



Australian Government

Comcare

Workers' Compensation:
How Comcare determines claims made under the
Safety, Rehabilitation and Compensation Act 1988

EDITION 1 – FOR CLAIMS WITH A DATE OF INJURY BEFORE 13 APRIL 2007

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Purpose of Guide

This Guide explains the processes followed by Comcare in determining claims for workers' compensation made under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act), for claims with a date of injury before 13 April 2007.

The guide is not a substitute for reading the SRC Act.

Introduction

Comcare administers the Commonwealth workers' compensation scheme for all Commonwealth Departments and most Commonwealth authorities, providing safety, rehabilitation and compensation services. The system administered by Comcare provides access to compensation for employees who are injured or ill as a result of their employment.

Employers can assist Comcare in determining whether or not compensation is payable in any particular case by providing factual information in relation to the circumstances of claims made by their employees. A statement of facts from an employer assists Comcare to make informed decisions and prompts the employer to focus on the circumstances that led to its employee being injured or becoming ill, the reasonable and practicable steps required to prevent other employees being harmed and the support required by the injured or ill employee to stay at or to return to work quickly and safely.

Principal characteristics of the scheme

The workers' compensation scheme established by the SRC Act is characterised by:

- a fully funded approach, where employers are financially accountable for the cost of work related injury and disease through the payment of an annual premium
- a "no fault" scheme (meaning there is no requirement to establish negligence or blame), with limited access to common law
- an integrated and cost effective approach to injury prevention, workers' compensation and occupational rehabilitation
- a comprehensive benefit structure with an entitlement, for those who are totally incapacitated, to incapacity payments for 45 weeks at 100 per cent of normal weekly earnings and 75 per cent thereafter until age 65 (except where an employee is injured at or after age 63)
- employer statutory responsibility for the occupational rehabilitation of injured employees
- payment of the reasonable costs of rehabilitation programs approved by the employer
- access to payments for medical and related costs associated with the treatment of work related injury and diseases
- payments for permanent impairment due to work related injury or disease
- coverage for journeys and ordinary recesses (for example meal breaks).

Comcare and the safety, rehabilitation and compensation commission

The SRC Act created the statutory authority, Comcare, and the Safety, Rehabilitation and Compensation Commission (SRCC) to administer the SRC Act.

Functions of Comcare

Comcare's functions under the SRC Act include making decisions on claims accurately and quickly, ensuring effective rehabilitation and return-to-work programs are implemented by employers and cooperating with others to reduce the incidence of injury to employees.

Role of the SRC Commission (SRCC)

The SRCC's role under the SRC Act includes to:

- provide advice to the Minister in relation to the SRC Act
- determine applications by Commonwealth authorities and eligible corporations wishing to self insure and/or manage their own claims under licence
- develop general policy direction for scheme administrators on the operation of the SRC Act
- ensure, as far as practicable, that there is equity of outcomes resulting from administrative practices and procedures used by Comcare and licensees
- act as a review body for premiums and regulatory contributions.

Compensation

For compensation to be payable under the SRC Act, Comcare must find that liability exists for the employees' injury/illness. Subsection 14(1) of the SRC Act provides that:

- Comcare is liable to pay compensation in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.

Section 4 of the SRC Act provides that an injury can be a disease, a physical or mental injury, or an aggravation of a physical or mental injury that arose out of, or in the course of employment. It does not include any disease, injury or aggravation arising under the "exclusionary provisions" of the SRC Act detailed below.

The SRC Act also specifies the manner in which claims are to be determined. Under section 72, Comcare:

- shall be guided by equity, good conscience and the substantial merits of the case, without regard to technicalities
- is not required to conduct a hearing
- is not bound by the rules of evidence.

A flowchart showing how claims made under the SRC Act are determined by Comcare is at the end of this document.

Determining liability for a claim

Comcare considers the following factors in determining liability for compensation:

- Compliance
- Employment relationship
- Exclusionary provisions
- Medical evidence

Compliance

The SRC Act requires that a claim must comply with certain conditions. The main requirements are that the claim:

- is made by an "employee" as defined in the SRC Act
- substantially complies with the approved form
- is accompanied by a medical certificate.

Employment relationship

Section 4 of the SRC Act defines a (compensable) injury as an injury that arose out of or in the course of employment. The SRC Act establishes a no fault scheme whereby it is not necessary for an injured employee to show that there was a special, unusual or wrongful factor that contributed to their condition.

