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LAWYERS

UNITED SERVICES UNION

W.H.S AND WORKERS COMPENSATION GUIDEBOOK

1300 136 604

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UNITED SERVICES UNION By your side

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NEXT STEPS TO HELP A MEMBER

- Refer member to your union organiser
- Refer member to USU Support Team
  Phone **1300 136 604** or visit
  www.usu.org.au

Dear Member,

The workers compensation scheme can be confusing. We have created this booklet to provide some basic information about the compensation claim process and to assist our injured members as they recover from an injury and attempt to return to work.

We hope you find it useful.

CARROLL & O'DEA LAWYERS

UNITED SERVICES UNION By your side

Level 18, 111 Elizabeth Street, Sydney New South Wales 2000

Disclaimer: The information provided is general in nature and does not address specific circumstances. It does not constitute legal advice. The information provided is relevant to the New South Wales Workers Compensation Scheme and does not apply to the Commonwealth Compensation Scheme.

This Guidebook has been prepared to assist you with workers compensation claims.

Where there are overlapping rights, careful consideration must be given to the appropriate cause/s of action and remedy sought. We would be pleased to provide further clarification in these circumstances as required.

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WORKERS COMPENSATION

All employees are covered for compensation for work injuries and illnesses whether employed on a full-time, part-time, casual, permanent or temporary basis. The New South Wales Workers Compensation Scheme is founded on a "no fault" principle and workers are generally entitled to compensation for work-related injuries whether or not they were at fault for their injury.

When is a Worker Covered?

Workers are covered for injuries sustained both at the workplace and away from the workplace and generally whenever an injury is sustained "in the course of employment". This can include:

a. a journey to and from work (with restrictions);
b. a recess or lunch break;
c. attending a training course (including a training or apprenticeship course);
d. a Union representative attending a course or a meeting (in most instances);
e. attending a work function.

What Type of Injury is Covered?

Compensation is payable for:

a. a specific incident or injury caused in the course of employment;
b. a medical condition (whether pre-existing or developed over a period of time) either caused at work or aggravated by employment duties; an injury from "wear and tear";
c. specific conditions including industrial deafness, cancers and lung conditions.

FIRST STEPS WHEN INJURED

After an injury is sustained, you should:

a. Report the injury, preferably in writing. If there is a need for medical treatment or incapacity from employment, your member should obtain a Certificate of Capacity (WorkCover Medical Certificate) detailing their treatment needs and restrictions for employment or period of incapacity.
b. The Certificate of Capacity should be lodged with the employer.

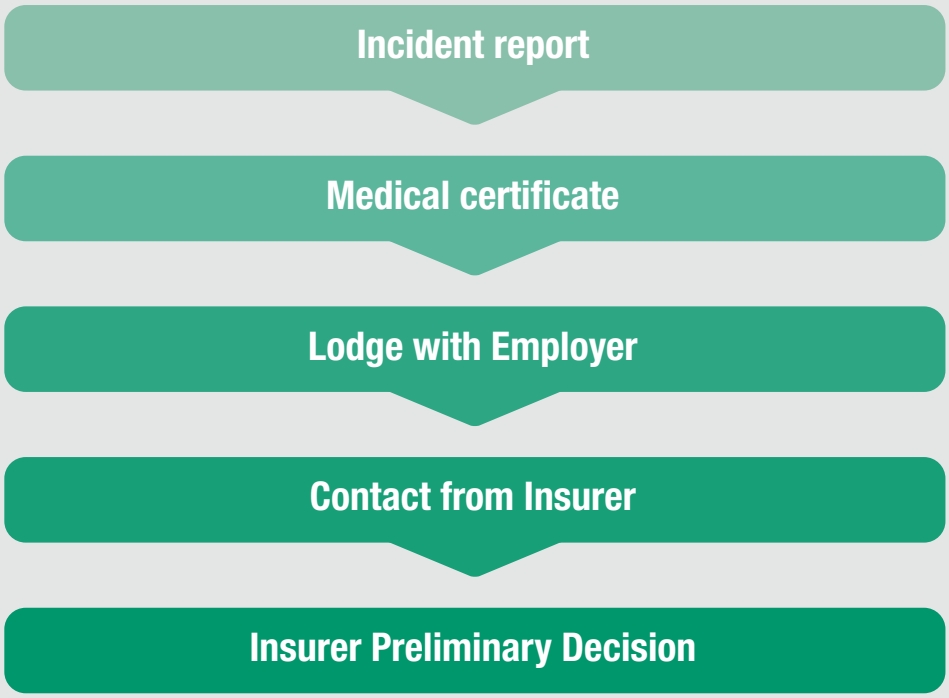
Once these steps are undertaken, an employer must lodge notice of the claim with their insurer within 48 hours.

