



ADJUSTING NORMAL WEEKLY EARNINGS UNDER SECTION 8(10) OF THE *SAFETY, REHABILITATION AND COMPENSATION ACT 1988*

PURPOSE

To provide decision makers with scheme guidance on adjusting normal weekly earnings (NWE) under section 8(10) of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

BACKGROUND

NWE represents an amount that an employee would have earned in employment had they not been incapacitated by their compensable injury.

Certain circumstances may arise where the NWE figure can result in the employee receiving incapacity compensation that is greater in amount than what they would have earned if not for their compensable injury. In such circumstances, the decision maker must utilise section 8(10) of the SRC Act to cap the NWE of an employee who:

- > continues to be employed by the Commonwealth or a licensee at the amount the employee would receive if they were not incapacitated for work
- > has ceased to be employed by the Commonwealth or licensee at the greater of the amounts they would receive if they had continued in the employment:
 - at the date of injury; or
 - at the date on which their employment by the Commonwealth or licensee ceased.

This guidance sets out how these provisions apply to both current and exited employees.

GUIDANCE

NWE is calculated in accordance with section 8 of the SRC Act. The NWE reflects the employee's average weekly earnings before the date of injury, determined week by week¹ over the life of the claim, with adjustments made based on changes to employment and other factors arising after the date of injury.

Subsection 8(10) of the SRC Act must be applied to every calculation of NWE. It provides a cap to the NWE during each week after the injury and is calculated differently depending on whether or not the employee continues in the employment of the Commonwealth or a licensee².

¹ The legal requirement is for the decision maker to turn their mind to the NWE for each week that incapacity payments are made (*John Holland Group Pty Ltd v Robertson* [2010] FCAFC 88 per Dowsett J at para [19]; *Comcare v Simmons* [2014] FCAFC 4 per Perry J at paras [50] and [91]). Administratively, NWE can be calculated for a period longer than one week, such that the NWE applied in that period is applied for each week in that period.

² *Comcare v Simmons* [2014] FCAFC 4 per Perry J at para [17].

Current employees

A current employee's NWE may decrease in circumstances unrelated to their compensable condition such as:

- > a demotion³
- > voluntarily moving to a job with a lower salary
- > decreasing their hours of work (e.g. changing to part time hours for personal or lifestyle reasons)
- > their previously received allowance or overtime being reduced or no longer being available (e.g. allowances no longer payable following the completion of a project or overtime no longer required in the employee's work area).

Where the NWE of a current employee exceeds the amount of earnings they would have received in a week had they not been injured, section 8(10)(a) of the SRC Act would apply to reduce the employee's NWE.

Calculating a current employee's weekly earnings under section 8(10)(a)

Where the employee continues to be employed by the Commonwealth or a licensee, the decision maker is required to make a notional enquiry as to what the employee's earnings would be in their actual, current employment had they not been injured. That enquiry involves consideration of how that employee would have been employed, including whether they would have continued to perform the same duties as they were performing at the time of the injury⁴. Case law has highlighted that the following factors may be relevant:

- > the weekly earnings of colleagues in the current or pre-injury role performed by the employee
- > whether certain allowances or wage incentives such as overtime or higher duties would currently be available to the employee—or available to the same extent as at the date of injury—if not injured
- > whether any particular personal or career choices unrelated to the employee's injury have reduced their current weekly earnings below their pre-injury weekly earnings. For example, an employee takes another role with the same employer for personal reasons but the new role does not attract the same allowances as the original position.

Based on these considerations, if the decision maker considers that the amount the employee would receive, if not incapacitated for work, is less than the NWE as calculated under sections 8(1) to 8(9) of the SRC Act, the decision maker must reduce the employee's NWE by the difference under section 8(10)(a).

Example—decrease in NWE due to personal career choices

An employee based in Canberra receives a \$20 000 per annum 'readiness for deployment' allowance for working in an operational unit. This allowance is tied to the particular work performed by employees in operational units and is not available to other staff.

The employee suffers a workplace injury resulting in incapacity. For the purpose of determining their compensation for incapacity, the readiness for deployment allowance is included in the calculation of NWE.

Sometime after the injury the employee declines an offer to remain in the operational unit and is granted a transfer to a regional office in Sydney for personal reasons unrelated to the injury. Their new role does not attract the allowance, resulting in a \$20 000 per annum reduction in income.

What impact does the change in role have on the employee's NWE?

