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What compensation is payable after the first 26 weeks of incapacity?

Section 65 compensation – how is this calculated?

In a nutshell

During the first 26 weeks of incapacity, a worker is paid 100% of their personal normal weekly earnings, less amounts actually earned. After the first 26 weeks of incapacity, a claimant is paid 75% of loss of earning capacity (noting loss of earning capacity is calculated considering a cap on normal weekly earnings); to a maximum of 150% of statistical average weekly earnings.

Incapacity benefits; weekly payments

Where we talk about:

- ‘weekly payments’, we mean weekly payments required by s64 and s65 of the *Return to Work Act (RTWA)*.
- ‘long term incapacity’, we mean incapacity after 26 weeks of compensation.
- ‘seriously injured’ claimants, we mean workers who have a relevant permanent impairment of 15% or more.
- ‘relevant permanent impairment’, we mean permanent impairment as normally assessed under s72 RTWA, save the impairment assessment must not include secondary psychological / psychiatric impairment.

For the first 26 weeks of incapacity, you pay 100% of Normal Weekly Earnings (NWE); less any amount *actually* earned.

Long term incapacity

How much weekly compensation is paid after the first 26 weeks? You pay 75% of a workers ‘loss of earning capacity’ or 150% of average weekly earnings; whichever is the lesser (s65(1B)).

Note here that average weekly earnings (AWE) are Australian Bureau of Statistics issued AWE (and has no relationship to a claimants NWE). Technically, AWE ‘means the Weekly Ordinary Time Earnings for the Northern Territory last published by the Australian Statistician before 1 January before the date in respect of which they are required under the RTWA to be assessed.’

What is 'loss of earning capacity' (LOEC)?

LOEC is the difference between NWE and the amount the claimant is capable of earning, given the available employment and their situation. After 104 weeks of incapacity, LOEC is determined ignoring the availability of employment.

Setting out the above in full, LOEC is determined as follows:

- **first 104 weeks of incapacity:** LOEC = NWE minus 'the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if ... he or she were to engage in the most profitable employment (including self-employment), if any, reasonably available to him or her; and having regard to the matters referred to in section 68.' (s65(2)(b)(i))
- **After the first 104 weeks of incapacity:** LOEC = NWE minus 'the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if ... he or she were to engage in the most profitable employment that could be undertaken by that worker, *whether or not such employment is available to him or her*; and having regard to the matters referred to in section 68.' (s65(2)(b)(ii))

Cap on long term compensation

As noted above, after 26 weeks, there is a cap on weekly compensation. A claimant is paid 75% of their LOEC (ie 75% of NWE less what they can earn); or 150% of AWE (in 2016, \$2,270.25); *whichever is the lesser*.

Further cap on NWE

In determining LOEC, there is a further cap – on NWE. This one is provided in s65(3). When LOEC is calculated, the figure of NWE you use is the one that is the least of the NWE as normally indexed each January; or 250% of AWE.

For example:

- the NT AWE for 2016 is \$1,513.50; and 250% of this is \$3,783.75.
- if a claimants NWE were \$1,500 gross per week, then the least of that and \$3,783.75 is \$1,500.
- if a claimants NWE were \$5,000 gross per week, then the least of that and \$3,783.75 is \$3,783.75.

What this means is that when working out LOEC you should note there is also a cap on the NWE in the case of very high income earners; those earning more than \$3,783.75 gross per week in 2016.

There is still a cap on weekly compensation after 26 weeks of 150% of AWE (ie \$2,270.25); but when working out LOEC, there is also a sub-cap, if you like, on very large NWE.

For example, a claimant earning \$250,000 pa ie \$4,800 gross per week:

- for the first 26 weeks of incapacity, weekly payments are 100% of NWE ie \$4,800 gross per week, less the amount actually earned in a week.

- after the first 26 weeks of incapacity, weekly payments reduce to 75% of LOEC (ie LOEC = NWE minus the amount earned in the most profitable employment).
- let's assume the most profitable employment pays \$1,500 gpw. LOEC = \$3,783.75 (because of the cap; and not \$4,800) minus \$1,500 = \$2,283.75). 75% of LOEC = \$1,712.81 (and that is what is paid, because it is less than 150% of AWE).
- without the NWE cap, 75% of LOEC would have been $75\% \times (\$4,800 - \$1,500) = \$2,475$; and the claimant would be paid \$2,270.25 (which is the overall cap on long term incapacity).

Take away

During the first 26 weeks of incapacity, a worker is paid 100% of their personal NWE; less any amount actually earned.

After the first 26 weeks of incapacity, a claimant is paid 75% of LOEC (noting LOEC is calculated considering a cap on NWE); to a maximum of 150% of AWE (in 2016, \$2,270.25).

The NWE cap applies to injuries after 1 July 2015; otherwise the overall cap on weekly compensation of 150% remains.

For injuries after 1 July 2015, save for seriously injured claimants, weekly payments stop after a claimant receives weekly compensation for 260 weeks of incapacity.

Note also there are provisions relating to the calculation of minimum weekly compensation in certain circumstances; and provisions regarding older workers.

For further information please get in touch with our lawyers at

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