



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

WORK CAPACITY REVIEWS

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 ongoing compensation after the end of the third entitlement period under sections 35B and 35C of the Workers Rehabilitation and Compensation Act, 1986 ('the Act').

2. BACKGROUND

- 2.1 Section 35B(1) states that a worker's entitlement to weekly payments ceases at the end of the third entitlement period if a worker has received or was entitled to receive weekly payments for an aggregate period of 130 weeks, unless a worker is assessed as having no current work capacity which is likely to continue indefinitely.
- 2.2 However, section 35B(4) provides that the entitlement to weekly payments does not cease at the end of the third entitlement period if a worker is receiving full weekly payments (at 80%) immediately before the end of the third entitlement period on the basis that they have no current work capacity. Weekly payments in those instances cannot be discontinued unless and until an assessment is completed pursuant to section 35B(1). A review of this assessment of a worker's entitlement to ongoing weekly payments must occur at least once every two years.
- 2.3 If a worker is in employment and has been receiving weekly payments under either section 35A or section 35B, they may apply under section 35C(1) that their weekly payments continue despite the operation of section 35B.
- 2.4 When assessing the availability of suitable employment, public sector agencies should consider what employment is available across the public sector, noting work injured employees are to be given priority consideration for non-executive vacancies as detailed within Commissioner's Determination 1 – Merit, Engagement, Assignment of Duties and Transfer of Non-Executive Employees.

3. PRACTICE

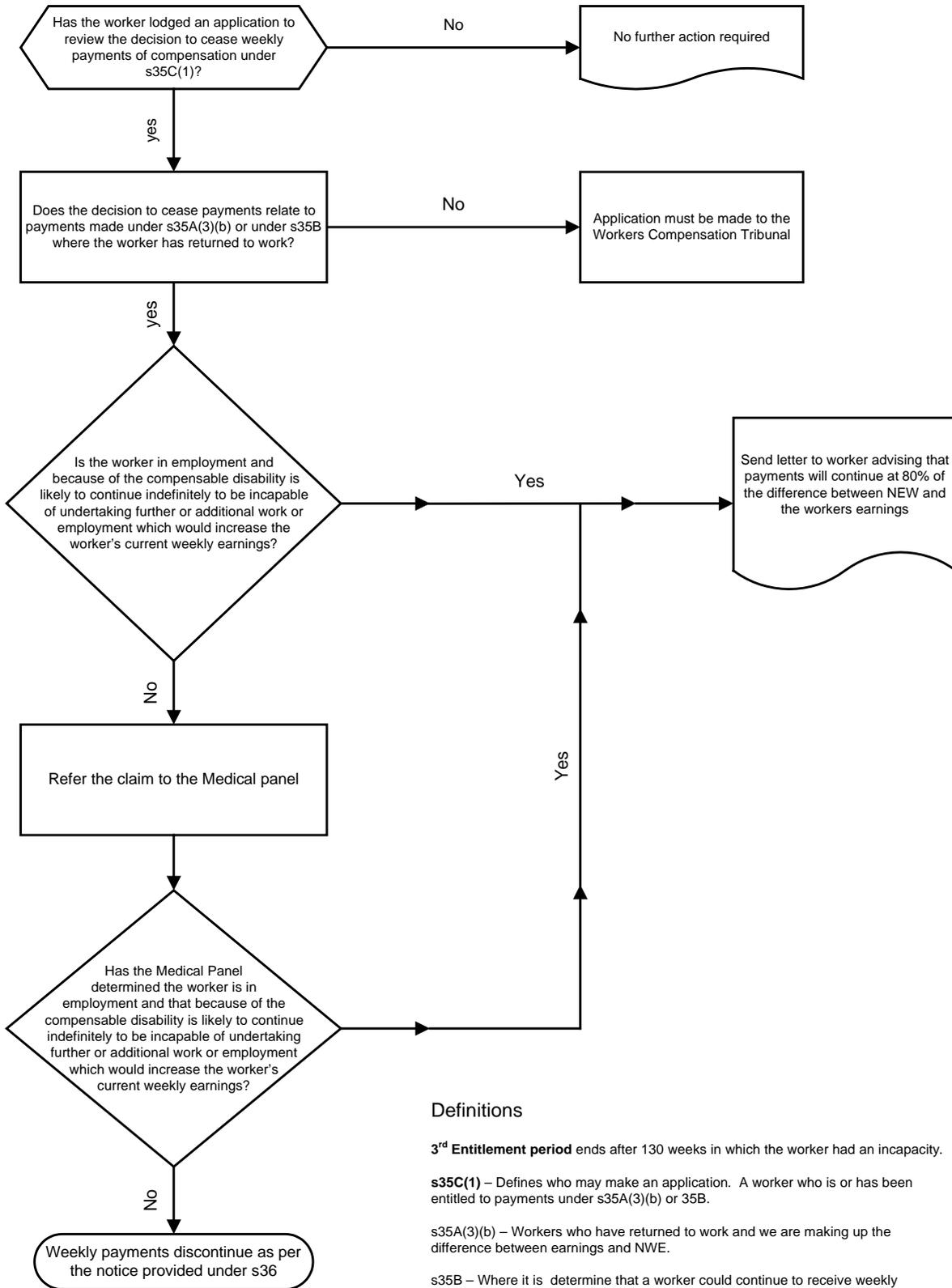
- 3.1 It is recommended that public sector agencies note:
- 3.1.1 That when determining what suitable employment the worker is capable of performing, it is important that the agency considers:
- What physical capabilities the worker has to perform work, i.e. the nature of the worker's current capacity, their pre-injury employment and details within the available medical information;
 - What the physical and vocational attributes of a particular job are;
 - Whether the job exists in the labour market;
 - Whether the worker's residual capacities are enough to do a particular job, considering their pre-injury employment, age, education, skills and work experience;
 - Where the worker lives;
 - The worker's return to work plan; and
 - Any rehabilitation services being provided to the worker.
- 3.1.2 This 'picture' of the worker will be obtained from:
- Treating medical practitioner opinions;
 - Independent medical examiner opinions;