Nor must they establish that their employer breached any duty of care. It is sufficient that employment contributed to the injury or aggravation of an injury, or materially to the development or aggravation of a disease.

Injury arising out of, or in the course of, employment

The circumstances where an injury is considered to arise “out of or in the course of employment” are set out in section 6 of the SRC Act. There are two possible bases for an injury to be compensable under this section:

- **arising out of employment** means arising out of the work the employee is employed to do or is incidental to that work, whether or not the employee is injured at their place of employment
- **in the course of employment** involves a purely temporal connection.

Basically, an injury will be taken to have arisen out of, or in the course of, employment if the injury is sustained:

- at work, for the purposes of employment or during an ordinary work recess such as the lunch break
- as a result of an act of violence that would not have occurred but for their employment
- on a journey between home and work
- whilst travelling for work
- on an approved educational course or while travelling to and from the course
- whilst at a place, or travelling, for a specified purpose in the SRC Act, for example, to receive medical treatment for a compensable injury.

Material contribution by employment

Where an “injury” is categorised as a “disease” or “ailment”, the consideration is whether there has been a material contribution by the employment to the contraction or “aggravation” of that disease.

In certain circumstances (S7), employment with the Commonwealth at any time before symptoms of the disease first became apparent may be taken to have materially contributed to the contraction of the disease, unless the contrary is established.

“Employment” has been interpreted broadly. The most commonly cited definition is Windeyer J in *Federal Broom Company v. Semlitch* (1964) 110 CLR 626:

“When the Act speaks of “the employment” as a contributing factor it refers not to the fact of being employed but to what the worker in fact does in his employment. The contributing factor must in my opinion be either some event or occurrence in the course of the employment or some characteristic of the work performed or the conditions in which it was performed”.

The term “material” is not defined in the SRC Act, but has been interpreted broadly by the Courts. The word “material” imposes an evaluative threshold below which a causal connection may be disregarded. The term “in a material degree” requires an evaluation of all relevant contributing factors for the purpose of asking whether the employee’s employment did or did not contribute materially to the suffering of the ailment, etc, in question (“the threshold evaluation”). Whether this will be so in a given case will be a matter of fact and degree.

Subsection 7(1) of the SRC Act allows the Minister to specify by written notice which diseases will be taken to have been materially contributed to by specific Commonwealth employment, if the employee was engaged in that employment at any time before symptoms became apparent, unless the contrary is established (reverse onus of proof).

There are approximately 28 occupational diseases on the “Schedule of Specified Diseases and Specified Employments” – including mesothelioma, ionising radiation exposure, occupational asthma, parasitic diseases, and exposure to various chemicals.

Exclusionary provisions

The legislation excludes some injuries from compensation.

An injury is not a compensable “injury” for the purposes of the SRC Act if it is the result of:

- reasonable disciplinary action
- failure to obtain a promotion, transfer or benefit
- that employee making a false representation, connected with their employment, that they did not suffer from the claimed disease
- travel exclusions that increased risk of injury
- the employee voluntarily and unreasonably submitting to an abnormal risk.

Comcare is not required to make a judgement about the outcome of any disciplinary action.

Comcare must assess the reasonableness of the disciplinary action on a case by case basis.

In addition, an injury is not a compensable “injury” for the purposes of the SRC Act if it is:

- intentionally self-inflicted
- caused by an employee’s serious and wilful misconduct but is not intentional, unless the injury results in death or serious and permanent impairment.

If an employee sustains a condition as a result of multiple causes and one such cause falls within the scope of an exclusionary provision, then it is necessary to assess the contribution that the factor has on the claimed condition.

If one of the operative causes falls within the meaning of the exclusion, and this cause contributed **materially** to the claimed condition, then the condition is not an “injury” for the purposes of the SRC Act.

Medical evidence

Comcare considers whether the claimed condition is related to the stated employment cause, and on the medical evidence, determines the nature and extent of the claimed injury and if the condition claimed is compensable. To assist in decision-making, Comcare may exercise its power under section 57 of the SRC Act to arrange for an independent medical assessment.

