



Australian Government

Comcare

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**Jurisdictional Policy Advice No. 2009/13**  
**Safety, Rehabilitation and Compensation Act 1988 (SRC Act)**  
**Considerations required before reducing Normal Weekly Earnings (NWE)**  
**under subsection 8(10)**

## Purpose

1. This advice provides guidance in the matters to be considered before applying a reduction to NWE under paragraph 8(10)(a) of the SRC Act, to reflect what the employee would have received had he or she not been incapacitated. Those considerations include suspension from employment for reasons unrelated to the SRC Act and periods of leave without pay (LWOP).

## Relevant Legislation

2. Section 19 of the SRC Act provides that Comcare is liable to pay compensation to an employee in respect any period during which the employee is incapacitated for work.
3. The calculation of incapacity payments under section 19 is based on an employee's NWE, which is calculated in accordance with section 8 of the SRC Act. Paragraph 8(10)(a) provides for the reduction of NWE in certain circumstances.
4. Section 8 of the SRC Act prescribes the method of calculating NWE. This is the base component in the calculation of the amount of weekly compensation payable under section 19 of the SRC Act to an employee who is incapacitated for work.
5. Subsection 8(10) of the SRC Act provides for the reduction of NWE where it does not accurately reflect what an employee would be earning if they were not injured. It requires a comparison between the pre-injury NWE and what the NWE would be at a later date. However, paragraph 8(10)(a) is only applicable where the employee continues to be employed by the Commonwealth or a licensed corporation.
6. Subsection 8(10) provides:

‘If the amount of the normal weekly earnings of an employee before an injury, as calculated under the preceding subsections, would exceed:

  - (a) where the employee continues to be employed by the Commonwealth or a licensed corporation - the amount per week of the earnings that the employee would receive if he or she were not incapacitated for work; or
  - (b) where the employee has ceased to be employed by the Commonwealth or a licensed corporation - whichever is the greater of the following amounts:
    - (i) the amount per week of the earnings that the employee would receive if he or she had continued to be employed by the Commonwealth or the licensed corporation in the employment in which he or she was engaged at the date of the injury;
    - (ii) the amount per week of the earnings that the employee would receive if he or she had continued to be employed by the Commonwealth or the licensed corporation in

the employment in which he or she was engaged at the date on which the employment by the Commonwealth or a licensed corporation ceased;

the amount so calculated shall be reduced by the amount of the excess.’

7. The intent of this provision is that an employee should not be financially better off during a period of incapacity as a result of a work related injury than if they were at work.

## Background

8. In [Burgess and Comcare](#) [2007] AATA 1637 (7 August 2007), Comcare determined the employee’s NWE to be nil during a period of suspension from employment without pay. The suspension was initiated by her employer under the *Public Service Act 1999*. It was not a suspension of the entitlement to compensation as provided for under subsections 36(4), 37(7) or 57(2) of the SRC Act.
9. Comcare considered that although totally incapacitated at the time of the suspension, if not for the incapacity the employee would have received a nil weekly pay amount for the period of the suspension. Comcare determined that her NWE was therefore nil during that period, resulting in no entitlement to compensation under section 19 of the SRC Act for the same period.
10. The Administrative Appeals Tribunal (AAT) set aside the Comcare decision, finding that the employee was entitled to compensation for incapacity. The AAT made two important points. It found that the SRC Act creates an entitlement to be paid compensation for incapacity for work, with that incapacity not removed by a suspension from work unrelated to the SRC Act. It also found that subsection 8(10) requires an amount of earnings to be received. If there are no earnings, no amount is received, paragraph 8(10)(a) is not engaged and so cannot be applied. The Tribunal did not regard subsection 8(10) as having any operation in the present circumstance, rather it’s function was to cater for cases where, through unusual variations, an employee’s NWE “was artificially high or to prevent the employee receiving a windfall”.
11. Comcare appealed the AAT’s decision to the Federal Court (Court). See [Comcare v Burgess](#) [2007] FCA 1663 (1 November 2007).
12. The Court upheld the AAT’s decision. The Court ruled that paragraph 8(10)(a) of the SRC Act only applies in a situation where an employee ‘continues to be employed by the Commonwealth’ and ‘continues to receive earnings from the Commonwealth’.
13. The Court held that ‘[h]ad the legislature intended that suspension of employment would bring about a reduction of normal weekly earnings to nil for the purposes of a formula quantifying the amount of weekly compensation under s19(3) during a period for incapacity for work, the legislature would have expressly provided for that result.’
14. Essentially, if an employee is suspended without pay, the paragraph has no role to play as subsection 8(10) does not contemplate a situation where an employee is still employed but receiving no remuneration from his or her employer for that period.

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15. Subsection 8(10) only applies where the employee would have received earnings had they not been incapacitated. If the employee would not have been in receipt of earnings, paragraph 8(10)(a) cannot apply and the NWE cannot be reduced to nil under those provisions.

16. The provisions of paragraph 8(10)(a) do not operate in a situation where an employee is suspended without pay for reasons unrelated to the SRC Act. Similarly, LWOP is likely to be considered by the Courts as being unrelated to both the issue of injury and compensation for an employee's incapacity.
17. The Burgess matter was decided on the application of the legislation. It could logically be said that an employee who is suspended from employment has the right to seek other employment in an effort to maintain an income. However, if that employee is precluded from obtaining such employment due to the compensable injury then compensation for the incapacity remains payable.
18. Determining authorities need to be aware of an employee's incapacity prior to suspension from employment as the employee may have an ongoing entitlement to incapacity payments under the SRC Act.
19. It is also unlikely that the granting of LWOP would preclude the employee's entitlement to incapacity payments. The mere fact that an employee on compensation leave is granted LWOP does not alter the fact that he or she is absent from employment due to an incapacity for work. It is not the granting of LWOP which 'causes' the employee to be absent from work, rather the granting of LWOP operates to relieve the employee of any obligation to attend work which would otherwise arise. For example, if the employee ceased to be on compensation leave in the relevant period.
20. Please be aware that NWE is only one component in the calculation of incapacity payments and there may be other relevant provisions in the SRC Act apart from subsection 8(10). Another component is the employee's ability to earn (AE). For example, a suspension without pay may be a relevant factor to take into account under subsection 19(4) of the SRC Act in determining an employee's AE.

## **Application**

21. The principles of this advice apply to all claims with a date of injury on and from 1 December 1988, the commencement of the SRC Act.
22. The principles of this advice are also likely to extend to the scenario of LWOP for current, incapacitated employees.
23. For enquiries concerning this policy advice, please contact the SRC Policy Section by telephone on 1300 366 979, or by email at [SRC.Policy@comcare.gov.au](mailto:SRC.Policy@comcare.gov.au).

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13 November 2009