



CALCULATING NORMAL WEEKLY EARNINGS

PURPOSE

To provide scheme guidance about calculating normal weekly earnings (NWE) under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

BACKGROUND

Once initial liability has been accepted for compensation under section 14 of the SRC Act, an injured employee may claim incapacity compensation if they require time off work.

In order to calculate an employee's incapacity payments, it will first be necessary to determine their NWE. The NWE represents an amount that an employee would likely have earned in a week had they not been injured. NWE is based on the employee's pre-injury earnings and may include overtime and allowances in some circumstances.

It is the decision maker's responsibility to determine the NWE figure based on the employee's pre-injury earnings during a period that fairly represents their weekly rate of pay.

GUIDANCE

Sections 8 and 9 of the SRC Act set out how NWE is calculated. A decision-maker must determine NWE under section 8 of the SRC Act before incapacity payments can be made. The NWE figure will form the basis upon which the incapacity payments are determined.

Calculating NWE

When calculating NWE, it is important to have regard to the following steps:

Step 1: Determine the relevant period

The basic rule

An employee's NWE is based on their earnings in the 'relevant period' prior to their injury.

Section 9 of the SRC Act stipulates the relevant period to be used when calculating an employee's NWE, with section 9(1) prescribing the relevant period to be the two weeks immediately prior to the date of injury.

Using an alternative period under section 8(5)

Section 8(5) of the SRC Act however allows for situations where, due to the shortness of the relevant period, the two-week relevant period does not provide a fair representation of the employee's weekly earnings. It enables the decision maker to select a period that more fairly represents the weekly rate at which the employee was being paid, rather than the two-week relevant period under section 9(1).

Generally, using the two-week relevant period prior to the date of injury will be appropriate where an employee works standard hours and their earnings do not fluctuate significantly. However, if the employee works different shifts each week, has varying hours, overtime or allowances etc., then using an extended alternative period may be required. In these situations, an average of the employee's earnings over another period which results in a fair and reasonable representation may be appropriate. This could be, for example, 6 weeks, 12 weeks or 12 months prior to the date of injury, depending on the complexity of the employee's earnings. It could even be a specific period of time prior to, but not concluding at, the date of injury.

There is no upper limit or statutory time set for the alternative period under section 8(5). However, the two-week relevant period under section 9(1) would be the starting point or default position for calculating NWE, unless it would not constitute a fair representation of the employee's NWE¹.

Comparing the two-week relevant period with an alternative period

If another period has been used under section 8(5), it is recommended that decision makers explain the choice of the period used (e.g. why certain dates were used, fluctuating hours, payroll data etc.) in the section 8 NWE determination to the employee.

It is not mandatory that an employee receive the most beneficial calculation possible by whatever means². The aim is to provide a fair representation of what the employee was ordinarily earning prior to the injury. In cases where the comparison of the NWE amount between section 9(1) and section 8(5) has produced little difference, the Tribunal has held that the section 9(1) NWE does fairly represent the average weekly earnings and a decision-maker should not depart from using the two-week relevant period³.

Step 2: Calculate NWE in the relevant period

The formula for calculating NWE is provided under section 8(1) of the SRC Act. The formula is based on the average hourly ordinary time rate of pay and an average of hours worked during the relevant period, not including any overtime hours worked⁴.

Attachment A provides the relevant legislative formulas.

Normal weekly hours

An integral component of NWE calculations is the employee's normal weekly hours (NWH). The NWH refers to the average number of hours (including hours of overtime) that an employee worked in each week during the relevant period.

The main impact that the NWH has upon incapacity payments is:

- > the calculation of the first 45 weeks of incapacity
- > establishing the section 19(3) adjustment percentage for post 45 week incapacity calculations.

