



Australian Government

Comcare

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## Jurisdictional Policy Advice No 2008/8

### *Safety, Rehabilitation and Compensation Act 1988*

## **The provision of rehabilitation assistance for severely incapacitated employees to facilitate social, recreational, community or disability related activities.**

**Issued on 22 July 2008**

### **Purpose**

1. To provide rehabilitation support under Part III the Safety, Rehabilitation and Compensation Act 1988 (SRC Act) for severely incapacitated employees who incur extra carer expenses while undertaking reasonable social, recreational, community or disability related activities.

### **Background**

2. The courts<sup>1</sup> have found that carer costs incurred by severely incapacitated employees such as being accompanied by their carer in order to undertake reasonable social, recreational, community or disability related activities (eg. carer admission tickets, travel and so on) are costs that do not fall within the meaning of attendant care<sup>2</sup> and can not be treated as medical treatment<sup>3</sup> costs. Therefore ancillary carer costs, those not payable as compensation for attendant care or medical treatment, can not be compensated under Part II of the SRC Act [Compensation].
3. Comcare, in consultation with Departments of Education Employment and Workplace Relations and Veterans' Affairs (DEEWR and DVA) agreed that participation in reasonable social, recreational, community or disability related activities could be considered as an element in the ongoing process of the rehabilitation<sup>4</sup> of severely incapacitated persons.

<sup>1</sup> *Wilby v Comcare* [2003] FCA 1381 (28 November 2003)

<sup>2</sup> Subsection 29(3) provides compensation for services that are required for the essential or regular personal care of an injured employee.

<sup>3</sup> Subsection 16(1) provides compensation for medical expenses obtained in relation to the employee's compensable injury.

<sup>4</sup> The ordinary meaning of rehabilitation encompasses a plan or agenda of measures formulated for the purpose of restoring the employee to his or her greatest potential: whether physically, mentally, socially or vocationally. Re: *Department of Defence and Fox* [1997] FCA 3 and *Finch and Telstra Corporation* [1998] AATA 198.

4. For that reason, a broader policy interpretation of Part III of the SRC Act [Rehabilitation] could enable an approved rehabilitation program to cover extra carer expenses incurred by severely incapacitated employees who are undertaking such activities.

### **Severely incapacitated employees**

5. Severely incapacitated employees are characterised as those employees suffering from a significant compensable injury, requiring 24 hour care and support to be maintained at home. It is the need for 24 hour care that may create a liability for extra carer costs. For example: An employee who suffers quadriplegia and as a result is totally incapacitated for work and requires 24 hour care.

### **Extra carer expenses**

6. Although the number of employees affected by this circumstance is low, the impact on their reasonable expectations to participate in social, recreational, community or disability activities, undertaken outside of their homes, can be significant. Such employees rely on their carer(s) to accompany them and in doing so can incur extra carer costs such as:
  - carer travel costs which may be local, interstate or overseas;
  - carer venue tickets;
  - carer meals;
  - carer accommodation, etc

Note that the cost of the carers services must be considered and determined under Part II of the SRC Act which provides compensation for nursing care (medical treatment) and personal care (attendant care). It is only the extra expenses that are reasonably incurred as a result of a carer accompanying a severely incapacitated employee away from home that may be incorporated into a rehabilitation program under Part III of the SRC Act.

### **Policy Advice**

7. Rehabilitation authorities may use Part III of the SRC Act in considering applications for additional intermittent support for severely incapacitated employees wishing to participate in reasonable social, recreational, community or disability related activities as part of their ongoing process of injury management.
8. A rehabilitation authority may, under section 37(1), make a determination that an employee in this circumstance should undertake a rehabilitation program and by doing so the extra carer costs can be met under Part III of the SRC Act.

