COMPENSATION FOR INJURIES RESULTING IN DEATH

PURPOSE

To provide scheme guidance about claims for injuries resulting in death under section 17 of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

BACKGROUND

Under section 17 of the SRC Act, compensation is payable to dependants of an employee whose compensable injury under section 14 has resulted in death. Sections 17(3) and 17(4) relate to the payment of a lump sum compensation amount payable to dependants. Sections 17(5) and 17(6) relate to the payment of weekly compensation for the benefit of a prescribed child.

Compensation benefits payable under section 17 of the SRC Act are indexed according to section 13AA. The current rates can be found on the Comcare website.

This guidance addresses:

> The date used to calculate section 17 benefits
> Matters to be considered when apportioning lump sum benefits between multiple dependants
> The definition of a prescribed child

GUIDANCE

Date for calculation of section 17 compensation benefits

The lump sum payment provided for by sections 17(3) and 17(4) of the SRC Act is indexed by section 13AA on 1 July each year. In cases where an employee suffers an injury resulting in death before 1 July, but a claim is either not made or not determined by the decision maker until the following financial year, some confusion may exist as to the date from which the lump sum compensation should be determined.

Similarly, the weekly compensation benefit provided by section 17(5) may vary with the indexing of each financial year but is also affected to a greater degree by the date on which compensation is begun to be paid.

A range of practical issues arise if the date from which compensation is to be paid is fixed at some time other than the date of death. Delays affecting amounts of compensation impacted by indexation, establishing contact with dependants, and routine processing issues could all alter the amount of compensation to be paid[1]. Fixing the date of calculation for section 17 benefits at the date of death avoids these issues and gives a clearer picture of which individuals were dependent upon the employee relevant to compensation.

When determining compensation under sections 17(3), 17(4) and 17(5) of the SRC Act, decision makers are advised to begin the calculation at the date of the death of the employee.

1 *Campbell v Comcare* [2010] AATA 692

Apportionment of lump sum benefits among multiple dependants

When an employee suffers an injury resulting in their death, the SRC Act provides a lump sum payment to be distributed to the employee's dependants[2]. There are many kinds of family structures in our community and the principles for apportionment contained in this guidance aim to assist decision makers in their considerations of more complex family structures. Comcare does not intend this guidance to apply prescriptively.

Sections 17(3) and 17(4) of the SRC Act prescribe the two lump sum options (based on whole or partial dependence) that are to be paid out under the section in the circumstances of either whole or partial dependence, as follows:

whole

> Section 17(3): if at least one of the dependants was wholly dependent on the deceased employee at the date of death, the maximum sum must be paid;

partial

> Section 17(4): if none of the dependants was wholly dependent on the deceased employee at the date of death but were partially dependent on the employee at date of death an amount up to, but not exceeding, the maximum lump sum is payable.

The total amount that is payable under either section 17(3) or 17(4) of the SRC Act is to be shared among all of the dependants, both wholly dependent and partially dependent[3]. Where compensation is payable to two or more dependants, section 17(8) gives the decision maker a broad discretion to determine the percentages of compensation payable to those dependants in the amount as 'Comcare thinks fit, having regard to any losses suffered by those dependants as a result of the cessation of the employee's earnings'.

The phrase 'as Comcare thinks fit'[4] allows decision makers to give broad consideration on how that discretion should be exercised. This broad discretion should be exercised on reasonable grounds. The following principles should be applied by decision makers when apportioning the amount of lump sum compensation payable to the dependants of an employee who suffered an injury resulting in death:

Every dependant is potentially entitled to receive some of the lump sum

The lump sum payable under sections 17(3) and 17(4) of the SRC Act must be distributed between wholly dependent (if any) and partly dependent dependants of the employee. Section 17(8) requires the decision maker to consider the losses suffered by those dependants as a result of the loss of the employee's income and creates an obligation that the decision maker consider each dependant (whole or partial) when apportioning the lump sum. In assessing a dependant's share of the lump sum, the decision maker could conclude that a share of zero is appropriate, given the actual level of financial dependence of the dependant.