Such an assessment may be sought where:

- the claimant receives treatment from a doctor with limited qualifications, and/or
- existing medical opinions are inconclusive, and/or
- further specialised opinion is reasonably required, and/or
- conflicts of opinion between doctors require resolution.

Consideration of the facts

Comcare's claim form, *Claim for Workers' Compensation (SRC16)* (the Form) provides for an employee to include factual information and also provides for the employer to include a Statement of Facts about the claim.

A statement of facts can be in any written form (a covering letter forwarded with the claim; an attachment to the claim, etc) and detailed advice on this is available at www.comcare.gov.au.

For complex claims, a statement of facts from the employer assists Comcare in making a correct decision, and enables a better understanding by the employer of the issues considered in determining claims.

If the employer expresses opinion/comments which are adverse to the claim, Comcare will provide the employee with an opportunity to respond, prior to making a determination.

Comcare can also request from an employee or their employer other information or documents relevant to a claim. The SRC Act provides Comcare with the authority to request, in writing, that employees (section 58) or employers (section 71) provide any information or documents within specified timeframes. Comcare may refuse to deal with a claim if the employee fails to reasonably comply with such a request. If either the employee or employer fails to comply with the request, Comcare may proceed with its decision without that information. An employee or their employer may also request documents relating to the employee's claim from Comcare (section 59).

Benefits

Once liability has been accepted for an injury, the employee (or in the case of death, their dependant/s) may be able to claim for a range of benefits, depending on their individual circumstances. The following benefits may be payable:

- Medical expenses (section 16)
- Death benefits (section 17)
- Funeral benefits (section 18)
- Incapacity benefits (sections 19-23)
- Permanent impairment & non-economic loss (sections 24-28)
- Household services and attendant care services (section 29)
- Aids, appliances, alterations & modifications (section 39)

Medical expenses

Under Section 16 of the SRC Act, Comcare may pay compensation for medical treatment obtained in relation to the injury (being treatment that is reasonable for the employee to obtain in the circumstances).

Comcare determines the amount of compensation that is appropriate to that medical treatment.

If costs of medical treatment are payable, Comcare may also be liable for travel or accommodation costs incurred by the employee if it is necessary for them to travel to and/or remain at a location for the purpose of obtaining the medical treatment.

Death benefits

When a compensable injury to an employee results in death and the employee dies leaving dependants, Comcare is liable to pay to the dependants compensation in respect of the injury.

A lump sum benefit may be payable to the dependants, with an additional weekly amount payable to a "prescribed child" (i.e. a child under 16 years of age or a full-time student between 16 and 25 years, as defined under s4) as set out under section 17.

Funeral benefits

When a compensable injury to an employee results in death, Comcare is liable to pay compensation in respect of the cost of the employee's funeral. The compensation payable cannot exceed the specified statutory (indexed) amount contained in section 18.

Incapacity benefits

Comcare may be liable to pay 100% of the injured employees' normal weekly earnings (NWE) for the first 45 weeks of incapacity (minus the greater of any amount the employee earns in other employment, including self-employment), then 75% or more, depending on the incapacity status and percentage of normal weekly hours in which the employee is employed each week thereafter until age 65.

The above does not apply however if an employee, who has reached age 63, suffers an injury. A maximum of 104 weeks incapacity (whether consecutive or otherwise) may be payable in such circumstances and payments for incapacity may go beyond age 65.

Section 19 provides statutory rates for maximum and minimum amounts payable after the first 45 weeks.

Incapacity payments (payment of wages/salaries whilst an employee is off work) are the main cost driver for a workers' compensation claim – the longer someone is away from work, the higher the costs – hence the need for employers to focus, through early intervention and rehabilitation, on an early and safe return to work for an injured employee.

Permanent impairment & non-economic loss

Where an employee's compensable injury results in permanent impairment, being 10% or more of what is termed "whole person impairment" (WPI) or 5% or more in the case of binaural hearing loss, compensation may be payable as a lump sum for the WPI and the non-economic loss that has resulted (permanent impairment in relation to fingers, toes, taste and smell is also compensable but without any minimum percentage applicable). A statutory maximum amount is used to calculate the amount of compensation payable. Section 25 of the SRC Act also allows Comcare to make an interim 10% WPI determination.

When considering whether a compensable injury results in permanent impairment, Comcare has regard to the duration of the impairment and the likelihood of improvement in the employee's condition, and whether all reasonable rehabilitation treatment has been undertaken.