Your member should then receive contact from the insurer within seven days.

Practical tip:

- If your member has not received contact from their insurer seven days after submitting a Certificate of Capacity , their employer/insurer is not complying with their obligations and your member should be referred to the Support Team.
- If a member needs help lodging a claim, they should be referred to the Support Team.

THE CLAIMS PROCESS



The claims process for psychological injuries caused by a category of conduct requires a claim form and additional information to be provided. See page 8 for more detail on psychological injuries.

Practical tip: After obtaining a medical certificate, an injured member should contact the Support Team for assistance processing a claim.

PROVISIONAL LIABILITY

Once an insurer receives notice of a claim, it must acknowledge receipt within seven days and respond in one of three ways:

a. determine liability – either accept or deny the claim outright;
b. commence provisional liability payments;
c. apply a "reasonable excuse".

It is unusual for an insurer to accept or deny a claim outright within seven days. Usually, they will either commence provisional liability payments or apply a reasonable excuse.

Provisional liability provides for a temporary or interim payment of compensation benefits for a period of up to 12 weeks whilst an insurer can more closely investigate a claim before making a decision to accept or decline a claim.

Provisional liability applies in most instances, however an insurer can apply a "reasonable excuse" and avoid having to pay provisional benefits in a limited range of categories.

Practical tips: If the insurer applies a reasonable excuse or does not respond at all within seven days, your member should be referred to the Support Team.

INVESTIGATION OF CLAIMS

An insurer may wish to undertake a factual and/or medical investigation in relation to a claim.

FACTUAL INVESTIGATION

If required to participate in a factual investigation, your member may be required to provide a statement of evidence. This will usually involve an investigator appointed by the insurer meeting with your member and preparing a statement of evidence. Your member is entitled to have a support person present for the interview. Further, your member should be discouraged from signing this statement at the time of the interview and should request a copy of the statement be provided to them for review. The statement of evidence is a critical document and amendments to the statement may be required.

If your member is subject to invasive surveillance by an investigator this may warrant a complaint to both the insurer and in some instances the police.

Practical tip:

- Take care with social media, insurers will review Facebook and other social media and can rely upon this material as evidence.
- Review of a draft statement may be circumstances for a referral to the Support Team for legal advice.

INDEPENDENT MEDICAL EXAMINATION

An insurer does, in some instances, have an entitlement to require your member to submit for an Independent Medical Examination (IME). Please note this does not apply in all circumstances and there are restrictions upon the requirement to attend an IME.

Further, in requiring your member to submit to examination with an IME, your member may be entitled to a choice of three doctors.

Practical tips: Referral to the Support Team may identify the circumstances your member is not required to attend an IME. Further, advice can be provided with respect to the best choice of doctor for an IME.

RETURN TO WORK AND SUITABLE DUTIES

The Workers Compensation legislation is focused on assisting injured workers to return to work as soon as possible and ideally to their pre-injury role. Any return to work should be in accordance with the restrictions of the nominated treating doctor (NTD) and in accordance with a return to work plan. The plan must be developed and agreed to by both the worker and the employer. To facilitate this process, a rehabilitation provider can also be appointed.

Most return to work plans provide for suitable duties to be performed with a graduated return to pre-injury duties without restrictions. Suitable duties can include:

a. parts of the job your member was doing before the injury;
b. the same job, but on reduced hours;
c. different duties all together;
d. duties at a different site;
e. training opportunities, or
f. a combination of some or all of the above.

Suitable duties must take into account:

1. the restrictions imposed by the Certificate of Capacity;
2. the age, education and work skills of your injured member;
3. where your member lives;
4. duties that are useful to the employer's trade or business.

There is an obligation upon an employer to provide suitable duties to an injured worker.

An employer representative cannot attend a medical appointment or treatment consultation unless requested to do so by your member.