The lump sum may be distributed unequally between the dependants

Lump sum compensation under section 17 of the SRC Act is not required to be distributed equally between dependants. Section 17(8) makes clear that decision makers have the discretion to determine the size of each dependant's share but does not require that the shares be equal.

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2 'Dependant' and 'dependent' are defined in section 4(1) of the SRC Act. Section 4(4) prescribes the requirement for persons taken to be wholly or partially dependent on an employee on their death, section 4(5) defines wholly dependent persons, while section 4(6) prescribes a child of the deceased employee, born alive after their death, to be taken to be wholly dependent upon the employee at the time of their death. Note: A person who might be economically dependent on the deceased employee (for example, a divorced spouse who receives income maintenance) but is not a dependant as defined in section 4(1) cannot receive any part of the lump sum.

3 See *Cook v Thales Australia Limited* [2012] FCA 777.

4 Sections 4(10) and 4(10A) define a reference to 'Comcare'. For the purposes of section 17(8), a reference to Comcare is a reference to a licensed authority or corporation under the SRC Act.

The focus should be on the losses suffered by each dependant as a result of the cessation of the employee's earnings

The wording of section 17(8) of the SRC Act identifies that the focus when deciding apportionment of the lump sum between dependants should be the losses suffered as a result of the loss of the deceased employee's income. Section 4 of the SRC Act further defines dependence as related to economic support.

Determining the nature and extent of the economic loss may not be straightforward. For example, a child, who lives with one parent, may visit and stay with the other. Whilst at the other parent's home all expenses are met. In determining the relative loss of the child after the death of the non-custodial parent, it may be appropriate to consider not only child support payments, but also the value of economic support the child received while visiting the non-custodial parent.

Section 17 of the SRC Act provides for the maximum payment of a specified lump sum. That sum is not reflective of the monetary value of the income lost as a result of the employee's death - otherwise the lump sum would vary depending on the dollar value of the income of the employee. For similar reasons, this section does not seek to replace the dollar value of the financial loss suffered by the dependant. Rather it seeks to allocate the legislated lump sum in proportion to the relative, rather than the actual financial loss, suffered by each dependant.

Although the SRC Act distinguishes between those dependants who are wholly and partly dependent, that distinction is made only to quantify the total amount of compensation payable under sections 17(3) and 17(4). Once that is determined section 17(8) governs the relevant considerations for apportionment, being the 'losses suffered' irrespective of whether the dependant was wholly or partly dependent.

In Australia today there is a large proportion of couple families with dependent children[5], all of whom are persons who may be deemed to be wholly dependent for the purposes of section 17(3) of the SRC Act. It may be appropriate that, after considering the losses suffered by the dependants, each dependant will receive part of the lump sum. It may further be appropriate, after considering the relative positions of each dependant, to apportion the majority of the lump sum to the dependent spouse, given they will be responsible for providing ongoing economic support for a child or children while they continue to be dependent. A smaller proportion might also be allocated and held in trust for a wholly dependent child or children. This is an example of what may be appropriate in one set of circumstances and is not intended to be prescriptive. The decision maker must exercise their discretion and apportion the lump sum as they think fit, having regard to any losses suffered by each of the dependent dependants.

Economic loss should be determined by reference to the sources of economic support available to each dependant at the date of the employee's death

The most appropriate way to ascertain the economic loss that a dependant has suffered as a result of the cessation of the employee's earnings is to consider all the sources of economic support that each dependant had at the date of the employee's death and to determine what proportion of support was constituted by the employee's earnings.

It will not be appropriate to consider superannuation (or life insurance policies etc.) as a form of economic support as there is separate legislation dealing with superannuation entitlement in the event of an employee's death. Similarly, neither compensation paid or payable under the SRC Act prior to the death of an employee[6], nor compensation available to prescribed children under section 17(5) should be considered.

With regards to a dependant child specifically, and consistent with section 4(7) of the SRC Act, the payments of Family Tax Benefit Part A, Carer Allowance, and Double Orphan Pension under the *A New Tax System (Family Assistance) Act 1999* should also not be considered when determining a dependant's level of economic support.