Where compensation is payable under sections 24, 25 or 27 in respect of a permanent impairment, an injured employee may elect in writing to take common law action instead of receiving compensation under the SRC Act for that injury in relation to non-economic loss.

Household services and attendant care services

If an injured employee reasonably requires household services or attendant care as a result of their injury, Comcare is liable to pay compensation of not less than 50% of the amount paid by the injured employee per week, but no more than a statutory weekly amount (section 29).

Household services means services of a domestic nature (including cooking, house cleaning, laundry and gardening services) that are required for the proper running and maintenance of the employee's household. The SRC Act requires Comcare to assess not only the medical restrictions of the injured employee, but also such things as the number of other household members and their capacity to perform the services themselves.

Aids, appliances, alterations & modifications

Compensation may also be payable in respect of any aids or appliances (or their repair) for the use of the employee, certain alterations to their place of residence or work, or vehicle modifications if the alterations and modifications are reasonably required, and other criteria in the SRC Act are met.

It is a requirement of section 39 of the SRC Act that the employee has suffered an injury resulting in "impairment" and is undertaking or has completed a rehabilitation program, or has been assessed as not capable of undertaking such a program, as the primary focus of this section is on assisting the employee to return to work.

Common law access

The SRC Act limits access to common law. Section 44 of the SRC Act precludes an action or other proceedings for damages against the Commonwealth. Section 45 of the SRC Act provides that where compensation is payable in respect of an injury that results in permanent impairment and the Commonwealth would, but for s44, be liable for damages for any non-economic loss as a result of an injury, an employee may, before any amount of compensation is paid under s24, 25 and 27, elect in writing to institute an action or proceedings against the Commonwealth for damages for that non-economic loss. The election by the employee is irrevocable and the amount the court may award for any non-economic loss is capped by the SRC Act.

Communicating decisions

Section 61 of the SRC Act requires Comcare to advise a claimant of its decision in writing. This advice will set out the terms of and reasons for the decision, and will include a statement advising the claimant of their rights if they are dissatisfied with the decision.

Reconsiderations and reviews

The SRC Act provides for a two-tiered review process where an employee or an employer is dissatisfied with a decision made by Comcare on a claim. The first tier involves a request for reconsideration by Comcare. This requires the decision to be reconsidered by a person within Comcare who was not involved in making the original decision. Once a reconsideration has been completed, that decision then becomes a 'reviewable decision' and either the employee or the employer may choose to apply to the Administrative Appeals Tribunal (AAT) for a review of that decision.

A review request must:

- set out the reasons for the request
- be made within 30 days of receiving the original decision (an extension of time based on reasonable grounds may be granted in some circumstances).

When a request for reconsideration of a decision is received by Comcare, both parties to the decision, the employer and employee, are provided with a copy of the reconsideration request and have 15 days to submit any additional evidence that they would like considered as part of the reconsideration.

The reconsideration will re-examine the decision under review including:

- reviewing the claim file and relevant source material
- evaluating medical reports and obtaining further evidence if required
- obtaining specialist medical or legal opinion if required
- the making of a reviewable decision.

If a party does not agree with the reconsideration decision, they may apply to the AAT for a review of that decision – an application cannot be made to the AAT for a review of a decision until a reconsideration decision has been issued, in writing, by Comcare.

The primary function of the AAT in these matters is to review administrative decisions made by Comcare, on their merits. Merit reviews of an administrative decision involve the AAT looking at the matter on the information provided and the facts before it. The AAT then decides whether the correct decision has been made in accordance with the applicable law.

If a party to an AAT review disagrees with the AAT's decision, that party can appeal to the Federal Court in respect of an error of law (for example misapplication of the law). If the Federal Court finds that such an error has been made, the Court may order that the matter be remitted back to the AAT to be reheard with directions, such as the appropriate interpretation of the law. A direction on interpretation by the Federal Court becomes binding on all matters with the same or similar circumstances, unless and until it is overturned by a higher Court. Decisions of the Federal Court may be further appealed on points of law to the Full Court of the Federal Court (consisting usually of 3 judges), and to the High Court by way of an application for special leave to appeal. Only a very small percentage of matters in this jurisdiction are successfully appealed to the High Court.

