a worker. For further detail please contact your case manager at Cambridge.

If payments are not made to the injured worker within the required time period interest is payable.

#### **4. Valid Claims for compensation (Including appropriate claim forms, certificates etc)**

A claim for compensation is valid if it complies with sections 103 and 105.

Section 103 requires that the claim:

- Be in a form approved by the authority in relation to the type of benefit claimed
- Unless the claim is for impairment benefits, death benefits or medical expenses only be accompanied by a certificate under section 105
- Subject to some minor exclusions be served on the employer
- Include a signed authority from the worker authorizing the provider of a medical service or hospital service to the claimant to give the authority, self-insurer, employer or conciliation officer information relating to those services

If a claim for weekly payments is submitted without a certificate under section 105, the claim does not become valid until the certificate is received. The same is true in the reverse where a certificate is received first and a claim form second.

If a claim for compensation contains a material defect then the authority has 14 days to return the claim to the worker with details of the defect. It is imperative therefore to ensure that any claim for compensation served is submitted to Cambridge as soon as possible and certainly within 10 days of receipt.

A Claim for Compensation must be accompanied by a medical certificate that meets the requirements of Section 105. Section 105 requires that the certificate be issued by an appropriate Medical Practitioner, and in some instances that can include a Physiotherapist and also be in the form approved by the Authority. The most important aspect of the certificate is that it specifies the duration of the worker's incapacity and whether the worker has a current work capacity or has no current work capacity. If the worker has a current work capacity it should identify any restrictions that will assist the worker in returning to suitable employment.

The first certificate submitted with the claim should be no longer than 14 days. If it is longer than 14 days the certificate is valid but not for the days after the 14<sup>th</sup>.

Subsequent certificates should be for a period of 28 days. This criterion is governed by Section 111 of the Act.

Section 105(4) enables the worker to apply to the County Court for a determination of the worker's incapacity if they are unable to supply certificates. Recently the County Court decided that as the requirement for a certificate is a procedural and not a sub-standard requirement of the Act, the worker has a general right to obtain incapacity benefits without the provision of certificates. This does not abrogate the responsibility of the worker to prove that he or she has an incapacity for employment.



As a result of this decision the Act has been amended to remove the requirement for certificates in some instances. Where a claim has been rejected, or payments terminated, and a Court overturns the decision, a worker is not required to submit certificates for the period from the decision of the Authority to the decision of the Court.

Section 111 discusses continuing certificates. The certificate must provide to the Authority details of the period in which the incapacity relates and contain a declaration that the worker has or has not engaged in any form of employment, self-employment or voluntary work during the period.

The general period for this certificate cannot exceed 28 days however as noted above, given that the certificate is not a sub-standard requirement of the Act as determined by the County Court it is possible that the certificate can be extended for further periods. This in fact is done quite regularly and in particular it is done for workers who have long-term injuries who are thereafter required to submit 3, 6 or 12 month certificates. There is a general rule against backdating certificates and the Act states that a certificate is of no effect to the extent that it relates to a period of 90 days prior to the date the certificate is issued.

It is important to recognise that the WorkCover certificate is provided so that the employer is able to determine the level of capacity that the worker has to perform suitable employment or pre-injury duties. The certificate should be for a limited period, a maximum of 28 days, so as to enable the employer to provide for the worker's current capacity and adjust to the improvement in the worker's condition.

As discussed elsewhere a certificate is required for reimbursement of weekly benefits to the employer.

## 5. *Obligations on the worker*

- (a) Reporting injuries
- (b) When to lodge a claim
- (c) Participation in return to work with injury employer
- (d) Participation in return to work outside injury employer
- (e) JSA and WISE

A worker is obliged to report all injuries to the employer within 30 days of the incident. It is not necessary to lodge a claim at this stage if there is no incapacity for employment or medical treatment required. However it is always a good idea to encourage workers to attend a GP to obtain an opinion on the level of seriousness of the condition so there is some understanding of the likely consequences of the injury.

The Authority may waive or extend the 30 day time limit for a notice of injury if satisfied, in particular under sub-section (6)(a), that it was not reasonably practicable for the worker, or another person on his or her behalf, to give notice.

