

WorkCoverSA

Claims Operational Guidelines

Chapter 12: Death claims

January 2013

Contents

Chapter 12: Death claims	4
Entitlements	4
Funeral expenses – section 45B	4
Counselling services – section 45C	5
Provision and payment of services	5
Payment for counselling services on undetermined claims	6
Transitional provisions - counselling services	6
Lump sum payments – section 45A	7
Definitions relevant to lump sum payments.....	7
Determining dependency.....	9
Determining dependency of dependent spouse or domestic partner	10
Determining dependency of dependent children	10
Amount of lump sum entitlements	11
Dependent partner/s and no dependent child	11
Orphan child/ren.....	11
Dependent partner/s and one dependent child	11
Dependent partner/s and two – five dependent children	11
Dependent partner/s and more than five dependent children.....	11
No dependent partner but dependent child or children.....	12
Partially dependent partners, dependent partners and dependent children	12
Partially dependent partner/s and no dependent partner and no dependent child.....	12
Other dependent persons	13
Dependents of deceased workers under 21 years old.....	13
Dependents under 18 years old	14
Interest payable on lump sum payments.....	14
Change of circumstances	15
Case law	15
Guidelines for negotiated settlements	15

Transitional provisions – lump sum	16
Weekly payments	17
Definitions relevant to weekly payments	17
Weekly payments and dependency	17
Weekly payments and change of circumstances	18
Weekly payment entitlement	19
Dependent spouse or dependent domestic partner	19
Dependent child	19
Dependent relative	20
Maximum amount payable to a worker's dependents	20
Review of weekly payments	23
Initiation of review	23
Annual review	23
Changes in income and earning capacity	23
Evidence of income	24
Failure to provide evidence	24
Notification of reduction	25
Taxation on weekly payments for minors	25
Commutation	25
Decision to commute/not commute is not reviewable	26
Claims agent cannot revoke decision without consent of parties	26
Commutation to a minor	26

Chapter 12: Death claims

A claim arising from the death of a worker (death claim) must be lodged in accordance with section 52 of the Act, but managed in accordance with section 44 and sections 45A, 45B, 45C.

Should a worker with a current claim (which may be accepted, rejected or undetermined) die, either as a result of the injury or from another cause, the claims agent must immediately notify WorkCoverSA (WorkCover) of the worker's personal details, date of death, cause of death (as far as it is known) and the status of the claim. A full report should be forwarded to WorkCover as soon as it is available.

At all times the claims agent should treat people with dignity, respect and empathy. The claims agent needs to be especially mindful of this when a claim is a death claim.

Where the claim arises from the death of a worker, the role of the claims agent in the first instance is to:

- contact the next of kin or representative as soon as possible
- explain the possible entitlements available
- coordinate investigations
- consider interim payments of weekly payments if the spouse or domestic partner is dependent on the deceased worker (refer to section 106).

Entitlements

All or any of the following entitlements may be payable on a death claim:

- Funeral expenses
- Counselling services
- A lump sum
- Weekly payments
- Medical expenses

Funeral expenses – section 45B

Section 45B of the Act provides for compensation for funeral expenses in the case of the compensable death of a worker. The amount payable is either:

- the prescribed amount (refer to the Schedule of Sums), or
- the actual cost of the funeral,

whichever is the lesser - this sum is payable either to the company that conducted the funeral or to the person who has paid or is liable to pay for the funeral.

Included in funeral expenses are:

- cost of the burial plot

- cremation charges
- church service charges
- cost of coffin
- stonemason's charges
- funeral director's charges
- wake (limited to the funeral director's after-service gathering)
- where the worker dies interstate or overseas, the reasonable cost of transporting the body back to the normal place of residence.

If the funeral is held overseas, the funeral expenses should be converted to \$AUD, and payment cannot exceed the prescribed amount. The claims agent is not required to meet the costs of relatives travelling to attend a funeral away from their normal place of residence.

Counselling services – section 45C

Section 45C of the Act allows family members of a deceased worker to be compensated for the cost of counselling services to help them deal with issues associated with the worker's death. Section 45C(5) defines a 'family member' as a spouse, domestic partner, parent, sibling or child of a worker (or child of the worker's spouse or domestic partner).

Only case managers specifically designated to deal with death claims and experienced in dealing with grieving families should be in contact with the worker's family members. The case manager must inform the worker's next-of-kin as soon as appropriate that counselling is available to family members. It is preferable that family members are given this advice in person eg, face-to-face or by telephone, rather than by letter.

It is entirely the choice of the family members whether or not they take up the offer of counselling services. Some family members may choose to and others may not, or all eligible family members may take up the offer.

The intent of this section is to provide counselling services to family members during the acute grieving phase after a worker's death. Counselling services can be provided to individuals or to a family group.

Provision and payment of services

Counselling services for the purpose of section 45C can be provided by a legally qualified medical practitioner (eg, a psychiatrist or general practitioner) or registered psychologist. Section 45C(1) refers to 'approved' counselling services. Section 45C(4) clarifies that these are counselling services approved by WorkCover. At this stage, WorkCover has not 'approved' any counselling services. Section 45C(3) provides for a scale to be approved by the Minister and costs to be capped by a maximum prescribed by the regulations. The Minister has not approved a scale and a maximum has not been set by the regulations. So the only limit that applies to payment of such costs is reasonableness. Therefore, the claims agent can determine the appropriateness of costs of counselling services and/or person delivering the services and pay accounts on a case by case basis to ensure that:

- a) families can receive these types of services when required; and
- b) processing of payments for services can occur promptly.