Rehabilitation

The SRC Act emphasises the mutual responsibilities of employers and employees in achieving a safe and durable return to work for an injured or ill employee. Under section 41 of the SRC Act, Comcare has issued guidelines to employers (Rehabilitation Authorities) in relation to the performance and exercise of their functions and powers under the SRC Act. Employers are required to comply with these guidelines.

The SRC Act provides, under section 36, that an employer (the rehabilitation authority) may, at any time and must on the written request of the employee, arrange for an assessment of the employee's capability of undertaking a rehabilitation program.

The SRC Act further provides that where an employee refuses or fails, without reasonable excuse, to undergo such an examination or in any way obstructs the examination, the employee's rights to compensation or redress under the SRC Act are suspended until the examination takes place.

Section 37 of the SRC Act provides that, following that assessment, an employer may decide that the employee should undertake a rehabilitation program and where the employer decides that such a program is required, the employer may arrange with an approved rehabilitation provider for the provision of a rehabilitation program for the employee or, where a section 37 determination is made on or from 13 April 2007, the employer may provide the program in-house.

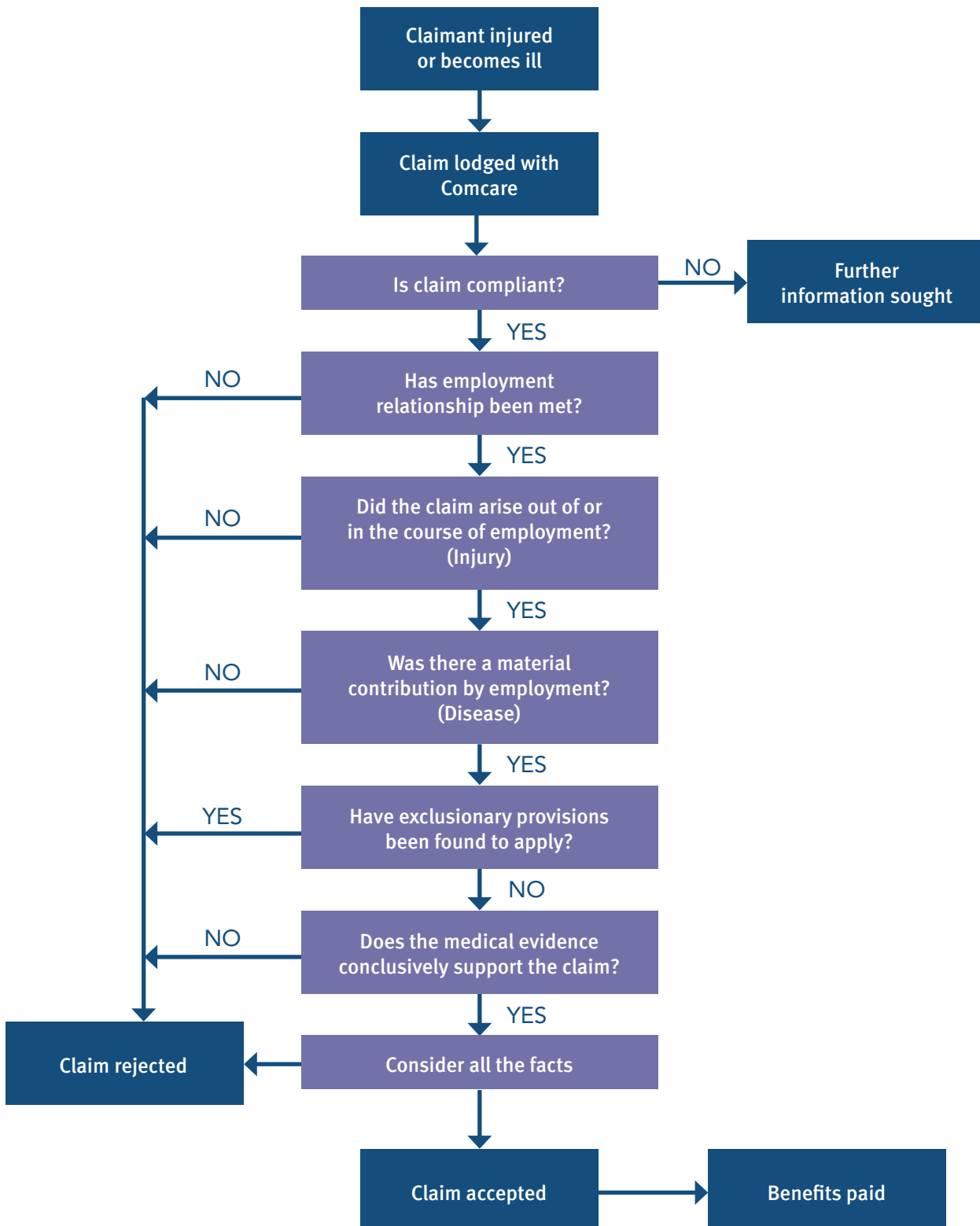
Employees are required to actively participate in the development and implementation of their rehabilitation programs. This section of the SRC Act also provides for suspension of an employee's rights to compensation or to institute or continue proceedings under the SRC Act, if the employee refuses or fails without reasonable excuse to undertake a rehabilitation program.

