



WR&C ACT 1986
INJURY MANAGEMENT PRACTICE NOTE
FOR THE PUBLIC SECTOR

LUMP SUM COMPENSATION FOR NON-ECONOMIC LOSS

1. PURPOSE

- 1.1 To ensure a consistent approach is applied within the public sector to the assessment of an injured worker's entitlement to lump sum compensation under sections 43 and 43A of the Workers Rehabilitation and Compensation Act, 1986 ('the Act').

2. BACKGROUND

- 2.1 Section 43 of the Act entitles an injured worker to a lump sum payment for non-economic loss, defined as:
- Pain and suffering
 - Loss of amenities of life
 - Loss of expectation of life
 - Any other loss or detriment of a non-economic nature
- 2.1 The payment of lump sum compensation under section 43 is in addition to any other compensation payable under the Act and has no effect on a worker's entitlement to receive weekly payments or the payment/reimbursement of medical expenses.
- 2.2 A worker with an accepted workers compensation claim is not obliged to make a separate application for an entitlement to lump sum compensation under section 43.
- 2.3 It is Government's expectation that entitlements under section 43 are identified and paid at the earliest opportunity.

3. PRACTICE

- 3.1 It is recommended that public sector agencies note the following:
- 3.1.1 Before an injured worker can be paid lump sum compensation under section 43, the agency must establish that the injury is:
- 'Permanent' – meaning for a long and indeterminate time and more likely than not to persist in the foreseeable future;
 - 'Stable' – when the worker's condition is medically stable and has reached maximum medical improvement;
 - 'Compensable' – only where a compensable injury leads to a permanent impairment will the worker be entitled to a section 43 payment;
 - 'Impairment' – the worker must be worse off than they would have been but for the injury.
- 3.1.2 Section 43A of the Act requires assessments for a section 43 entitlement to be:
- Made in accordance with the WorkCover Guidelines for the evaluation of permanent impairment; and
 - Undertaken by a medical practitioner who is accredited with WorkCover to assess permanent impairment.
- 3.1.3 There is no entitlement to lump sum compensation if the assessment is less than 5% whole person impairment (WPI). Multiple injuries arising out of a single event, or from separate events occurring in the same calendar year, are combined by the permanent impairment assessor and the worker's entitlement to compensation is determined on the final %WPI calculated.

- 3.1.4 There is no entitlement to lump sum compensation under section 43 for psychiatric injury. However, should a compensable psychiatric injury result in a permanent loss of function of a body part contained in the WorkCover Guidelines, the worker is entitled to compensation under section 43 for that loss of function.
- 3.1.5 Disfigurement is assessed as an impairment of the relevant body part/system/organ which it affects, rather than as an impairment in itself. Where the disfigurement is in the nature of scarring, this is assessed as an impairment of the skin.

The WorkCover Guidelines provide (at Chapter 13.5) that the skin is regarded as a single organ and all scarring is measured together as one overall impairment, rather than assessing individual scars separately and combining the results. The exception is facial scarring - this is considered separately as an impairment of the face falling within "Ear, nose, throat and related structures" in Chapter 6 of the WorkCover Guidelines.

3.2 Operational requirements

- 3.2.1 Permanent impairment assessments are to be conducted using the WorkCover Guidelines for the evaluation of permanent impairment. The assessor will determine the degree of permanent impairment and provide a report (in a standard format authorised by WorkCover) stating the reasons for their findings.
- 3.2.2 As soon as it becomes apparent that permanent impairment has resulted from a compensable injury, and the injury appears to be stable, the agency should request a permanent impairment assessment by an accredited assessor or make a referral to Medical Panels SA under paragraph (p) of section 98E of the Act (unless the worker asks that the assessment be deferred).
- 3.2.3 An injured worker may obtain his/her own permanent impairment assessment report and an agency may rely solely on that report for the purpose of making a determination. An agency is able to request a report from an accredited assessor of its own choosing notwithstanding that a compliant report may have been provided by the injured worker.
- 3.2.4 An agency should confirm that the report is compliant with the WorkCover Guidelines and, if so, make a determination of the worker's section 43 entitlements within 28 days of receiving the report. It is Government's expectation that an agency that has requested and received a compliant report does not unnecessarily delay the determination of a worker's section 43 entitlement by requesting additional medical reports in an attempt to obtain a more favourable outcome.
- 3.2.5 A copy of the report must be sent to the worker within 7 days of its receipt, unless it is evident that the worker has received a copy of the report direct from the assessor.
- 3.2.6 Reports that are not compliant with the WorkCover Guidelines should be returned to the assessor for amendment. Once the amended report is received, a determination of the worker's section 43 entitlements should be made.
- 3.2.7 The amount of lump sum compensation to be paid is based on the %WPI (contained in the report received from the accredited assessor) and calculated by using the WorkCoverSA s43 lump sum calculator.
- 3.2.8 After the worker's entitlement is calculated, a determination is issued to the worker outlining their entitlement and rights of review.

Further guidance and information is provided to public sector agencies under Attachment A, to assist agencies determine a worker's entitlement to lump sum compensation under sections 43 and 43A of the Act.