Once determined, the NWH of an employee does not change. Based on the definition contained in section 4 of the SRC Act, the NWH must be based on an employee's pre-injury weekly hours. It is not possible in any circumstance to adjust an employee's pre-injury NWH to reflect post-injury circumstances. There is no provision under the SRC Act to vary NWH after the date of injury.⁵

The average hours worked refers to the hours actually worked in the relevant period, not the hours that the employee was paid in money⁶. For example, if the employee's contracted, 'ordinary' or paid hours are 25 hours per week but the employee had been consistently working 30 ordinary hours per week leading up to the date of the injury, then the 30 ordinary hours per week would be considered the hours worked during the relevant period. The additional hours would be included as hours worked for the purposes of the section 8(1) formula, even if the additional hours are unpaid or taken as time off in lieu.

It should then be established whether the employee was required to work overtime on a regular basis.

1 *Re Barrington and Comcare* [2015] AATA 29 at paragraph 27; 146 ALD 444.

2 *Re Zegura and Comcare* [1998] AATA 199.

3 *Re De La Cruz and Australian Postal Corporation* (1997) AATA 573; *Re Maley and Comcare* (1998) 27 AAR 100; *Re Shaw and Australian Postal Corporation* (2005) AATA 747

4 *Re Comcare v Pires* [2005] FCA 747

5 *Re Comcare v Heffernan* [2011], FCAFC 131

6 *Comcare v Wuth* [2017] FCA 433

Step 3: Determine if overtime is to be included

Where the employee is required to work overtime on a regular basis, section 8(2) of the SRC Act provides for the inclusion of an overtime amount in the NWE. Before overtime can be included in an employee's NWE, it must be established that the overtime is 'regular' and 'required'. Neither of these terms are defined in the SRC Act.

Required

The ordinary everyday meaning of 'required' is the imposition by the employer of an obligation upon the employee to work overtime on a regular basis. Required does not mean that the employer 'needed' someone to work overtime. However, if there is an expectation by the employer or an inherent condition of the position that the employee work overtime, then that overtime will be 'required'⁷.

The Full Federal Court in *Peisley*⁸ found that an employee will be 'required' to work overtime where there is an agreement that constitutes authority to work the additional hours. When determining if an employee was required to work overtime, it needs to be established if there was an agreement between the employee and the employer that the overtime be performed. This agreement can be formal i.e. a written contract or terms of employment, or it can be informal i.e. a verbal request and agreement and does not necessarily need to be legally enforceable.

Once the employee has the agreement of their employer to work a certain period of overtime, that is sufficient to determine it was 'required'.

Regular

The Full Federal Court in *Peisley* considered that where an employee is 'required' to work overtime to the extent that such an authority to work additional hours would occur in the normal course of events, the statutory notion of 'on a regular basis' would also be satisfied. When determining whether an employee worked overtime on a regular basis, decision makers must be satisfied the requirement to work overtime was recurring. The same hours of overtime do not need to recur each week to satisfy the notion of 'on a regular basis,' rather it is the requirement to work overtime that must be recurring.

Step 4: Determine if allowances should be added

Under section 8(1) of the SRC Act, an employee's NWE can include a component for allowances they were receiving prior to the date of injury.

Allowances to be included in NWE are for:

- > conditions encountered during employment
- > special skills/qualifications
- > special duties.

Allowances for monies spent, or likely to be spent, should not be included in the calculation of NWE, as they are not classified as 'earnings' i.e. these are not monies obtained as a reward for work or merit⁹. For example, an employee receiving an allowance to purchase suitable clothing for a posting in a cold climate would not be considered an allowance for inclusion in the NWE calculation.

Nor can the NWE include 'prospective' allowances i.e. an allowance that may have been, but for the injury, payable at some time after the injury on completion of a course, training or some other pre-qualification¹⁰. For example, an employee would have been receiving a firearms allowance following completion of the necessary training if not for their injury. Other trainees completed the training and receive the allowance. The employee's injury prevented the completion of the training, therefore the allowance cannot be included in the NWE.

Attachment B provides further examples of matters that should ordinarily be included or excluded as part of the NWE calculation.

⁷ *Re Peisley and Telstra Corporation Limited* [2005] AATA 929.

⁸ *Telstra Corporation Limited v Peisley* (2006) 151 FCR 275.