The medical fee schedule and the psychology fee schedule for the purpose of section 32 each have individual consultation item numbers as well as family group therapy or group psychotherapy items and are a good guide as to what is a reasonable charge.

In relation to counselling services, WorkCover will **not** reimburse the cost of:

- medications for a family member
- fees associated with non-attendance or cancellation of a counselling consultation
- travel to and from counselling consultations
- counselling provided to family members who reside outside Australia
- counselling for people other than family members as defined by section 45C(5).

Generally, service providers will invoice the claims agent directly. However, if a family member pays for the cost of counselling, claims agents will reimburse the family member for the costs incurred.

Payment for counselling services on undetermined claims

Because death claims often take longer than usual to determine it is probable that most claims where counselling services are offered will be undetermined. The fact that a claim is undetermined should not preclude the family members of a deceased worker being offered counselling services. In such cases interim payments may be utilised to pay for counselling services (refer to section 106 of the Act and Chapter 5 of the Claims Operational Guidelines). Section 106 provides for interim payments of compensation to be made to claimants, pending the final determination of a claim. Family members of a deceased worker who accept an offer of interim payments for payment of counselling services are required to complete and sign a form indicating their understanding of interim payments. Section 106(2) of the Act enables WorkCover to recover interim payments from claimants if, when the claim is determined, it is clear that the claimant was not entitled to receive the payments. However, the claims agent should not take any action to recover the payments as the Board may waive this amount. The claims agent should provide the details of the payment to WorkCover so an application for waiver can be made to the Board.

Transitional provisions - counselling services

Counselling services is a new provision and applies to claims for compensation made under section 45C of the Act on or after 1 July 2008, whether or not entitlement to compensation arose before, on or after 1 July 2008. The claims agent may also determine that it is reasonable to provide counselling services to family members of a deceased worker where the claim for workers compensation was made under section 44 of the Act before 1 July 2008. Such determination is at the discretion of the claims agent, and will be made taking into consideration the particular circumstances of the family members of a deceased worker.

Lump sum payments – section 45A

If a worker dies as a result of a compensable injury (the worker), persons dependent on the worker's earnings are entitled to receive compensation in the form of a lump sum. Section 45A of the Act sets out the lump sum entitlement for:

- dependent partner/s
- dependent child/ren
- partially dependent partner/s
- other dependent persons.

Definitions relevant to lump sum payments

The following definitions (refer to sections 3 and 45A of the Act) are relevant when determining entitlements to a lump sum:

child means a person who is:

- under 18 years old; or
- a full-time student at an educational institution approved by WorkCover and under 26 years old; or
- a person who is incapable of earning a living because of a physical or mental injury.

dependent child: means a child, including an orphaned child totally, mainly or partially dependent on the worker's earnings.

dependent partner: means a spouse or domestic partner totally or mainly dependent on the worker's earnings.

partially dependent partner: means a spouse or domestic partner who is to any extent dependent on the worker's earnings.

prescribed sum means the section 43 prescribed sum, as at the time of the compensable injury resulting in the worker's death occurred, less any amount paid to the worker under section 43. From 1 July 2008 the prescribed sum is \$400,000, indexed annually (Refer to Schedule of sums).

orphan child means a child whose natural or adoptive parents are dead and includes a child, one of whose natural or adoptive parents is dead and who has no reasonable prospect of being supported by the surviving natural or adoptive parent.

domestic partner means a person is the domestic partner of a worker if he or she lives with the worker in a close personal relationship and:

(a) the person

- (i) has been so living with the worker continuously for the preceding period of three years, or
- (ii) has during the preceding period of four years so lived with the worker for periods aggregating not less than three years, or

(iii) has been living with the worker for a substantial part of a period referred to in subparagraph (i) or (ii) and WorkCover considers that it is fair and reasonable that the person be regarded as the domestic partner of the worker for the purposes of this Act, or

(b) a child, of whom the worker and the person are the parents, has been born (whether or not the child is still living).

Note: In the case of same sex couples, the person claiming to be the domestic partner of a deceased worker will have to rely on criteria (i), (ii) or (iii) above. This is because in South Australia only the natural or adoptive parents of a child are recognised as the child's legal parents and same sex couples cannot legally adopt children in this State. The only exception to this will be if a same sex couple has legally adopted a child in a State or country where this is legally available to them and the adoption is recognised by South Australian law.

close personal relationship: means the relationship between two adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis, but does not include:

(a) the relationship between a legally married couple, or

(b) a relationship where one of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind.

Note: Two persons may live together as a couple on a genuine domestic basis whether or not a sexual relationship exists, or has ever existed, between them.

Typical examples of a domestic partner relationship are:

- two opposite sex persons living together in a sexual relationship
- two same sex persons living together in a sexual relationship
- two same or opposite sex persons living together and sharing their lives in a similar way to a couple in a relationship with a high level of involvement, interdependence and support for each other, but not in a sexual relationship eg, two unrelated adults, two siblings, a parent and adult child or two other related adults.