The employee has no entitlement to the allowance once they commence in the new role because the decision to transfer is not related to their injury. Having changed roles (for reasons unrelated to the injury) the NWE is now based on weekly earnings in the new role as this is what they would have been earning had they not been incapacitated by their injury (section 8(10)(a)). Consequently, the NWE should be reduced by the amount of the allowance.

³ *Hobday and Comcare* [2016] AATA 504

⁴ *John Holland Group Pty Ltd v Robertson* [2010] FCAFC 88

Leave without pay, suspended without pay or suspended on reduced pay

Where an employee is granted or deemed to be on leave without pay (LWOP) or is suspended without pay during a period of incapacity, their employment may or may not continue, depending on the employee's terms and conditions of employment. Decision makers should assess this on a case by case basis⁵.

If the employment continues during a period of LWOP or suspension without pay, section 8(10)(a) applies and the NWE should be reduced to nil if the reason for the suspension or LWOP is unrelated to the employee's injury.

Where an employee is suspended on reduced pay, for reasons unrelated to their injury, section 8(10)(a) again applies and the NWE should be reduced to the new reduced weekly wage amount. For example, an employee is suspended with no access to selected allowances amounting to \$300, the employee's NWE is reduced under section 8(10)(a) by \$300.

If the suspension or LWOP terminates the employee's employment, NWE must then be calculated in accordance with section 8(10)(b), that is, with regard to either the pre-injury earnings or immediately before employment ceased.

Example—suspended employee

An employee suffers a psychological injury after a workplace conflict with a colleague. Liability is accepted for the injury. The employee is redeployed to a new team to avoid further contact with the colleague and receives weekly incapacity compensation during this period.

Sometime later, the employee is suspected of engaging in behaviour contrary to their employer's code of conduct. The employee is temporarily suspended without pay while an investigation is commenced but continues to be employed for this period.

Does section 8(10) of the SRC Act continue to apply after the employee is suspended without pay?

Yes. While suspended without pay, the employee's NWE should be reduced to nil under section 8(10)(a). This section applies because they continue to be employed while suspended and the suspension is for reasons unrelated to their compensable injury. Consequently, incapacity compensation is not payable.

The employee's NWE should be recalculated and incapacity payments reinstated when the employee returns to work or receives earnings while suspended, in accordance with section 8(10)(a).

Exited employees

Calculating an exited employee's weekly earnings under section 8(10)(b)

Section 8(10)(b) of the SRC Act sets out different provisions for capping an employee's NWE if they have exited employment with the Commonwealth or a licensee. Section 8(10)(b)(i) and (ii) require a decision maker to assess what the employee would now be earning had they continued to be employed in the same employment at:

- > the date of their injury; and
- > the date their employment ceased.

The greater of these two figures will represent the cap that the NWE must not exceed⁶.

⁵ *ACT v Comcare* [2012] FCA 67 at paras [44-48] and referred to in *Dunstan and Comcare* [2014] AATA 208.

⁶ *Comcare v Simmons* [2014] FCAFC 4

Example—comparing earnings under section 8(10)(b)(i) and 8(10)(b)(ii)

While remaining employed with the Commonwealth, an employee chooses to change roles due to a personal decision unrelated to their compensable injury. Given that the new role does not attract the same allowances as the employee's role at the date of injury, the employee's NWE is reduced under section 8(10)(a) of the SRC Act.

The employee subsequently leaves Commonwealth employment and finds a role with an employer that is not covered by the SRC Act.

Does subsection 8(10) continue to apply after the employee exits the Commonwealth?

Yes. After the employee exits employment, their NWE is capped under section 8(10)(b). Section 8(10)(b) caps the NWE of an exited employee to what they would receive if they had continued to be employed in the same employment in which they were engaged in (i) at the date of injury, or (ii) at the date of exit; whichever is greater.

Should the allowances be disregarded from NWE when the employee exits Commonwealth employment?

No. Section 8(10)(b) applies from the week after the employee exits the Commonwealth. In that week, the circumstances which reduced their NWE under section 8(10)(a) no longer exist, and their pre-injury NWE can now only be capped by reference to the greater of sections 8(10)(b)(i) or (ii).

In this example, the employee would receive more if they had continued in the employment they held at the date of injury. This amount is the same as their NWE, calculated under sections 8(1) - (9) of the SRC Act. Consequently, the allowances are reinstated in the employee's NWE.

Assessing the earnings under section 8(10)(b) of the SRC Act does not involve the notional formulation of conditions of employment that never existed⁷. Rather, it requires the decision maker to:

- > refer to the employee's actual terms and conditions of employment at the date of injury and cessation of employment (not just the classification of the employee's position)⁸
- > assess the likely earnings arising from those terms and conditions at the date of calculation.