9. In making such a decision, the rehabilitation authority delegate would give particular attention to the following relevant paragraphs of subsection 37(3):
- (c) the cost of the program
  - (e) the likely psychological effect on the employee of not providing the program
  - (f) the employee's attitude to the program
  - (g) the relative merits of any alternative and appropriate rehabilitation program; and
  - (h) any other relevant matter
10. In considering (h) 'any other relevant matter', the degree of the severity of the employee's injury is relevant. It is proposed that the following conditions should apply in order to be considered for such a program:
- i) the employee requires 24-hour care
  - ii) the employee has an accredited<sup>5</sup> carer
  - iii) services provided by the carer shall be personal services such as dressing, bathing/toileting, feeding or services necessary to attend certain venues or to travel on certain forms of transport
  - iv) the employee activity for which the carer's costs are to be reimbursed has been designated in advance by the rehabilitation authority as part of an approved rehabilitation program
  - v) the rehabilitation authority has assessed the activity for which the carer's costs are to be reimbursed as an activity associated with their injury or which, but for the compensable injury, would be a reasonable part of the employee's participation in social, recreational and community activities
  - vi) in considering the reasonableness of any activity in terms of point (v) above, the rehabilitation authority shall have regard to 'community standards' of access to such activities, including the reasonableness of the cost and the frequency and nature of activities attended prior to the compensable injury. What constitutes 'community standards' will vary from case to case, but would include attending social, community or recreational activities, such as visits to the movies or sporting matches. It would also include events occurring less frequently such as:
    - attendance at significant family event (eg. wedding, funeral, holiday season gatherings)

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<sup>5</sup> A support worker with current professional qualifications to Certificate III in home, aged, disability or community care who has the experience to meet the specific personal/clinical needs of the employee.

- attendance at a reunion or significant event in the community, to which the employee belongs or closely identifies with
  - attendance at an interstate appointment where such as service is not available locally (eg. high level legal advice, specialised financial advice unrelated to the claim)
- vii) the activity for which the carer's costs are to be reimbursed is separate from and in addition to any entitlements under Part II of the SRC Act.
11. To ensure equity of outcomes in making such determinations, the rehabilitation authority<sup>6</sup> may confer with the relevant authority<sup>7</sup> before determining or varying a rehabilitation program to specify a social, recreational, community or disability related activity for the employee to participate in.

## Application

12. The principles of this advice apply to all claims with a date of injury on and from the commencement of the SRC Act (1 December 1988).
13. The courts<sup>8</sup> have found that decision-makers can only determine rehabilitation programs prospectively. Consequently, rehabilitation programs providing assistance to severely incapacitated employees cannot be determined retrospectively to pay the cost of past expenses.
14. Rehabilitation authorities should assess the needs of the employee and, if the requirements set out in the Policy Advice above are satisfied, determine a rehabilitation program without an end date. Upon the commencement of the rehabilitation program, carer costs incurred from the date of the program can be paid and the program may be amended where it is identified that further carer costs are to be incurred.

<sup>6</sup> Rehabilitation authority is defined in section 4(1) of the SRC Act and means: 'in relation to an employee (a) where the employee is employed by an exempt authority – Comcare; and (b) where the employee is employed by a licensed authority – the principal officer of that authority, and (ba) where the employee is employed by a licensed corporation – the principal officer of that corporation, and (c) if the employee is employed by an Entity or a Commonwealth authority, other than an exempt authority – the principal officer of the Entity or the Commonwealth authority in which the employee is employed; and (d) if the employee is a member of the Defence Force – the Chief of the Defence Force.'

<sup>7</sup> Relevant authority is defined in section 4(1) of the SRC Act and means: '(a) in relation to an employee who is employed by a licensee – the licensee; and (b) in relation to any other employee – Comcare.'

<sup>8</sup> *Chang and Comcare*: The Federal Court held that s36 should be construed so that it only operates prospectively and not retrospectively. The Full Court dismissed an appeal in *Chang and Comcare* (1997); in part O'Loughlin J stated 'the word rehabilitation of itself is a word identifying prospectivity not retrospectivity.'

## References

### 15. Safety, Rehabilitation and Compensation Act 1988

- Part II – Compensation
  - Division 5 – Section 29: Compensation for household services and attendant care services.
- Part III – Rehabilitation
  - Division 3 – Section 37: Provision of rehabilitation programs

## Further Information

16. Any issues relevant to this advice may be discussed with Comcare's SRC Policy section, telephone 1300 366 979 or email [SRC.Policy@comcare.gov.au](mailto:SRC.Policy@comcare.gov.au)

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