### **Changes**

Sub-section (7) elaborates, without limiting the generality of sub-section (6), that the failure to give notice within the time limits is to be taken not to have been reasonably practicable, if the failure is due to:

- ignorance or a mistake; or
- undue influence or duress; or
- being absent from Victoria.

Section 103(5) dictates when a claim for compensation should be made. This is in addition to the requirement to report the injury within 30 days. In the first instance the claim form should be given or served on the employer prior to the worker ceasing employment. If it is not, then the claim is not validly made until the worker provides an explanation as to why the claim could not reasonably have been made whilst employed. For the claim to be valid this explanation needs to be accepted by the authority.

Section 103(7) provides time limits for specific claims and when they should be lodged:

- For weekly payments claims the claim must be lodged as soon as practicable after the incapacity becomes known.
- For death benefits the dependants need to lodge the claim within 2 years of death
- Claims for pain and suffering under section 98A must be lodged at the same time as the impairment claim under s98
- Claims for medical expenses need to be lodged within 6 months of the relevant service.

The worker is generally able to provide an explanation for late lodgement of claims and seek a waiving of the time limits. However the explanation needs to address relevant considerations and a good defence to the request is that the employer is unfairly prejudiced by the delay.

There are also other specific rules that relate to impairment claims.

### **Weekly payments claims**

To be entitled to ongoing benefits, a worker is required to make every reasonable effort to rehabilitate themselves to return to work. All employees, regardless of whether they have a current work capacity or not, need to make every reasonable effort to co-operate and participate in occupational rehabilitation or return to work plans, make every reasonable effort to return to work in suitable employment (either at the injury employer or an alternate employer), and participate in assessments of capacity, rehabilitation progress and future employment prospects.

Injured workers who require an Occupational Rehabilitation service will now have some choice in provider. The Authority, employer or self-insurer must nominate not less than 3 approved providers of an occupational rehabilitation service. If 3 approved providers are not available, it is sufficient to list available rehabilitation provider(s). In nominating such approved providers, consideration is given to:

- the type of injury the worker has suffered;
- the type of rehabilitation services required;
- the worker's residence; and
- the rehabilitation providers' location.

The worker is entitled to choose an approved provider of rehabilitation services from the list of nominated providers. If the Authority, employer or self-insurer does not nominate a list, the worker can choose any approved provider of rehabilitation services. If the worker does not choose an approved provider within 14 days, the Authority, employer or self-insurer will nominate the provider.

The first approach to the worker should be by the injury employer to arrange for a return to work in suitable lighter duties. This obligation is based on the employer's obligation to provide alternate duties for 12 months after injury.

However if that is not possible because of the injury and the inability of the employer to provide suitable employment then further rehabilitation will be provided. An assessment will be conducted to determine if any retraining of the worker is required in the context of identified suitable vocational options available.

If retraining is required that will be arranged and the worker is obliged to participate. If not, the worker will be referred for a 16 week program of Job Seeking Assistance, or JSA. The JSA process will assist the worker in addressing barriers to employment and provide a structured means by which those barriers will be overcome. The time period can be extended if it is of assistance.

As part of JSA, and sometimes independent of JSA, a worker can be assessed for referral to the WISE program. The WorkCover Incentive Scheme for Employers (WISE) was set up to provide an incentive for employers to engage injured workers. For the first 12 months employers receive a subsidy and are indemnified against any aggravations of the relevant injury.

Workers are obliged to participate in JSA, and where relevant WISE, in order to continue to be entitled to weekly benefits.

If the worker fails to attend an examination to assess work capacity or suitability to attend and participate in JSA or WISE, payments can be suspended or terminated.

## 6. *Benefit types*

- (a) Medical and Like expenses
- (b) Weekly Payments (Notional Earnings/Current Weekly Earnings)
- (c) Impairment Benefits
- (d) Damages

including how benefits are terminated.

### **Medical and Like Expenses**

A worker is entitled to medical and like expenses if they have a compensable claim. Medical expenses include, but are not limited to:

- Treatment from the worker's health providers i.e GP, physio, surgeon
- Hospital treatment including ambulance
- Gym membership
- Travelling expenses
- Home help including gardening, firewood, domestic cleaning
- Home modifications, vehicle modifications
- Funeral/burial costs

Medical and like expenses continue for 52 weeks. If a worker is also entitled to weekly benefits, medical and like expenses continue for 52 weeks after the cessation of weekly payments.