Effectively, this involves identifying the actual earnings at the relevant dates and adjusting them to reflect changes in circumstances at the date of calculation. For example, the decision maker would need to consider whether any allowances or overtime paid to the employee on the date they were injured or ceased employment would be payable in the particular week of the NWE calculation. The employee's weekly earnings under section 8(10)(b) should be adjusted if, for example, under the terms and conditions of employment, any entitlement to:

- > overtime was conditional upon the actual working of a period of overtime, and in the circumstances at the date of the NWE calculation, no overtime was available to be worked
- > a specific allowance was dependent on the employee's performance of particular duties, and no such duties were available to be performed in the week of the NWE calculation.

Consequently, an employee may not be entitled to have all allowances and/or overtime that was actually paid to them at the date of injury or at the cessation of employment included in their NWE. Access to these entitlements may vary from week to week after they have ceased employment, depending on the terms and conditions of employment applicable to them.

⁷ *John Holland Group Pty Ltd v Robertson* [2010] FCAFC 88 at [75]-[76] per Dowsett J.

⁸ *Ibid* at [73]-[74] per Dowsett J.

Example—application of subsection 8(10) for certain types of contract work⁹

An employee is employed on a temporary contract to work on a specific construction project. Under the terms and conditions of that employment, the period of the contract is contingent upon the completion of the specified project (that is, once the project is completed the contract ends). On completion of the project, the general practice of the employer is to redeploy individuals employed on that project to another project.

The terms and conditions provide for:

1. The employee to work substantial amounts of paid overtime in addition to their salary. There is no entitlement to overtime. The employee is only paid for overtime actually worked.
2. Certain skill based allowances. One of these allowances is in respect of rigging work undertaken above a height of 50 metres, which is payable regardless of whether such work is actually performed during the week in question.

The employee suffers a workplace injury resulting in incapacity. Shortly thereafter, their contract period comes to an end due to completion of the project.

What does the decision maker need to consider when calculating this employee's weekly earnings after they cease employment with the employer?

1. Section 8(10)(b) of the SRC Act applies because the employee has ceased employment once the project ends.
2. The actual terms and conditions of the employment at the time of the injury and at the time employment ceased must be determined. This is not a notional enquiry so the decision maker should not consider what terms and conditions of employment might have existed in the hypothetical scenario that the employee had been redeployed to another project.
3. The terms and conditions of the employment must then be applied to the circumstances as at the date of calculation. Payments that are dependent on particular tasks being performed that can no longer be performed after completion of the project cannot form part of the weekly earnings under section 8(10)(b)(i) or (ii). Amounts that would have been payable regardless of whether such tasks can be performed will be included in the weekly earnings under section 8(10)(b)(i) or (ii). On this basis:
 - > the salary will be taken into account as this amount is payable regardless of whether the work is available
 - > overtime will not be taken into account as it would no longer be available following completion of the project
 - > the skills based allowance for undertaking rigging at heights in excess of 50 metres will be taken into account as it is payable regardless of whether or not the work is available.

An employee's weekly earnings must be determined on a case-by-case basis. For example, if the employee had a contractual entitlement to a certain number of overtime hours each week that was included in their NWE, then that entitlement would also be included in the weekly earnings under section 8(10)(b) following completion of the project. Similarly, if the skills based allowance was dependent upon actual performance of that type of work, the skills based allowance would not be included in the weekly earnings under section 8(10)(b) following completion of the project, as that work is no longer available.

Determining the NWE

Decisions to adjust the NWE of an employee under section 8(10) are considered determinations under section 60 of the SRC Act and as such should be set out in writing¹⁰ and include:

- > that the NWE has been determined under section 8 of the SRC Act
- > the reason(s) for adjusting the NWE
- > a summary of the information that has been considered in arriving at the NWE figure
- > the notice of rights to reconsideration

⁹ *John Holland Group Pty Ltd v Robertson* [2010] FCAFC 88

¹⁰ Section 61 SRC Act

FURTHER INFORMATION

For further information on calculating incapacity see the [scheme guidance](#) on:

- > Calculating Normal Weekly Earnings
- > Calculating incapacity compensation after 45 weeks
- > Calculating incapacity compensation when in receipt of superannuation

Scheme [e-guidance](#) is also available on the incapacity provisions.

For further information, please contact Comcare's Scheme Policy and Design team on 1300 366 979 or email: scheme.policy@comcare.gov.au.