Persons living together on a commercial basis are not considered to be living in a domestic partnership, eg:

- a live-in housekeeper, nanny or carer who is paid for their services
- boarders or paying guests in a home or persons who live in a rooming house
- persons who share lodgings but do not share their lives eg, a group of students living together in a share house, even though they may contribute to common expenses and share the domestic tasks.

Factors that claims agents should take into account when determining if a person was the domestic partner of a deceased worker include the following:

- Have they have been living together for the preceding three years or an aggregate of three out of the preceding four years, or do they substantially meet one of these requirements?
- Have they had a child together, whether or not the child is living?

- Did they make a domestic partnership agreement under the *Domestic Partners Property Act*? (This would not by itself qualify the person and the deceased worker as domestic partners. It signifies however, the serious intention of the parties to live together on a genuine domestic basis.)
- Did they jointly inhabit their home, as opposed to living in separate quarters under the same roof?
- Was one of the persons partly or wholly financially dependent on the other?
- Did they pool their money eg, in a joint bank account?
- Did they jointly share the liability for day to day living expenses?
- Did they own the property in which they lived in joint names?
- Did each person contribute to mortgage or rent payments?
- Did they share the housework or carry out household tasks for each other?
- Were they committed to a shared life together?
- Did they socialise together and/or present themselves as a couple?

A claimant does not have to satisfy all the above criteria to be determined to be the domestic partner of a deceased worker, but the more criteria they meet the more likely it is that their status will be so determined. Each case will need to be decided on its own merits.

dependant/dependent: in relation to a deceased worker, means a relative of the worker who, at the time of the worker's death:

- (a) was wholly or partially dependent for the ordinary necessities of life on earnings of the worker, or
- (b) would, but for the worker's injury, have been so dependent, and includes a posthumous child of the worker.

educational institution means:

- (a) a secondary school, or
- (b) a trade or technical school, or
- (c) a college of advanced education, university or other institution at which tertiary education is provided, or
- (d) any other educational or training institution approved by WorkCover for the purposes of this definition.

(Note: WorkCover has not approved any other educational or training institution.)

spouse means a person is the spouse of another if they are legally married.

Determining dependency

To enable the claims agent to make a determination as to the dependency of the claimant/s, the following information and documents may be required but will vary on a case by case basis:

- Complete tax returns for the three years prior to and including the year of death for:
 - (a) the claimant/s

- (b) the worker
 - (c) any business in respect of which the worker or the claimant/s had a financial interest or, if the tax returns cannot be obtained, details of any distribution or profit paid to the worker or claimant/s from any business in respect of which the worker or the claimant/s had a financial interest
 - (d) any family trust relevant to the worker or the claimant/s, or, if the tax returns cannot be obtained, details of any distribution or profit paid to the worker or claimant/s from the family trust.
- Details and records of the income of all claimant/s from all sources during the 12 months prior to the death of the worker, including income from all investments, employment or business.
 - In the event of partial dependency, details of the nature and extent of alleged dependence together with copies of relevant domestic accounts and receipts if applicable. Where relevant and appropriate, the claims agent may request a statutory declaration in respect of this information.
 - Access to bank records and statements relating to the claimant/s and the worker where required.
 - Where the worker was a proprietor, director or shareholder of the employer named on the claim form, and the claimant has access to employer information, which may include copies of all business and employment records for three years preceding the death of the worker including but not limited to wage and accounting records relating to the worker, these records may be required.
 - A copy of the certificate of marriage may be required.
 - Where the claim is made by a child a copy of the child's birth certificate.
 - Where the child is aged between 18-26 and claiming to be a full-time student, documentation establishing whether the child is a full time student.
 - Where a person claims that they are incapable of earning their own living, medical evidence of the physical or mental injury of the person.

Determining dependency of dependent spouse or domestic partner

When determining whether or not a worker's spouse or domestic partner was wholly or mainly dependent on the worker's earnings at the time of the worker's death, the claims agent should not take into consideration any money the spouse or domestic partner was earning by his or her personal exertion, or any savings from such earnings. In other words, ignore the dependent spouse's or domestic partner's earnings.

(Refer to section 45A(2) of the Act.)

Determining dependency of dependent children

If a worker and their spouse or domestic partner jointly contributed to the support of a dependent child immediately before the compensable injury resulting in the worker's death occurred, the spouse or domestic partner's contribution must be disregarded when determining whether or not the child is dependent, and the extent of the dependency.

(Refer to section 45A(3) of the Act.)

Amount of lump sum entitlements

Dependent partner/s and no dependent child

If a worker's only dependent is a dependent partner they are entitled to an amount equal to 100% of the prescribed sum.

If a worker leaves more than one dependent partner, each is entitled to equal shares of an amount equal to 100% of the prescribed sum.

(Refer to section 45A (5) of the Act.)

Orphan child/ren

If a worker's only dependent is an orphaned child they are entitled to an amount equal to 100% of the prescribed sum. If there is more than one orphan child each is entitled to equal shares of an amount equal to 100% of the prescribed sum.

(Refer to section 45A(6) of the Act.)