(14) Compensation under this section does not cease if-

(a) the worker has returned to work but-

(i) could not remain at work if a service under sub-section (1) was not provided; or

(ii) surgery is required for the worker; or

(iii) the worker has a serious injury within the meaning of section 93B(5);  
or

(b) the worker requires modification of a prosthesis; or

(c) the service provided under sub-section (1) is essential to ensuring that the worker's health or ability to undertake the necessary activities of daily living does not significantly deteriorate.



## **Weekly Benefits**

If a worker has an incapacity for pre-injury duties they are entitled to weekly benefits. The weekly benefits generally extend to 130 weeks for weekly payment claims registered on or after 1 January 2005.

For the first 13 weeks of a person's incapacity, payments are made at 95% of the pre-injury average weekly earnings (PIAWE) and thereafter if the worker is totally incapacitated at 75% of the worker's PIAWE. If the worker has a current work capacity and is working, the worker will receive 75% of pre-injury average weekly earnings less 75% of actual earnings.

As noted above a worker with a current work capacity who is working will have payments reduced by current weekly earnings. Current weekly earnings are the actual earnings of the worker but are based on the ordinary hours and the ordinary rate of pay. Overtime is not considered a current weekly earning. It is assumed that if a worker is earning overtime, payments would already be reduced to zero as they would be working full hours.

The Authority can also apply current weekly earnings based on what the Authority considers the worker could earn if they were working. These are called notional earnings. This is a highly contentious area and the Authority has deliberately limited its application. In the first instance there must have been an offer of suitable employment. Second, the worker must have stopped performing the suitable employment or refused to accept suitable employment based on reasons unrelated to the compensable injury. If the worker is performing suitable employment and dismissed due to disciplinary reasons notional earnings can be applied.

New legislation effective 1 July 2006 states that a worker who has a current work capacity but is not provided suitable employment, will be paid at the rate of 75% of the worker's PIAWE or \$1,210 (indexed annually), whichever is the lesser.

In the first 26 weeks of benefits a worker's PIAWE would include overtime and shift allowances. Thereafter the PIAWE are calculated on the worker's ordinary time rate of pay multiplied by an ordinary hours of work up to a maximum of 38.

A worker's payments generally continue for 130 weeks. However at the expiry of 130 weeks, if a worker is unable to return to work of any kind indefinitely payments will continue. Further, if a worker is able to perform suitable employment, is working more than 15 hours and earning more than \$141 per week, and that is the maximum capacity that the worker will be able to perform, then the worker's payments continue at 75%. The worker needs to make a specific application for these payments to continue.

In November 2004, specifically on the 18 November 2004, changes were made to the Accident Compensation Act with respect to older recipients of compensation benefits. A worker generally receives benefits for 130 weeks or to retirement age if they are entitled to continuing benefits. If a worker was injured after the age of 64 then they were entitled to 52 weeks of benefits and then the payments cease on the new retirement age. The amendments to the Act in November 2004 now allow a worker who is injured after the age of 63 to receive benefits for 130 weeks before retirement causes those payments to cease. Those workers who were on payments as at the 18 November 2004 and where the injury occurred after their age of 63 will also benefit from those provisions.



A person's weekly benefits of compensation can only be ceased if the Authority provides a valid notice to the worker. A worker's weekly benefits can be terminated generally on the following grounds:

- Employment is no longer a material contributing factor to any incapacity
- The worker has received 130 weeks of benefits and has a current work capacity
- Retirement age has been reached
- The payments were obtained fraudulently
- The worker has returned to work

The worker is entitled in most instances to receive a written notice advising of the termination of payments and the date that the termination is to take effect. A notice period of up to 28 days is also required. In some circumstances no notice is required.

The termination of a worker's benefits is a very technical area and is best left to the claims agent to advise on.

### **Impairment Benefits**

If a worker has a permanent injury as a result of a WorkCover injury then they are entitled to additional compensation in the form of a lump sum. The amount and nature of this compensation depends on the date of injury. If the date of injury is before 12 November 1997 the benefits are calculated under Sections 98 and 98A. If the injury is after 12 November 1997 the benefits are calculated under Section 98C. The difference being that after the 12 November 1997 there is a minimum threshold of 10% before a worker is entitled to any compensation benefits for a lump sum and the assessment of all injuries is to be based on the 4<sup>th</sup> edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. This is a no fault benefit again.