- Vocational assessments that outline the worker's prior work history, education, literacy and numeracy, their skills and qualifications and any training courses completed;
 - Functional capacity evaluations; and
 - Rehabilitation reports, including details of any work trials or work hardening placements.
- 3.1.3 Importantly, the availability of a particular job that falls within the suitable employment is not relevant in determining whether or not the worker is capable of performing the work, but work of that nature must be available in the labour market.
- 3.1.4 If, on assessment, the agency determines that the worker does not have a current work capacity and this is likely to continue indefinitely, weekly payments will continue under section 35B(1) at the rate of 80% of the worker's notional weekly earnings.
- 3.1.5 If, on assessment, the agency determines that the worker is not entitled to ongoing weekly payments, then the worker must be given written notice that their payments will cease, as follows:
- 13 weeks – for those workers that were in receipt of full weekly payments (at 80%) immediately before the end of the third entitlement period on the basis that they had no current work capacity; or
 - 28 days – for any other cases.
- 3.1.6 If a worker applies under section 35C(1) for their weekly payments to continue, the agency has 90 days to either make a determination under section 35C(2) or refuse to make such a determination. The agency cannot refuse to make the determination without first referring the matter to the Medical Panel.
- 3.1.7 If the agency is satisfied that the worker is in suitable employment and working to their full capacity, the worker is entitled to continue to receive weekly payments equal to 80% of the difference between the worker's notional weekly earnings and the worker's current weekly earnings.
- 3.1.8 If the agency is not so satisfied and has referred the matter to the Medical Panel for opinion, the Medical Panel will either:
- Indicate that the worker is likely to continue indefinitely to be incapable of undertaking further or additional employment and therefore is entitled to weekly payments equal to 80% of the difference between their notional weekly earnings and their current weekly earnings; or
 - Be of the opinion that the worker is capable of further or additional work and therefore is not entitled to weekly payments, so the weekly payments can be discontinued.
- 3.1.9 The opinion of the Medical Panel is binding of all parties.

A flow chart depicting the process for undertaking a review under sections 35B and 35C is provided in Attachment A.

Should you have any questions in relation to this advice please direct your enquiry Public Sector Workforce Relations (Workers Compensation Performance), Department of the Premier and Cabinet (phone 8226 2683).

Application to Review Decision to End Payments after the 3rd Entitlement Period – s35C



Definitions

3rd Entitlement period ends after 130 weeks in which the worker had an incapacity.

s35C(1) – Defines who may make an application. A worker who is or has been entitled to payments under s35A(3)(b) or 35B.

s35A(3)(b) – Workers who have returned to work and we are making up the difference between earnings and NWE.

s35B – Where it is determine that a worker could continue to receive weekly payments a the 80% rate and the worker has now returned to work.