



INJURY ARISING OUT OF OR IN THE COURSE OF EMPLOYMENT

PURPOSE

To provide guidance about the interaction of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) provisions regarding an injury 'arising out of or in the course of an employee's employment.'

BACKGROUND

A decision of the full court of the Federal Court (*Linfox Australia Pty Ltd v O'Loughlin*¹) clarified the application of the provisions in which an injury may be considered to have arisen out of or in the course of an employee's employment under the SRC Act.

The Court found that where an injury arose out of or in the course of an employee's employment in accordance with section 5A(1) (the definition of injury), the injury circumstances set out under section 6(1) of the SRC Act (and the relevant clarifying and disqualifying provisions under that section) do not apply, and cannot apply to deny any finding under section 5A(1).

Where the connection between an injury and employment cannot be established under section 5A(1), section 6 must be considered. Section 6 extends and clarifies the circumstances in which an injury may be taken to have arisen out of or in the course of an employee's employment. Where section 6(1) is relied on, the provisions that operate to clarify and disqualify the operation of section 6(1) will also apply.

GUIDANCE

Compensation for injuries

For compensation to be payable under the SRC Act, liability for an injury must be determined under section 14(1) of the SRC Act by a determining authority.²

Liability to pay compensation must include consideration of the relevant definition of 'injury' and whether the circumstances in which the employee was injured arose out of or in the course of the employee's employment.

Meaning of injury

Section 5A(1) provides that injury means:

- > a disease, or
- > an injury (other than a disease) that is a physical or mental injury arising out of, or in the course of, the employee's employment, or
- > an aggravation of a physical or mental injury (other than a disease) that arose out of, or in the course of, the employee's employment.

¹ On 20 March 2019, the High Court upheld the Federal Court of Australia Full Court (FCAFC) decision in *Linfox Australia Pty Ltd v O'Loughlin* ('O'Loughlin').

² Determining authority, in relation to a determination, means the person who made the determination [section 60(1) of the SRC Act]. For the purposes of this guidance, the determining authority will be referred to as the 'decision-maker'.

A separate, significant degree test applies in relation to disease claims.³

For injury claims, the 'arising out of, or in the course of, employment' test is the connection required between the injury (or aggravation of) and employment. If this test is satisfied, the employee has suffered an injury in circumstances connected to their employment, without the need to refer to section 6.

Arising out of employment

An injury may arise 'out of employment' if there is a causal relationship between the injury and employment.

Arising in the course of employment

For an injury to arise 'in the course of employment' there needs to be a temporal connection between the injury and employment. This means that the injury has occurred while the employee is undertaking work-related activities or activities incidental to their work. It extends cover beyond the period the employee is undertaking their normal work duties or at their place of work, to include something the employee is reasonably required or expected to do in order to carry out their duties.

Example: An employee sustains an injury when they slip on a section of wet floor while accessing the bathroom. As the employee was at their place of work for the purposes of work and is injured undertaking an activity that is reasonably expected to occur during the workday, the employee's injury is taken to have arisen in the course of their employment. As a result, liability for the injury is accepted in accordance with section 5A (without the need to refer to section 6).

Interval/interlude within an overall period of employment

An injury may be 'in the course of employment' if it was sustained while the employee was at a place or engaged in an activity that was induced or encouraged by their employer, during an interval or interlude within an overall period or episode of work.⁴

Circumstances in which an injury is treated as arising out of or in the course of employment

If the connection between the injury and employment is unclear, it may be more efficient for a decision-maker to consider section 6(1) first to confirm whether any of the injury circumstances are satisfied.

Section 6(1) provides a list of injury circumstances that satisfy the 'arising out of, or in the course of, an employee's employment' test. The section extends and clarifies, but does not limit, the circumstances in which an injury may be compensable.

If a decision-maker determines that:

- > the injury was not suffered in the course of employment under section 5A(1), they must also consider whether any of the circumstances in section 6(1) are satisfied; or
- > none of the circumstances in section 6(1) are satisfied, or the application of section 6(1) is clarified by section 6(1C) or disqualified by section 6(3), they must also consider whether section 5A(1) is satisfied.

An injury will arise out of or in the course of employment if either section 5A(1) or section 6(1) applies to the injury circumstances.

Clarifying and disqualifying provisions

Where a decision-maker applies an injury circumstance under section 6(1), consideration must be given to whether a relevant clarifying or disqualifying provision set out in section 6 also applies.

Section 6(1C) clarifies the application of section 6(1)(d) by providing that travel between an employee's place of residence and usual place of work is not taken to be at the direction or request of the Commonwealth or a licensee.

³ Section 5B of the SRC Act.

⁴ Refer to Comcare Scheme Guidance: Injury in an interval or interlude during an overall period or episode of work.

Section 6(3) disqualifies the application of section 6(1) where the employee sustains an injury as a result of voluntarily and unreasonably submitting to an abnormal risk of injury while at a place referred to in section 6 or during an ordinary recess.

Where an injury circumstance is not applicable due to section 6(1C) or disqualified by section 6(3), and the circumstances do not otherwise satisfy section 5A(1), compensation is not payable under section 14(1) of the SRC Act. There is no need to consider any other provisions of the Act.

Example: An employee is injured in a motorcycle accident during their lunch break. The evidence shows that the employee intentionally went through a red light without stopping.

Section 5A(1) is considered, but as the employee was away from their workplace at the time of the incident the connection between the injury and employment is unclear. Through reference to section 6(1)(b) it can be established that the injury is taken to have arisen out of or in the course of the employee's employment because the employee was temporarily absent from their place of work during an ordinary recess.

However, coverage under section 6(1)(b) is disqualified by the operation of section 6(3): the employee sustained their injury during an ordinary recess, but they voluntarily and unreasonably submitted to an abnormal risk of injury.

As a result, liability for the injury is disallowed.

Liability to pay compensation

Once the connection between the injury circumstance and employment is satisfied, a decision-maker must return to section 14 of the SRC Act.

If the injury satisfies section 14(1), compensation is payable under the SRC Act unless the section 14(2) or (3) exclusionary provisions apply. The exclusionary provisions set out that compensation is not payable if an injury is:

- > intentionally self-inflicted [section 14(2)], or
- > caused by serious and wilful misconduct (and not intentionally self-inflicted) unless the injury results in death, or serious and permanent impairment [section 14(3)].

Following consideration of the exclusionary provisions, a decision-maker can progress to a determination regarding liability to pay compensation under the SRC Act.

Attachment A provides an injury arising out of or in the course of employment flow chart.

PROCESS AND PRACTICES

Decision-makers are advised to have processes and practices in place to assist in considering the interaction between the injury provisions of the SRC Act.

RELATED COMCARE SCHEME GUIDANCE

Other relevant scheme guidance:

- > Injury in an interval or interlude during an overall period or episode of work
- > Travel and recess provisions
- > Considerations in the reconsideration process.

FURTHER INFORMATION

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

ATTACHMENTS

Attachment A—Injury arising out of in or the course of employment flow chart.

ATTACHMENT A

Injury arising out of or in the course of employment flow chart