Practical tips:

- Disputes with respect to return to work and suitable duties are not uncommon. There are a range of steps that can be taken to assist an injured member return to work.
- Circumstances where referral to the Support Team may be appropriate include:
  a. suitable duties are not offered or withdrawn (often after the denial of a claim);
  b. suitable duties are demeaning or otherwise inappropriate;
  c. an employer is attempting to unduly influence the return to work plan;
  d. Members should not be inviting or otherwise agreeing to employer representatives attending medical appointments.

DENIAL OF A CLAIM

Whilst the workers compensation system is a "no fault" system, there are a number of grounds upon which an insurer can deny liability for a claim. The insurer's decision is not final and can be reviewed. The denial of a claim must be put in writing and a "verbal" denial of a claim is not in accordance with an insurer's obligations.

There is no time limit for the review of the denial of a claim.

Practical tip: The denial of a claim is a basis for referral to the Support Team for legal advice. After the denial of a claim, the member should not write or communicate with the insurer, as information provided may not be helpful and can be used to further support the denial of the claim.

PSYCHOLOGICAL INJURIES

Amendments to workers compensation law now only entitle a claim for psychological injury if the circumstances of the injury fall into the defined categories of:

- A traumatic event
- Particular categories of "conduct" (known as conduct events)

Circumstances of injury outside of these categories are not compensable.

Practical tip:

- The circumstances of an injury arising from personal interactions may, in some instances, not be compensable as a workers compensation claim. Alternate ways to recover compensation may be available if an injury isn't compensable under the workers compensation legislation.
- The completion of a claim form for psychological injury must accurately reflect all the circumstances contributing to the injury, i.e. each instance of relevant conduct must be detailed. This can be onerous; early referral to Member Services is appropriate in all circumstances.

JOURNEY CLAIMS AND MOTOR ACCIDENT CLAIMS

Following amendments to Workers Compensation Law in 2012, coverage for injuries sustained on a journey are still possible, however it is necessary to show a "real and substantial" connection to employment.

There are a growing number of cases that fall within this category.

In circumstances where the injury occurred in a motor accident, there is also an entitlement to compensation under the Motor Accidents

Scheme which provides both a “no fault” and fault-based compensation scheme.

In addition, there is insurance coverage under the Union’s Journey Insurance Policy.

Practical tip: Referral to the Support Team may be appropriate to consider both the merits of a journey claim as well as the best and most suitable insurance coverage for someone injured on a journey or in a motor accident.

PERMANENT IMPAIRMENT CLAIMS

In circumstances where an injured member is left with some level of functional restriction (which can be either physical or psychological), they may have an entitlement to a payment for permanent impairment compensation.

A claim of this nature provides a “tax-free” payment for the loss of quality of life or function caused by a work injury. Further, and importantly, the level (percentage) of permanent impairment is central to determining the extent of ongoing coverage for compensation benefits.

For physical injury:

Whole Person Impairment Table (for Medical Coverage)
0% – 10% – two years medical coverage after last receipt of weekly payments
11% – 20% – five years of medical coverage after last receipt of weekly payments
21% or more – lifetime medical coverage

In circumstances where a permanent impairment claim is not made or your member does not know their percentage of permanent impairment, they will receive the “default” coverage of only two years of medical coverage after last receiving weekly compensation payments, irrespective of the seriousness of their injury.

For psychological injury: New impairment thresholds apply for psychological injury which make access to extended weekly benefits and medical coverage more difficult. Entitlement to weekly benefits is now restricted to 130 weeks in most situations. Coverage for medical expenses are restricted to 12 months after last receiving weekly compensation benefits.

Practical tip: An injured member likely to be left with some level of permanent restriction from an injury should be referred to the Support Team for legal advice to assess their percentage of whole person impairment. As a rule of thumb, a work-related surgery, or a restriction at work or social activities may give rise to a permanent impairment entitlement.

NEGLIGENCE CLAIMS

Claims can be made for "negligence" against the employer. These types of claims can only be made:

- where the injury is of a particular seriousness (15% permanent impairment or greater);
- where an injury was caused by the employer's negligence.

A 3-year limitation period applies for negligence claims, although this time period can be extended in some circumstances.

In broad terms, a successful negligence claim can result in a payment for past and likely future earnings loss paid in one single sum to an injured worker.

Importantly, these types of claims do extinguish ongoing workers compensation benefits.

A separate impairment threshold applies for psychological injury.