Dependent partner/s and one dependent child

If a worker leaves a dependent partner, or dependent partners, and only one dependent child they are entitled to an amount as follows:

- *Dependent partner*: an amount equal to 90% of the prescribed sum; if there is more than one dependent partner, equal shares of an amount equal to 90% of the prescribed sum
- *Dependent child*: an amount equal to 10% of the prescribed sum.

(Refer to section 45A(7) of the Act.)

Dependent partner/s and two – five dependent children

If a deceased worker leaves a dependent partner, or dependent partners, and more than one but not more than five dependent children, they are entitled to an amount as follows:

- *Each dependent child* – an amount equal to 5% of the prescribed sum
- *Dependent partner/s* – the balance of the prescribed sum; if there is more than one dependent partner, equal shares of the balance of the prescribed sum

(Refer to section 45A(8) of the Act.)

Dependent partner/s and more than five dependent children

If a worker leaves a dependent partner, or dependent partners and more than five dependent children, they are entitled to an amount as follows:

- *Dependent partner/s* – an amount equal to 75% of the prescribed sum; if there is more than one dependent partner, equal shares of 75% of the prescribed sum
- *Dependent children* – equal shares of an amount equal to 25% of the prescribed sum

(Refer to section 45A(9) of the Act.)

No dependent partner but dependent child or children

If a worker leaves only a dependent child, or dependent children (not including any orphan child or orphan children), they are entitled to an amount, or share of an amount, not exceeding the prescribed sum, that is considered by the claims agent to be reasonable and appropriate to the loss suffered by the dependent child or children.

(Refer to section 45A(10) of the Act.)

In determining what is reasonable and appropriate the claims agent may consider the following:

- Age of the child/ren
- Amount of financial support paid by the worker to the child/ren in the period before the worker's death (this may include moneys payable but not paid eg, pursuant to a court order)
- Likelihood of the financial support increasing or decreasing ie, would the deceased worker's income have reduced or increased
- Annual earnings, needs and future income of a carer / guardian of the dependent child/ren
- Any other relevant information

Partially dependent partners, dependent partners and dependent children

If a worker leaves:

- a partially dependent partner, or partially dependent partners, and
- a dependent partner or dependent partners or a dependent child or dependent children, or
- any combination of the above,

Each is entitled to a share of a sum, not exceeding the prescribed sum, which the claims agent considers is reasonable and appropriate to the loss suffered by the dependent/s.

(Refer to section 45A(11) of the Act.)

In considering what is reasonable and appropriate, the claims agent may consider similar information as in respect of a claim under section 45A(10) of the Act.

Partially dependent partner/s and no dependent partner and no dependent child

If a deceased worker leaves:

- a partially dependent partner, or partially dependent partners and
- no dependent partner and no dependent child,

the partially dependent partner, or each of the partially dependent partners, is entitled to a share of a sum not exceeding the prescribed sum, which the claim agent considers is reasonable and appropriate to the loss suffered by the dependent/s.

(Refer to section 45A(11a) of the Act.)

In considering what is reasonable and appropriate, the claim agent may consider similar information as in respect of a claim under section 45A(10) of the Act.

Other dependent persons

If a worker does not leave any dependent partner, partially dependent partner or dependent child, but leaves any other person who is to any extent dependent on the worker's earnings, the claims agent may, if it considers it to be justified in the circumstances, pay an amount to that person that it considers is reasonable and appropriate to the loss suffered by the person. The amount paid cannot exceed the prescribed sum. If the claims agent decides to make a payment to more than one person, the total amount paid to all persons must not exceed the prescribed sum.

(Refer to section 45A(12) of the Act.)

When considering whether or not there is justification to pay compensation to other dependent persons, the claims agent may require such person/s to provide evidence of the nature and extent of their dependence on the worker's earnings. Such evidence may include:

- evidence of mortgage/rent payments (or contribution thereto) made by the worker relevant to the residence of the other dependent person/s
- evidence of utility accounts eg, electricity, gas or water, paid by the worker (or contribution thereto) relevant to the residence of the other dependent person/s
- a signed statutory declaration from the other dependent person/s that they were dependent on the worker's earnings and stating the nature and extent of such dependency
- evidence of the other dependent person/s earnings or other income and their financial situation eg, assets and liabilities.

The above list is by no means exhaustive. Each case will need to be determined on its own merits.

Example:

A son and mother, not being domestic partners, may decide to purchase a house together and both contribute to the maintenance of the house and mortgage payments. If the son dies, then the mother may be entitled to a lump sum under section 45A(12) following consideration of the above evidence.

Dependents of deceased workers under 21 years old

If the worker is under 21 years old at the time of the compensable injury, and leaves dependents but immediately before the injury, contributed to the maintenance of the home of the members of their family, the members of their family are taken to be dependents of the worker, partly dependent on the worker's earnings and may be entitled to a lump sum. (Refer to 'Partially dependent partner/s, dependent partner/s and dependent child/ren' above.)

(Refer to section 45A(13) of the Act.)

