

AAT increases Comcare weekly payments for injured worker

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On 7 June 2024, the Administrative Appeals Tribunal (AAT) in Brisbane determined that an injured worker in receipt of Comcare benefits was entitled to be paid more in weekly benefits (loss of earnings) than Comcare was paying him. It's an important decision for injured workers who are covered by the federal Comcare worker's compensation scheme as it highlights that it is always important for injured workers to scrutinise what they are being paid by Comcare (or a self-insurer under the scheme).

Calculating weekly payments in Comcare claims

It is not uncommon for the insurer/employer to incorrectly calculate the Comcare benefits injured workers should be getting paid. That is not to say that the insurer/employer are deliberately underpaying claimants; rather, mistakes can be made when they try to calculate the 'normal weekly earnings' of injured workers.

The golden rule is, if you're in receipt of worker's compensation benefits of any kind, they are your benefits. You need to make sure you're getting everything you're entitled to. If you're unsure, you should seek legal advice.

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Injured worker asks Comcare to review weekly payments calculation

In the case of Jarrett and Comcare (Compensation) [2024] AATA 1494; 6 June 2024, Mr Jarrett had suffered a psychological injury in the form of an adjustment disorder with mixed anxiety and depressed mood, working for the Department of Social Services. He lodged a Comcare worker's compensation claim which was accepted.

Mr Jarrett did the right thing and carefully reviewed the calculation Comcare had made of his 'normal weekly earnings'. He

observed that he was being underpaid because of a shortfall (he said) of an allowance for 'average number of hours of overtime' that he said should be included in the calculation of his weekly payments for loss of earnings.

Mr Jarrett asked Comcare to review their calculation, but Comcare maintained its position regarding the 'average weekly overtime' component in its calculations.

Comcare said the relevant period which more fairly represents the claimant's average weekly overtime earnings, was 12 weeks up to date of injury. This resulted in a figure of 11.03 hours.

Injured worker pursues AAT appeal disputing Comcare's calculations

Mr Jarrett disputed Comcare's calculations of his average weekly earnings before the AAT. He asked that the AAT revert to the 'standard' 2-week period provided by the *Safety, Rehabilitation and Compensation Act* (**'the Act'**).

Unfortunately, the Act (which governs Comcare claims) is not an 'easy read' by any means. The section that deals with how average weekly earnings is calculated, is section 8. The relevant part of section 8, insofar as Mr Jarrett's situation was concerned, was the part which deals with how overtime is to be factored into the amount of average weekly earnings.

In a nutshell, working out what overtime can be factored into the amount of weekly payments to be paid to injured workers is the:

> '… average number of hours of overtime worked in each week by the employee… during the relevant period.'

What is the 'relevant period' in Comcare average weekly earnings calculations?

It is this concept of 'relevant period' that Mr Jarrett's appeal to the AAT focused on.

Section 9 of the Act defines 'Relevant period'. It basically states that reference to 'relevant period' is a reference to:

> *'…the latest period of 2 weeks before the date of injury during which the employee was continuously employed (by the employer).'*

But (and unfortunately there are many 'buts' in the law), the Act also provides that if the 'relevant period' (noted above) would not, in Comcare's opinion, fairly represent the weekly rate at which the employee was being paid (immediately before his or her injury), then Comcare can choose another period that it considers reasonable for the purpose of arriving at the amount of normal weekly earnings. And that period may be longer than the *'…latest period of 2 weeks'* referenced in the Act.

Based on information provided by Mr Jarrett's employer, the Department of Social Services, Comcare decided that the 2 weeks wasn't a 'fair representation' of his earnings. Comcare applied a longer period of 12 weeks prior to date of his injury to determine

his average weekly earnings.

It was Comcare's determination of the worker's overtime (which he regularly worked) over this extended 12-week period that Mr Jarrett was not prepared to accept. As it turned out, he was right!

AAT finds in favour of the injured worker

In deciding in favour of Mr Jarrett, AAT Senior Member Mitchell noted the following:

> The question of what 'fairly represents' the average weekly number of hours of overtime being paid prior to the injury is to be answered based on the facts of the particular case (nothing new in this statement);
>
> It is not for the Tribunal to determine what might be the most 'favourable' period for the claimant, but what is a 'fair representation' of the claimant's average earnings, including what overtime ought to be included in its calculation;
>
> The Senior Member made reference to a number of Federal Court decisions which provide important guidance (indeed precedent) as to how she was to determine the issue of overtime;

In the end, Senior Member Mitchell concluded (at paragraph 39 of her reasons):

> *'Based on the evidence before it, the Tribunal does not consider that there is compelling reason to find that the 2-week relevant period set by Section 9(1) of the SRC Act in this case provides anything other than a fair representation of the Applicant's average overtime worked prior to date of his injury.'*

The Tribunal accepted the Applicant, Mr Jarrett's calculation of his average number of hours of overtime worked as being 13.98 hours (up from Comcare's determination of 11.03).

Whilst on the face of it, that doesn't seem like much (in increase of about 3 hours), given penalty rates apply, it does result in a somewhat significant increase in what Mr Jarrett was to be paid (and now back paid) by way of Comcare weekly payments.

Get help from a Comcare lawyer

If you're having difficulties with your Comcare claim, or you've received an adverse decision from Comcare that you do not agree with, you should seek legal advice. It costs nothing to have your Comcare case reviewed by our team of expert Comcare lawyers.

Notably, strict time limits apply when it comes to disputing decisions made in Comcare cases, so don't wait to find out what your rights are when it comes to decisions made by Comcare (or a self-insurer).

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