5 Australian Institute of Family Studies - https://aifs.gov.au/facts-and-figures/population-and-households

6 As per section 17(7) of the SRC Act.

The time period over which the employee could reasonably have been expected to continue supporting each dependant should be considered

When ascertaining the loss that each dependant has suffered, it is appropriate to consider the length of time that the deceased employee could reasonably have been expected to continue supporting that dependant.

For a spouse or partner, it is reasonable to assume that the relevant period of loss is from the date of the employee's death until the date when they would have reached statutory retirement age. This is because that period has a causal connection with the cessation of the employee's earnings. This may also be the relevant period of loss for other dependants whose economic dependence is likely to continue throughout their lifetime, such as a child with a disability.

For a dependent child it may be reasonable to assume that the relevant period of economic loss is from the date of the employee's death until the child reaches 18 years of age, unless they are in full time education. The use of this age is for illustrative purposes only and should not be considered prescriptive. In determining the likely period of a dependant's economic dependence, the decision maker must exercise their discretion, having regard to the total circumstances of the case.

The decision maker retains discretion to adopt a different approach

The decision maker should clearly and transparently document the relative apportionment of the lump sum to all dependent dependants. This is particularly important in situations where the delegate has reasons to adopt a different approach to the apportionment of the lump sum between the various dependants, or if they consider that the application of the above principles would produce a result which would not reasonably correspond with the respective economic losses suffered by each of the dependants.

Compensation payable with regards to a prescribed child

In addition to a lump sum payment, dependants of a deceased employee who meet the definition of a prescribed child[7] are entitled to weekly compensation payments as outlined in section 17(5) of the SRC Act. A prescribed child is a child under the age of 16, or a child between the ages of 16 and 25 that is studying full time and is not normally employed, as defined in section 4(1) of the SRC Act.

Age as it relates to compensation payments

Compensation paid under section 17(5) of the SRC Act ceases in the following circumstances:

> once the age limit of 16 is reached and the prescribed child ceases to be engaged in full-time education at a school, college, university or other educational institution

> after the age of 16, once the prescribed child is considered to be in employment or engaged in work on their own account

> once the prescribed child reaches the age of 25, even if still in full-time education.

Once the claim for compensation under section 17(5) is accepted, payment is calculated from the date of the employee's death. If the child of the deceased employee was not yet born at the time of the employee's death, payment should be calculated from the date of the child's birth instead.

7 A person under 16 or 16 or more but under 25, receiving full-time education and not ordinarily employed on their own account, as per Section 4(1) of the SRC Act.

What is considered full-time education?

The definition of a prescribed child requires that in order to be considered in full-time education, a person must be receiving that education at a 'school, college, university or other educational institution'. This requirement excludes people such as those receiving education through a traineeship or apprenticeship.

When considering whether a person is in full-time education, the decision maker should consider how much of an educational institution's standard full-time load that person is receiving. The definition of a prescribed child does not provide for the consideration of a person's capacity for participating in full-time education, and so if a person does not meet the institution's requirements for a standard full-time load then they would not ordinarily be considered to be in full-time education for the purpose of section 17(5) of the SRC Act.

What is considered being engaged in work?

The definition of a prescribed child requires that the person in full-time education be 'not ordinarily in employment or engaged in work on his or her own account'. When a person defined as a prescribed child is reported to be in employment of some kind, a decision maker should consider then whether or not the person could be said to be engaged in that employment by their 'own account', that is, they are engaged in work that is not ancillary to their full-time education, such as limited part-time or casual work.

Periods without compensation payable

Any period in which a prescribed child fails to meet these requirements should be considered as a period in which they do not meet the criteria for a prescribed child, and so have no entitlement to compensation under section 17(5) of the SRC Act[8]. Such a period might be limited by time or circumstance, such as in the case of full-time education interrupted by illness or injury (whether a complete interruption or a reduction in the level of educational engagement), periods of full-time employment without study, etc. If a person's circumstances change again, bringing them back within the definition of a prescribed child, then compensation under section 17(5) can again be paid.

FURTHER INFORMATION

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

8 As per section 17(6) of the SRC Act.