Example:

A worker under 21 years old may have regularly paid the utility bills for their parents' home and there was a strong likelihood this would have continued for a significant period of time. Consideration of the following may assist in determining entitlement:

- *Evidence of how long the arrangement was in place*
- *Age of the dependents*
- *Evidence to support likelihood of arrangement continuing including wills, statements from other persons*
- *Worker's financial records*
- *Worker's relationship with others and whether it would impact on the arrangement*

Dependents under 18 years old

If the recipient of a payment under section 45A of the Act is under 18 years old the claims agent may decide to make the payment, wholly or in part, to the recipient's trustee or guardian, for their benefit.

(Refer to section 45A(14) of the Act.)

Interest payable on lump sum payments

Claimants are entitled to receive interest at the prescribed rate on an amount payable in accordance with section 45A(15) of the Act and the regulations¹. Interest is payable for the period starting from the date the claim was lodged and ending on the date of the payment.

The Australian Taxation Office (ATO) issued a Class Ruling (CR2010/8) in 2010. This is summarised as follows:

- the lump sum compensation paid under section 45A(4) of the Act is not ordinary income and is therefore not assessable for income tax.
- the amount of interest that accrues from the date the claim is lodged until the date the claim is determined is also not assessable for income tax.
- any interest that accrues from the date of the determination to the date of payment is assessable for income tax.

The full ATO ruling can be found in the ATO's legal database available online.

Where possible, the claims agent should ensure they have the dependent's full and correct EFT details prior to the determination so the lump sum and interest can be processed on the day the determination is made. This will avoid the dependent having any tax assessable income.

Note, relevant standard letters on Cúram advise the dependent of the ATO ruling.

¹ Regulation 40(2) of the *Workers Rehabilitation and Compensation Regulations 2010*.

Change of circumstances

The worker may have a spouse, domestic partner or child that are not dependent at the time of the worker's death. If however, the circumstances of the spouse, domestic partner or child change such that, had the worker survived, they would have become dependent on the worker's earnings, the claims agent may decide to make a lump sum payment to such spouse, domestic partner or child/ren.

(Refer to section 45A(16) of the Act.)

Case law

The *Victorian Accident Compensation Act 1985* has very similar provisions to section 45A and the following Victorian County Court decisions may assist in determining lump sum entitlements:

- *Harrison & Ors v New Zealand Insurance Workers Compensation (Victoria) Limited*
- *Serdzeff v Victorian WorkCover Authority [2005] VSCA 320*
- *Fairbairn and information Syndicate Pty Ltd – No. 2000/02709*

Guidelines for negotiated settlements

General

The claims agent must not initiate discussions to negotiate a claimant's entitlements pursuant to sections 44 (weekly payments), 45A (lump sums), 45B (funeral benefits) and/ or 45C (counselling services).

A claimant must establish their entitlement on the balance of probabilities. This is the usual standard of proof in compensation claims. For example, for the section 45A lump sum entitlement, a claimant must prove on the balance of probabilities that the worker's death arose from employment and that the claimant is a dependent partner, dependent child, partially dependent partner or otherwise has a claim (refer to section 45A(12)) pursuant to section 45A. The amount of the lump sum entitlement is calculated by either a formula method (refer to information provided for subsections 45A (5) to (9) inclusive in this chapter) or by what is reasonable and appropriate (refer to information provided for subsections 45(10) to (12) inclusive in this chapter).

If, on all the evidence, the claimant can prove an entitlement on the balance of probabilities, then the claimant should receive their full entitlement and not a reduced negotiated amount, or reduced component of their claim such as a reduced lump sum, on a risks basis. If the claimant has not proved their entitlement on the balance of probabilities, then the claim should be rejected by the claims agent and the claim decided by Tribunal.

Exceptions

There may be circumstances when it is appropriate to move from this general guideline. Where an adult claimant elects to pursue a negotiated settlement then, as it is their decision, a limited negotiated settlement can be considered. For example, for a variety of reasons, the claimant although able to establish an entitlement to compensation on the balance of probabilities may elect to forgo weekly payment entitlements but still seek their full lump sum as part of a negotiated settlement to finalise a matter quickly because it is

taking an emotional toll. The claims agent must base their decision to accept or reject the negotiated settlement on the evidence and the merits of the claim.

There may also be instances when entitlement is finely balanced so that it is appropriate and reasonable to negotiate a settlement of the claim(s), particularly if the claimant is at risk of failing to establish an entitlement eg, where the outcome depends on how the evidence unfolds or is applied by the Tribunal etc. This option should not be considered without supporting legal advice.

Child or claimant under a disability

These guidelines also apply to a claim by a dependent child (claimant) or an adult claimant under a disability (eg, as a consequence of a mental disability is not able to make an informed decision). The Tribunal has made a specific rule dealing with such claims generally but which should always be applied in the case of a dependent child (claimant) or an adult claimant under a disability. Sub rule 28(5) provides that:

Where the dispute concerns an infant or other person under legal disability, any settlement thereof must be approved by a Presidential Member both as to the appropriateness of the settlement and as to the disposition of the settlement monies. To this end the Presidential Member may issue such directions and adopt such procedures as are deemed appropriate, but would ordinarily require the production of an opinion on these matters from independent counsel and hearing from the litigation guardian or such other person as the Presidential Member considered necessary.

Transitional provisions – lump sum

Section 45A of the Act commenced operation on 1 July 2008. Its provisions apply to claims for lump sum compensation made on account of the death of a worker that are lodged on or after 1 July 2008, whether or not the entitlement to compensation arose before, on or after 1 July 2008.