Additional guidance information on the assessment of lump sum compensation under sections 43 and 43A, is also available to agencies in chapter 9 of WorkCover's Injury and Case Management Manual, available on workcover.com

Should you have any questions in relation to this advice please direct your enquiry to Public Sector Workforce Relations (Workers Compensation Performance), Department of the Premier and Cabinet (phone 822 62683).

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ATTACHMENT A

The following information is provided to public sector agencies to assist them in determining a workers entitlement to lump sum compensation under sections 43 and 43A of the *Workers Rehabilitation and Compensation Act*.

This information outlines circumstances that might only arise from time to time, but is issued to agencies to assist in complying with the Act. However, should one of the particular circumstances arise, it is recommended that the agency discuss the specific matter with the Crown Solicitors Office before issuing a lump sum determination.

1. Aggravation, acceleration, exacerbation, deterioration or recurrence of a previous compensable injury

Section 43(7) of the Act, requires a previous lump sum payment to be deducted from compensation payable for impairments resulting from an aggravation, deterioration etc. of a previous compensable injury.

Example

A worker has a previous compensable back injury and received lump sum compensation of \$20,000 for that injury in 2008. The worker suffers an aggravation in June 2010, which results in further impairment assessed at 15% WPI in December 2010.

15%WPI under the prescribed sum for 2010 is \$28,486. The amount of the previous compensation \$20,000 will be deducted before determining the worker's entitlement to compensation for the aggravation in 2010.

As a result, the worker has an entitlement after application of section 43(7) of \$8,486 (\$28,486 - \$20,000).

2. Impairments from unrelated injuries or causes

Section 43A(9)(b) of the Act requires accredited permanent impairment assessors to disregard impairments from unrelated injuries or causes. Therefore, the assessor will exclude impairments that are not related to the injury being assessed.

Example

A worker has an unrelated injury (a previous knee injury from playing sport). The worker then injures their knee at work. The agency should advise the assessor of this unrelated injury in the permanent impairment assessment report request.

The assessor will establish the %WPI for the sports injury and exclude it from the final compensable %WPI. The worker will then be entitled to the %WPI for the compensable injury, if the final %WPI exceeds the 5%WPI threshold.

3. Impairments are to be assessed in chronological order

Section 43A(9)(a) of the Act requires impairments resulting from injuries that occur on different dates to be assessed in chronological order. This means:

- The accredited assessor must assess and rate the %WPI for each of the compensable injuries separately; although they may be grouped together where they occur in the same calendar year, and
- An agency will determine the workers entitlement to lump sum compensation under section 43 by applying the total %WPI for each injury, or group of injuries, which fall within the same year, to the prescribed sum for the relevant injury year.

4. Multiple impairments including a total loss, no disadvantage table

Section 43B of the Act requires a worker to be paid, as a minimum, the amount provided for in Schedule 3A of the Act when a total loss of a body part/system/organ occurs.

When a compensable injury involves a total loss, the agency must compare the compensation payable under sections 43 and 43A, to the compensation payable under Schedule 3A in order to determine the worker's entitlement to compensation. The worker is entitled to receive the higher amount.

Example

In 2008 a worker has an amputation of the ring finger (a total loss). This is assessed as 5% WPI, which is \$10,000 under sections 43 and 43A. However, under Schedule 3A the compensation payable is \$30,340 and the worker is therefore entitled to receive this higher amount.

Example – aggravation resulting in a total loss

Worker has two compensable injuries (knee and back) as a result of an injury at work in June 2009. The %WPI ratings are 10%WPI for the knee and 8% WPI for the back. Compensation is then paid to the worker.

In 2012, the worker undergoes a knee reconstruction due to deterioration of the knee joint and due to complications with the surgery requires an amputation above the knee. There are no further issues with the back.

The knee stabilises and is assessed to determine permanent impairment of the knee. The assessor rates the permanent impairment as a result of the amputation (a total loss) at 32%WPI.

The agency then compares the worker's entitlement under section 43 and 43A against the entitlement under Schedule 3A on the basis that the worker is entitled to receive the higher amount.

The agency then deducts from the final amount of compensation payable to the worker, the amount of compensation paid in 2009 for the knee, as the further impairment has been the result of an aggravation, exacerbation, recurrence or deterioration as required under section 43(7) of the Act. The worker then receives the difference in compensation.

5. Lump sum compensation – section 43(7) deductions of supplementary benefits

There will be cases where a worker has received a lump sum payment prior to 1 April 2009.

Under the 'system' that operated prior to 1 April 2009, a worker who received lump sum compensation greater than 55% of the prescribed sum was entitled to an additional payment referred to as a supplementary benefit. A supplementary benefit no longer applies under the amended provisions which came into effect on 1 April 2009.

Section 43(7) of the Act requires a previous lump sum payment to be deducted from compensation payable for impairments resulting from aggravation, deterioration etc. of a previous disability. It is unclear whether the supplementary benefit amount paid should be included in the amount deducted, as the supplementary benefit previously paid is not always directly attributable to a specific disability and may have been paid as a result of multiple injuries.

The previous Regulation 25 did not include any supplementary benefit paid when reducing a worker's previous lump sum payment. We will have to await a relevant decision by the Workers Compensation Tribunal for guidance on how section 43(7) should be applied in cases involving previous supplementary benefits.