There is a complicated means of working out the benefits payable to a worker. Injuries prior to the 12 November 1997 are governed by the Table of Maims. Injuries after the 12 November 1997 are assessed by reference to the impairment as assessed under the 4<sup>th</sup> edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. There are also specific procedures in which the worker needs to apply for these benefits.

### **Lump Sum Damages Claims**

If a worker can prove that they are seriously injured as assessed under s134AB of the Act and that the employer negligently caused their injury, they are entitled to additional benefits for pain and suffering and economic loss damages.

In order to prove serious injury the worker has to indicate an impairment of greater than 30% according to the 4<sup>th</sup> edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The worker could also, if they cannot establish that ground, prove that they have sustained a serious and long term loss of body function. There are also some other



smaller categories the most significant of which is a severe and long-term behavioural disturbance to establish a mental disorder.

In addition to that, in order to establish a claim for economic loss, a worker needs to show a past and future loss of income of 40% or greater.

The worker needs to apply to the Authority for leave to proceed and the Authority needs to assess whether a worker is seriously injured before they can seek to pursue the employer for any negligence. If the Authority does not agree to accept the application then the Court may decide whether a worker is seriously injured.

A worker can obtain damages for pain and suffering and economic loss or separately.

## **7. *PIAWE and appropriate record keeping***

A worker's compensation payments are based on the worker's pre-injury average weekly earnings. (PIAWE). PIAWE are defined in Section 5A of the Accident Compensation Act. The starting point is generally a reference to the average of the earnings of the worker for the 12 months prior to the injury. The actual pre-injury average weekly earnings are calculated by reference to the worker's ordinary time rate of pay for the normal number of hours that the worker was employed per week. There is a maximum of 38 hours generally.

If the worker has been employed for less than 12 months then the same process is continued by calculating the worker's ordinary time rate of pay for the normal number of hours per week for the amount of time that the worker was employed.

If the worker was employed for less than 4 weeks, the PIAWE is based on what the worker could have expected to earn. This is not affected by a probation period.

For the first 26 weeks of the worker's entitlement he or she is also entitled to an additional amount for overtime and shift allowances. The worker is entitled to receive these benefits if in the 12 months prior to the injury the worker performed overtime and it would be likely that the worker would continue to perform overtime work. The same arrangement applies to shift allowance.

It is not always easy to work out what a shift allowance is and what periods of time the worker's overtime pay is calculated given that the worker can sometimes be paid at different rates. In those circumstances where there are different rates of pay then the easiest way is to average the different rates of pay to get a consistent rate. However the most accurate way would be to record every hour at the different rates of pay, add them all up and divide by the hours.

If the worker has not got a normal number of hours or a normal rate of pay, or has not been working for the one employer for a continuous period, or is employed by more than one employer, the calculation of pre-injury average weekly earnings starts to become more complicated. This is also the case where the worker starts to salary sacrifice his income into superannuation or other benefits such as a car, mobile phone or computer.

Where the worker's normal hours and normal rate of pay are not standard and there is a considerable difference between the two, or the worker's employment has not been continuous, then you will need to refer these matters to the Senior Legal Manager.

In order to ensure that it is easy to calculate a worker's pre-injury average weekly earnings it is really important that accurate records are kept. Appropriate records would include a breakdown of:-

1. The hours worked by the worker on an ordinary time rate.
2. The hours worked by a worker at a special rate for overtime.
3. Details of any allowances or deductions made with respect to the worker's salary including shift allowances, uniform allowances, travel allowances, rostered day off deductions, social club deductions, superannuation payments and salary sacrifice details.



If the worker is a casual employee keeping details of the shifts worked and the regularity of those shifts would be important.

If the worker has salary sacrificed, and in particular the salary sacrifice to superannuation, then there needs to be some clarity and demarcation between the payment of the worker's normal superannuation and the payment of salary sacrifice if that amount is to be included for the purposes of the worker's pre-injury average weekly earnings.