Weekly payments

Definitions relevant to weekly payments

The following definitions are relevant for the purposes of section 44 of the Act:

dependent/dependant in relation to a deceased worker, means a relative of the worker who, at the time of the worker's death

- (a) was wholly or partially dependent for the ordinary necessities of life on the earnings of the worker;
or
- (b) would, but for the worker's injury, have been so dependent,

and includes a posthumous child of the worker.

relative in relation to a deceased worker, means a spouse, domestic partner, parent, grandparent, step-parent, child, grandchild, stepchild, brother, sister, stepbrother, stepsister, half-brother or half-sister of the worker.

orphan child means a child whose natural or adoptive parents are dead and includes a child, one of whose natural or adoptive parents is dead and who has no prospect of being supported by the surviving natural or adoptive parent.

educational institution means:

- a secondary school, or
- a trade or technical school, or
- a college of advanced education, university or other institution at which tertiary education is provided, or
- any other educational or training institution approved by WorkCover for the purpose of this definition
(*Note: WorkCover has not approved any other educational or training institution.*)

(Refer to section 3 of the Act.)

Weekly payments and dependency

It is important to note that the weekly payments referred to in this section are not the same as the weekly payments of income maintenance referred to elsewhere in the Act. This is because the weekly payments referred to here, relate solely to section 44.

In order to qualify for weekly payments under this section, the claimant must be a 'dependent spouse' or a 'dependent domestic partner' or 'dependent child' or a dependent orphaned child.

The 'earnings of the worker', in the definition of dependent above, refers to all earnings from all and any employment and not just earnings from the employment in which the worker sustained the relevant injury. To prove dependency, a person must establish that he or she was reliant on the worker for maintenance and support in respect of the ordinary necessities of life. This is a question of fact and will involve ascertaining the total family income, how it was spent, the extent of the benefit derived from the expenditure by each

person and hence establishing the support derived by each claimant, if more than one. What is considered to be an 'ordinary necessity of life' will vary and the circumstances of each case will need to be examined to determine what the normal lifestyle of the claimant is. The 'ordinary necessities of life' should be regarded as expenses incurred on things that can be considered fairly to be within the limits of ordinary living for Australian families in general. They could include:

- food and household provisions
- clothing
- furniture and equipment eg, fridge, washing machine, TV
- school education
- public utilities (water, electricity, telephone)
- medical and hospital expenses.
- Social activities/entertainment
- Motor vehicle expenses/transport.

The ordinary necessities of life should generally, but not always, be distinguished from 'luxury items' such as expensive holidays, membership fees, investment properties, pay TV.

(For further information about 'the ordinary necessities of life' see the Supreme Court judgment in the case of *Spiel*, SCGRG-93-744 Judgement No S4167.)

Weekly payments and change of circumstances

Section 44(6) provides the claims agent with the discretion to pay compensation to a spouse or domestic partner of a deceased worker who, although not dependent on the worker at time of death, suffers a change of circumstances that may, if the worker had survived, have resulted in the spouse or domestic partner becoming dependent on the worker.

It is important to note that the employer is not liable for payment of the first two weeks of weekly payments under section 44.

Weekly payments shall not be paid beyond the date on which these payments would normally have ceased, assuming that the worker had survived – this would in most cases be the retirement age as defined in section 35. (Refer to section 44(8).)

Weekly payment entitlement

Dependent spouse or dependent domestic partner

A deceased worker's dependent spouse or dependent domestic partner is entitled to weekly payments as follows:

- Totally dependent – 50% of the deceased worker's notional weekly earnings
- Partially dependent – a lesser percentage of the deceased worker's notional weekly earnings, determined by the claims agent, having regard to the extent of dependency

(Refer to section 44(1)(a) of the Act)

Dependent child

The following dependent children of a deceased worker are entitled to receive weekly payments:

- A dependent orphaned child
- A dependent child who is not an orphan

Such dependent children are entitled to the following proportion of weekly payments:

- *Totally dependent orphaned child*: 25% of the deceased worker's notional weekly earnings
- *Partially dependent orphaned child*: such lesser percentage of the deceased worker's notional weekly earnings, as determined by the claims agent, having regard to the extent of dependency
- *Totally dependent child(not an orphaned child)* : 12.5% of the deceased worker's notional weekly earnings
- *Partially dependent child (not an orphaned child)*: such lesser percentage of the deceased worker's notional weekly earnings, as determined by the claims agent, having regard to the extent of dependency

(Refer to section 44(1)(b) and (d) of the Act.)

Weekly payments are not to be made to a dependent child unless:

- the child is under 18 years of age or
- the child is a full time student at an educational institution approved by WorkCover and is under 26 years of age, or
- the child is incapable of earning a living because of a physical or mental injury.

(Refer to section 44(7) of the Act.)

For the purpose of determining dependency, any contribution to the support of a child from the worker's spouse or domestic partner, where the worker and the worker's spouse or domestic partner jointly contributed to the support of the dependent child immediately before the worker's death, shall be disregarded.

(Refer to section 44(4) of the Act.)