Where an employee undertakes or has completed a rehabilitation program, their employer must take all reasonable steps to provide the employee with suitable employment or to assist the employee to find such employment. This means employment for which the employee is suited having regard to their age, experience, training, language and other skills; their suitability for rehabilitation or vocational retraining; the feasibility of relocation of the employee or any other relevant matters.

The aim of occupational rehabilitation is to ensure that individuals resume their pre-injury employment as soon as possible following injury. This is the best possible outcome for both employees and employers.

Effective rehabilitation and return-to-work programs are the key to minimising the cost of workplace injury for both the employee and their employer and as such, employers are encouraged to consider the employee's needs for rehabilitation without waiting for a decision by Comcare on liability on any workers' compensation claim. Comcare's publication *Leadership Commitment: Early rehabilitation assistance to employees* (PUB 31) provides further guidance on this subject and is available at www.comcare.gov.au.

Workers' Compensation Claim Flow*

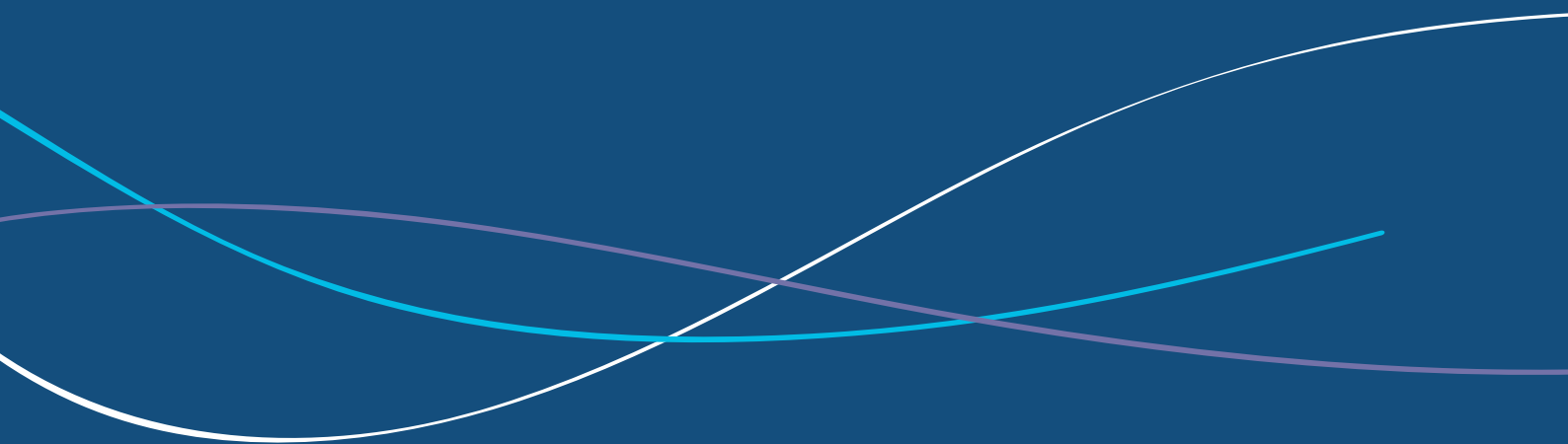


*Abridged version for general guidance only.

Further Information

Further information is available at:

- www.comcare.gov.au
- www.aat.gov.au
- via e-mail at claims.help@comcare.gov.au
- Comcare's General Inquiry Line: 1300 366 979



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