Practical tips:

- Retain records of any accident – often the "seriousness" of an injury is not known until a later time.
- A 3-year limitation period applies – seek early advice from the Support Team.

DEATH CLAIMS

Workers Compensation law provides a substantial sum payable to the dependants of a worker killed in the course of their employment. This can also include an ongoing weekly payment to dependants of support as well as a significant "lump sum".

OTHER CLAIMS

In some instances an injury sustained at work can give rise to a range of other entitlements. Some obvious examples include:

a. a motor accident;

b. a public liability claim;

c. discrimination claim.

Claims outside of the workers compensation legislation often have a different set of entitlements and may have strict time limits for the making of a claim. Importantly, in some instances "other claims" may provide better support for an injured member than the New South Wales Workers Compensation Scheme.

Practical tips:

- The resolution of one claim may extinguish another type of claim – beware and seek advice.
- Any circumstances of injury suggestive of an "other" type of claim should be referred to the Support Team for legal advice.
- Don't delay! Strict time limits can apply.

PAYMENT OF WEEKLY COMPENSATION BENEFITS

Compensation is payable for lost earnings with reference to pre-injury average weekly earnings (PIAWE). PIAWE is measured as the total of earnings for the period of 12 months before the injury. This does include overtime and allowances (with limits).

Payments are made as follows:

a. For the first 13 weeks of total incapacity after an injury, your injured member is paid at 95% of the PIAWE rate.

b. From weeks 14 to 52 they are paid at 80% of the PIAWE rate.

c. After that, your member is paid at their award rate, unless they were injured after 26 October 2018 in which case they will be paid at 80% of the PIAWE rate.

In circumstances where your member is fit to return to suitable duties and actually works 15 hours per week (or more) they are entitled to have their actual earnings "topped up" by the insurer to 95% of the PIAWE rate.

Please note the formula for weekly payments varies depending on the date of injury. This is only a summary rough guide.

For psychological injuries an interim payment at 75% of PIAWE applies for up to 56 days or until a claim is determined.

Practical tip: The calculation of weekly payments is complex and insurers can get it wrong. If a member is concerned that their weekly amount isn't correct, they can be referred to the Support Team.

LEGAL COSTS

Under New South Wales Compensation Law, legal costs can be paid by:

a. an injured worker;

b. through the Independent Review Office (IRO);

c. a combination of both of the above.

In support of your injured members Carroll & O'Dea Lawyers do not charge legal costs; we recover costs and expenses only from IRO.

This means that your members are not responsible for legal costs or expenses in relation to a statutory workers compensation claim or dispute.

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NEXT STEPS TO HELP A MEMBER?

Refer member to your union organiser

Refer member to USU Support Team-
Phone 1300 136 604
or **visit www.usu.org.au**

QUICK TIPS
What to do and when.

1. INITIAL STEPS

- Provide a notice of injury, ideally in writing
- **Insurer does not respond:** Refer to the Support Team if no contact from the insurer seven days after submitting a Certificate of Capacity.
- **Insurer doesn't accept provisional liability:** If the insurer applies a reasonable excuse or does not accept the claim on a provisional basis, refer to the Support Team.

2. INSURER CONDUCT AND DENIAL OF A CLAIM

- **Investigation of claims:** Take care with social media; insurers will review Facebook and other social media and can rely upon this material as evidence.
- **Independent medial examination:** Refer to the Support Team for choice of doctor and for circumstances where members are not required to attend an IME.
- **Return to work disputes:** If suitable duties are not offered or withdrawn, are demeaning or inappropriate or an employer is attempting to unduly influence the return to work plan refer to the Support Team.
- **Denial of a claim?** Refer to the Support Team for legal advice.

3. CIRCUMSTANCES OF INJURY

- **Journey claims:** When considering the merits of a journey claim and/or the most suitable insurance coverage for someone injured on a journey or in a motor accident refer to the Support Team for advice.
- **Permanent impairment:** If a member is likely to be left with some level of permanent restriction from an injury they should be referred to the Support Team for legal advice.
- **Multiple claims:** Any circumstances of injury suggestive of another type of claim should be referred to the Support Team for legal advice. Strict time limits can apply to other types of claims.
- **Calculating weekly payments:** If a member is concerned that their weekly payment amount isn't correct they should be referred to the Support Team.

Liability limited by a scheme approved under Professional Standards Legislation (in NSW and Victoria).
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