Where a worker dies leaving a spouse or domestic partner and dependent child, and the spouse or domestic partner subsequently dies, the child will be entitled to receive weekly payments as an orphaned child (provided the child is otherwise still eligible to receive weekly payments – refer to section 44(7)).

(Refer to section 44(5) of the Act.)

The claims agent has discretion to pay compensation to a child of a deceased worker who, although not dependent on the worker at the time of the worker's death, suffers a change in circumstances that may, had the worker survived, have resulted in the child becoming dependent on the worker.

Refer to section 44(6) of the Act.)

The claims agent has the discretion to pay the weekly payments (wholly or in part) of a child under the age of 18 years directly to a guardian or trustee for the benefit of that child.

(Refer to section 44(10) of the Act.)

A supplementary allowance may be paid to a person (not being a dependent spouse or domestic partner of the worker) who is caring for the child of a deceased worker who is under 18 years of age and is entitled to weekly payments. The supplementary allowance is to assist in the care of the child until either of the following first occurs:

- The child attains the age of 18 years, or
- The person ceases to care for the child,

whichever occurs first

Where the child is incapable of earning a living because of a physical or mental injury, the claims agent may pay a supplementary allowance during the period of incapacity even though the child has attained the age of 18 years.

(Refer to sections 44(11) and 44(12) of the Act.)

Dependent relative

A dependent relative (not being a spouse, domestic partner or child) is entitled to weekly payments as may be determined by the claims agent having regard to:

- the extent of the relative's dependency on the deceased worker
- the earning capacity of the relative
- the relative's means
- the extent of any other benefits provided under the Act in respect of the worker's death.

(Refer to section 44(1)(e) of the Act.)

Maximum amount payable to a worker's dependents

The total amount in weekly payments, in aggregate, payable to claimants under section 44 is limited to the amount of weekly payments to which the worker would have been entitled if they were totally and

permanently incapacitated. Should the amount payable to all claimants exceed this amount, the claims agent shall proportionately reduce the weekly payments so as not to exceed it.

(Refer to section 44(9) of the Act.)

Because section 44(9) limit weekly payments 'as if the worker was totally and permanently incapacitated' the section 35 and 35A first, second and third entitlement period reductions must be applied as if the worker had no current work capacity.

The total weekly payments must be limited to 100% of the worker's NWE for the first 13 weeks, 90% of the worker's NWE after 13 weeks and 80% after the next 13 weeks.

Example:

In this example the worker has the following dependents:

- *A totally dependent spouse or domestic partner entitled to 50.0%*
- *5 totally dependent children (each entitled to 12.5%) + 62.5%*

The total percentage entitlement 112.5%

In the above example, the total percentage entitlement has exceeded the 100% maximum for the first 13 weeks, so each dependent's weekly payment entitlement will need to be reduced proportionately for weekly payments in the first 13 weeks.

To reduce the above 112.5% to 100% you need to multiply each entitlement by the same factor (100/112.5) as follows:

A totally dependent spouse or domestic partner entitled to $50.0 \times (100/112.5) = 44.45\%$

5 totally dependent children @ 12.5% each $62.5 \times (100/112.5) = 55.55\%$

Total percentage entitlement $112.5 \times (100/112.5) = 100.00\%$

A similar calculation would be needed to proportionately reduce the 112.5% to the maximum 90% or 80% after applying the section 35, 35A entitlement reductions.

NOTE:

As section 44(9) only limits the total amount payable it will not affect all cases (but likely to do so where we have 1 adult and 3 or more children or 2 adults ie, whenever the total exceeds 90% in the second entitlement period, or 80% in the third entitlement period a proportionate reduction would need to be applied.

Example:

A totally dependent spouse or domestic partner entitled to 50.0% of NWE

3 totally dependent children @ 12.5% each 37.5% of NWE

Total percentage entitlement 87.5% of NWE

In this example, if the weekly payments are in the first or second entitlement period (ie, when limited to 100% or 90% of NWE) no reductions would need to be applied. However, in the third entitlement period which is limited to 80% a proportionate reduction would need to be applied.

To reduce the above 87.5% to 80% you need to multiply each entitlement by the same factor (80/87.5) as follows:

A totally dependent spouse or domestic partner entitled to $50.0 \times (80/87.5) =$ *45.71 %*

3 totally dependent children @ 12.5% each $37.5 \times (80/87.5) =$ *34.29%*

Total percentage entitlement $87.5 \times (80/87.5) =$ *80.00%*

NOTE:

If the determination to accept the dependent's claim for weekly payments is made more than 13 weeks (or more than a further additional 13 weeks) after the date of the worker's death, the claims agent should include any section 44(9) reductions (ie, 90%, 80% reductions). The claims agent should also include in the determination, notice of any proposed section 44(9) reduction if the claims agent could not otherwise give the dependent the required 21 days of a reduction.

(Refer to the decision *Malcolm Joseph Campbell v Monroe Australia Pty. Ltd. [1997] SAWCAT 36 (11 April 1997)* where Deputy President Judge McCusker says in the penultimate paragraph 'The notice provisions are clearly intended to apply where the Corporation decides to reduce the weekly payments in existence'.

