DISCUSSION PAPER

ABETZ CURTIS
LAWYERS

FAQs FROM EMPLOYERS REGARDING WEEKLY PAYMENTS

under the Workers Rehabilitation and Compensation Act 1988

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1. IN SIMPLE TERMS, HOW DO YOU CALCULATE THE WEEKLY PAYMENT RATE?

1.1. When a claim for compensation is received, employers are required to calculate the amount of weekly payment to be paid to the worker. This is called the Weekly Payment Rate, it is the greater of the amounts derived from the Normal Weekly Earnings formula and the Ordinary Time Rate of Pay formula (s. 69(1)(a), Act).

1.2. The Normal Weekly Earnings formula is the average *earnings* of the worker for:

1.2.1. the 52 weeks immediately prior to the commencement of the incapacity; or

1.2.2. if the worker has been employed for less than 52 weeks, the average earnings of the worker for the period they have been employed prior to the commencement of the incapacity (s. 69(14), Act).

1.3. What is to be included and excluded as *earnings* for the purposes of the Normal Weekly Earnings formula is largely dealt with in s. 70 of the Act.

1.4. The Ordinary Time Rate of Pay formula is:

1.4.1. the *ordinary time rate of pay* (i.e. base rate of pay) for the worker determined by their industrial award or enterprise agreement; multiplied by

1.4.2. the number of hours worked in the *period* immediately before the period of incapacity.

1.5. The general rule is that the *period* should be 7 days but there are exceptions to this – see section 5 of this paper.

2. IS THE COMMENCEMENT OF THE PERIOD OF INCAPACITY ALWAYS THE DATE THE INJURY OCCURRED?

2.1. **No**. When the period of incapacity commences may or may not be when the injury occurred. The date stated on the initial workers compensation medical certificate as the commencement of the incapacity is the best reference point.

3. CAN YOU ALWAYS CALCULATE AN ORDINARY TIME RATE OF PAY?

3.1. **No**. Some workers won't be covered by an industrial award or enterprise agreement so they won't have an *ordinary time rate of pay*, in which case there is only one choice of formula, namely the Normal Weekly Earnings.

3.2. Please note that rates of pay fixed by individual contracts of employment do not qualify as the *ordinary time rate of pay* – you must look to the relevant industrial award or enterprise agreement for that worker to find their *ordinary time rate of pay*.

4. IS IT RELEVANT THAT THE WORKER IS EMPLOYED BY MORE THAN ONE EMPLOYER?

4.1. **Yes**. If the worker has a contract of service for part-time work with another employer (at the commencement of the period of incapacity) then the earnings from this job are to be included when calculating the Normal Weekly Earnings.

4.2. If it is casual work with another employer then it might be open to argue that the worker does not have a contract of service because there is no expectation of future work. However, this is to be determined on the facts of the case.

5. WHAT IS THE RELEVANT PERIOD FOR THE PURPOSES OF THE ORDINARY TIME RATE OF PAY FORMULA?

5.1. There is a paper on the Abetz Curtis website; "Calculating the Ordinary Time Rate of Pay"[1], that addresses this issue in more detail.

5.2. It is <u>not</u> the pay period immediately before the commencement of the incapacity.

5.3. The most sensible approach is to use the 7 days immediately prior to the commencement of the incapacity. If that yields an unfair result because, for example, the worker was absent during that time, it may be appropriate to consider a longer period, for example, take the average of the previous 2 weeks.

5.4. A factor, such as holidays, may 'intervene' between the period of incapacity and the worker's last period of work. If so, the period of incapacity may be deemed to commence prior to the intervention.

6. DO YOU EVER RE-CALCULATE THE WEEKLY PAYMENT RATE?

6.1. **Yes**. But only when a new period of incapacity commences.

7. WHAT HAPPENS IN THE EVENT OF A PAY RISE DURING A PERIOD OF INCAPACITY?

7.1. If the Weekly Payment Rate was calculated based on:

7.1.1. the Normal Weekly Earnings formula then you do not apply the increase;

[1] http://abetzcurtis.com.au/calculating-the-ordinary-time-rate-of-pay/

7.1.2. the Ordinary Time Rate of Pay formula then you recalculate using the new *ordinary time rate of pay* input.

7.2. If the pay increase lifts the Ordinary Time Rate of Pay above the Normal Weekly Earnings, then the Ordinary Time Rate of Pay becomes the new Weekly Payment Rate.

8. WHAT ARE SOME OF THE EXCEPTIONS TO THE FULL STEP-DOWN?

8.1. Section 69B(2) prescribes that only part of the step-down will apply (i.e. 95% instead of 90%; or 85% instead of 80%) if there is medical evidence that the worker is fit for suitable alternative duties but the **original** employer does not enable the worker to undertake those duties with them. If the worker is no longer employed with the original employer then arguably this exception does not apply.

8.2. Section 69B(2A) prescribes that no step-down applies in respect of any week the worker engages in work for 50% or more of the worker's normal weekly hours under the worker's approved RTWP or injury management plan with **any** employer or host employer.

9. WHEN DO WEEKLY PAYMENT CEASE DUE TO AGE OF THE WORKER?

9.1. Unless a s. 87 referral is filed with the Tribunal, weekly payments will cease:

a. when a worker attains the age of 65 if the injury occurred on or before they turned 64; or

b. 12 months after the date the injury occurred if the injury occurred after the date they turned 64.

For further information in relation to the issues discussed in this paper, please contact either Joe Brown or Aaron Hindmarsh.