



Australian Government

Comcare

DEEMING ABILITY TO EARN

This fact sheet explains the process for deeming an employee able to earn.

WHAT IS 'DEEMING'?

The term 'deeming' is not a term used in the *Safety Rehabilitation and Compensation Act 1988* (the Act). When Comcare uses the term 'deeming' or 'deemed', this refers to an amount that an employee has been found to be able to earn, but is not actually being earned by that employee.

ABILITY TO EARN

When an employee is incapacitated for work as a result of an injury, Comcare is liable to pay the employee an amount of compensation worked out using the formula:

$$\text{NWE} - \text{AE}$$

NWE is the employee's normal weekly earnings.

AE is the greater of:

- (a) the amount per week (if any) that the employee is able to earn in suitable employment, or
- (b) the amount per week (if any) that the employee earns from any employment (including self-employment).

AE AND SUITABLE EMPLOYMENT

How a Claims Manager determines an employee's AE figure depends on whether the employee:

- > is a permanent Commonwealth/ACT Government employee
- > has separated from Commonwealth/ACT Government employment (or was not a permanent Commonwealth/ACT Government employee at the date of injury), and
- > whether the employee has received and failed to accept, or failed to continue to accept an offer of suitable employment.

The employee's employment status will prescribe what suitable employment means for them which in turn will affect how the Claims Manager determines the employee's AE figure.

Permanent Commonwealth/ACT Govt employees

For permanent Commonwealth/ACT Government employees who continue to be employed, suitable employment is any Commonwealth/ACT Government employment *having regard to their age, experience, training, language, skills, suitability for rehabilitation or vocational retraining, place of residence and any other matter Comcare deems relevant*.

Note: Suitable employment for Commonwealth employees is Commonwealth employment, and for ACT Government employees suitable employment is ACT Government employment where those employees continue to be employed.

When assessing a Commonwealth/ACT Government employee's AE figure, the Claims Manager will take the higher of the employee's:

- > actual earnings in any employment, or
- > 'deemed' ability to earn in suitable Commonwealth/ACT Government employment (with regard to the factors mentioned above).

Ex-Commonwealth/ACT Government or temporary employees

For all other employees, suitable employment is any and all types of employment, *having regard to their age, experience, training, language, skills, suitability for rehabilitation or vocational retraining, place of residence and any other matter Comcare deems relevant.*

When assessing an ex-Commonwealth/ACT Government employee's AE figure, the Claims Manager will take the higher of:

- > actual earnings in any employment, or
- > 'deemed' ability to earn in any employment (with regard to the factors mentioned above).

Note: Any income an employee is actually receiving from any employment, whether 'suitable employment' or not, will be taken into account when determining the employee's AE.

NO SUITABLE DUTIES DESPITE BEING FIT FOR WORK—CURRENT EMPLOYEES

There may be circumstances where a current employee is fit to undertake suitable employment, however:

- > their employer has not offered any suitable duties, or
- > suitable duties are not available.

In these circumstances the Claims Manager cannot deem an AE figure as no suitable employment has been identified or offered to the employee.

Note: Section 40 of the SRC Act provides that the employer must take all reasonable steps to provide the employee with suitable employment, or assist the employee find such employment.

NOT UNDERTAKING SUITABLE EMPLOYMENT DESPITE BEING FIT FOR WORK

Current employees

In circumstances where an employee has been certified fit to undertake suitable employment but is not doing so, the Claims Manager will need to consider:

- > the medical evidence (what has the employee been certified fit to undertake?)
- > whether suitable duties have been offered by the employer (any offer should be made in writing to the employee and a copy provided to Comcare so that the details of the offer are clear)
- > any excuse the employee may have provided in relation to failing to undertake those suitable duties as offered and the reasonableness of that excuse, and
- > any determination issue by the employer under s37 of the SRC Act that the employee should undertake a rehabilitation program. This determination should clearly outline the duties or activities that the employee is required to undertake as part of the program.

The Claims Manager will then determine whether it is appropriate to 'deem' an AE if the employee unreasonably failed to accept an offer of suitable employment or unreasonably failed to continue in suitable employment.

The Rehabilitation Authority (employer) should also consider the possibility of suspending an employee's benefits under the provisions of subsection 37(7) of the SRC Act if the employee has refused or failed, without reasonable excuse, to undertake the rehabilitation program provided for them.

Ex-employees

Where an ex-employee has been certified fit to undertake employment they have a responsibility to seek suitable employment. If an ex-employee is fit to undertake suitable employment but has not undertaken any (or has not undertaken employment for the full hours they are certified fit to work), then the Claims Manager will investigate the employee's specific circumstances to determine whether or not the employee has an ability to earn/greater ability to earn in suitable employment, including in any proposed or actual self-employment.

Employers, in meeting their section 40 obligations, should provide the employee with support and assistance to job seek (this would normally be undertaken as part of a rehabilitation program under section 37 and include a detailed job seeking program).

The Claims Manager will likely make contact with the Rehabilitation Authority to discuss the case. This discussion may include:

- > the viability and benefit of undertaking a transferrable skills assessment and labour market analysis under the provisions of section 36 of the SRC Act. The outcome of these assessments will provide guidance to both the Rehabilitation Authority and the Claims Manager about the extent of the employee's capacity for employment and ability to earn.
- > the benefits of undertaking a rehabilitation program to support and require the employee to job seek.
- > other support services available to the Rehabilitation Authority regarding rehabilitation of ex-employees.

In order to deem an ability to earn, suitable employment options need to be identified as being available to the employee. Identification of employment options is generally undertaken by an Occupational Therapist or Vocational Assessor with appropriate labour market expertise. While Comcare can arrange this type of assessment, it is preferable that the assessment be undertaken as part of a broader rehabilitation program under section 37 of the Act.

By undertaking any assessments through the rehabilitation provisions and following through with a rehabilitation program focussed on job seeking support, it is much more likely the employee will end up in actual paid employment.

If a rehabilitation program has been determined and the employee continues to fail to seek or to accept an offer of suitable employment, then their right to compensation under the Act can be suspended or Comcare may be able to deem an ability to earn.

FURTHER INFORMATION

For further information in relation to rehabilitation or entitlements under the Act, please visit www.comcare.gov.au or phone Comcare on 1300 366 979.