⁹ *Re Sutton and Comcare* (1996) AATA 168.

¹⁰ *Re Perry and Department of Defence* (1997) AATA 93.

Other options available to calculate NWE

Using comparable employee to calculate NWE

In some cases, it may not be possible to calculate an employee's NWE using the steps outlined above. An example of such a situation could be in the case of a new employee who is injured not long after commencing employment.

Section 8(4) of the SRC Act can be used to calculate NWE in circumstances where, because of the shortness of the relevant period, it is impracticable to calculate the NWE. This provision would mainly apply where a new employee is injured within the relevant period. Due to the short duration of employment during the relevant period, the decision maker may determine the NWE by reference to the earnings of another employee doing the same or similar work.

NWE for part-time employee with other employment

If the employee is in part-time or unpaid employment with the Commonwealth or licensee at the date of injury, section 8(3) of the SRC Act provides for the inclusion of earnings from any other employment in the NWE calculation. The employee's NWH will also include the average number of hours that the employee worked in the other employment in each week during the relevant period. For example, if a part time truck driver was also employed to stack shelves at night in a grocery store during the relevant period, then their earnings and average hours worked from that employment in the relevant period will also be included in NWE and NWH calculations.

Note: There is no provision under the SRC Act that allows for the inclusions of earnings from any other employment to be included in a full-time employee's NWE calculation.

Information to include in an initial NWE determination

Initial NWE determinations should include:

- > that the NWE has been determined under section 8 of the SRC Act
- > the period used to calculate the NWE
- > an explanation as to why a particular period was chosen e.g. the usual relevant period or an alternative period
- > a summary of the data considered in arriving at the NWE figure e.g. pay records for a particular period were used.

FURTHER INFORMATION

This guidance should be read in conjunction with the Scheme Guidance 'Adjusting normal weekly earnings under section 8(1) of the *Safety, Rehabilitation and Compensation Act 1988*'.

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

- > Adjusting Normal Weekly Earnings under section 8(10) of the *Safety, Rehabilitation and Compensation Act 1988*
- > Calculating incapacity compensation after 45 weeks
- > Employers receiving superannuation benefits and incapacity payments

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.

ATTACHMENT A

Normal weekly earnings (section 8)

- (1) For the purposes of this Act, the normal weekly earnings of an employee (other than an employee referred to in subsection (2)) before an injury shall be calculated in relation to the relevant period under the formula:

$$(NH \times RP) + A$$

where:

NH is the average number of hours worked in each week by the employee in his or her employment during the relevant period;

RP is the employee's average hourly ordinary time rate of pay during that period; and

A is the average amount of any allowance payable to the employee in each week in respect of his or her employment during the relevant period, other than an allowance payable in respect of special expenses incurred, or likely to be incurred, by the employee in respect of that employment.

- (2) Where an employee is required to work overtime on a regular basis, the normal weekly earnings of the employee before an injury shall be the amount calculated in accordance with subsection (1) plus an additional amount calculated in relation to the relevant period under the formula:

$$NH \times OR$$

where:

NH is the average number of hours of overtime worked in each week by the employee in his or her employment during the relevant period; and

OR is the employee's average hourly overtime rate of pay during that period.

ATTACHMENT B

Included and excluded allowances

The following table provides some examples of the type of allowances that should be included in the employee's NWE, and the allowances that should be excluded. This is not an exhaustive list.

Included	Excluded
Higher duties allowance (HDA)	Annual leave bonus
First aid allowance	Travelling allowance (TA)
Leading hand allowance	Meal allowance
Proficiency allowance	Tropical clothing allowance
Senior officer allowance (overtime component)	Senior officer allowance (work related expenses component)
Site allowance	Laundry allowance
Height allowance (danger money)	NewStart allowance under the <i>Social Security Act 1991</i> .
X-ray allowance	Training allowance under the <i>Disability Services Act 1986</i> .
Emergency Warden Allowance	District, or accommodation allowance
	Remote locality leave fare allowance