Review of weekly payments

Sections 35 and 35A reductions apply to workers NWE

Sections 35 and 35A entitlement reductions apply to the worker's notional weekly earnings amount which sets the limit payable to all the worker's dependents the total amount payable to all dependents exceeds 90% (after 13 weeks) or 80% (after a further 13 weeks) of the worker's NWE, dependents payments are to be reduced proportionately. Refer to section 44(9) and above 'Maximum amount payable to a worker's dependents').

Initiation of review

Section 45(1) enables the claims agent to initiate a review of weekly payments at any time. However, they must conduct a review if requested by an employer, a dependent spouse, domestic partner, child or relative. Where the request for a review is made within six months from the completion of an earlier review, the claims agent is not required to conduct the review (see section 44(2)).

Section 45(1) provides the basis for reviewing section 44 payments and enables the claims agent to review weekly payments to:

- a dependent spouse
- a dependent domestic partner
- dependent children
- dependent relatives

that is, any person receiving a weekly payment pursuant to section 44 of the Act.

Annual review

Section 45(3) requires the claims agent to review weekly payments at least once each year.

Changes in income and earning capacity

When conducting a review, section 45(4) requires the claims agent to make any necessary adjustments to the amount of weekly payments:

- to reflect changes in the income or earning capacity of the person to whom the weekly payments are payable and any other relevant changes in the circumstances of that person, and
- to reflect changes in the average minimum award rates where the review is an annual review.

The claims agent should apply the Australian Bureau of Statistics (ABS) percentage when conducting annual reviews to reflect changes in the average minimum award rate as applied for the purpose of section 39.

The claims agent must ensure that appropriate enquiries are carried out so that changes in income, earning capacity or other relevant changes can be properly reflected in any review.

Although not defined in the Act, the following are considered to be income:

- wages
- income from investments
- interest
- annuities
- superannuation benefits

A pension of any type from Centrelink is not considered income— This was DP Judge Parsons conclusions at paragraph 38 *Nieass v Workcover/MMI (Pavement Salvage P/L) [2000] SAWCT 41 (13 April 2000)* where he states – ‘I would therefore conclude that the word "income" in the relevant section excludes sole parent pension and guardian's allowance’. Changes in the circumstances of dependents are discussed in *Nieass v WorkCover/MMI (Pavement Salvage Pty Ltd) 2000 SAWCT 41 and Giovanna Pianezzola v Workcover Corporation/MMI Workers Compensation (S.A.) Ltd. (R. and G. Pianezzola) [1997] SAWCT 63 (Full Bench)*. Section 45(4)(a) refers to changes in the earning capacity of the person to whom weekly payments are made. This relates to the earning ability of the person. The earning ability is not measured actual earnings. Where the evidence reveals that the person's earning capacity or ability to earn has changed, weekly payments should be adjusted if appropriate even though the person is not actually earning the amount assessed.

Section 45(4)(a) also refers to ‘any other relevant changes in the circumstances’ of the person to whom weekly payments are paid. For example:

- remarriage
- death of a dependent
- an inheritance or unexpected windfall
- increases in the costs of living.

Evidence of income

Section 45(5) authorises the claims agent to make a written request to a person who is receiving weekly payments to produce satisfactory evidence of:

- income
- earning capacity
- any other circumstances relevant to the payment or amount of weekly payments.

Failure to provide evidence

Section 45(6) allows the claims agent to suspend weekly payments to a person who fails to comply with a request for information as described above. The suspension continues until the person complies with the request. As no notice provisions are prescribed, the suspension may take place and written notice should be given as soon as practicable after the event, but not necessarily before it takes place. There are no

requirements in the Act or Regulations on how a suspension is implemented. However, the claims agent should provide information to the extent set out in the regulations² to properly inform the person in question of the reasons for the suspension. If a notice of dispute is lodged it is not necessary to reinstate the weekly payments pending resolution or determination of the dispute.

Notification of reduction

Section 45(7) requires the claims agent to give 21 days written notice where it intends to reduce the weekly payments to a person following a review under section 45. The notice must contain information referred to in section 45(7)(a) and 45(7)(b), which includes the information required by regulation 35 of the Regulations.

Taxation on weekly payments for minors

The Australian Tax Office (ATO) has granted a variation to the amount of withholding tax to be paid on compensation payments to eligible minors (under the age of 18) under section 44. The variation applies from 1 July 2010.

This means, WorkCover is not required to withhold tax on payments to minors (dependents under 18) where weekly payments are less than the *maximum annual tax threshold*.

The threshold amount is calculated using a formula set by the ATO.

Effective 1 July 2010 the maximum annual threshold was \$307 per week (or \$16,000 annually). This amount is subject to change in accordance with relevant taxation scales and rulings as updated from time to time (generally annually).

The variation also waives the requirement for the eligible minors to provide a tax file number declaration to WorkCover.

Note, if the dependent child has income other than weekly payments, there is potentially a tax liability when their income tax return is processed due to insufficient withholding. The claims agent will advise dependent children to seek professional taxation advice when informing them of their entitlements to weekly payments.

Note, the Commissioner of Taxation may withdraw approval for this variation at any time by notice in writing.

Commutation

A liability to make weekly payments to a worker's dependent may, in certain circumstances, be commuted to a liability to make a capital payment. The amount of the capital payment is the actuarial equivalent of the weekly payments (refer to 44(14) & 44(18)) of the Act) with a 3% discount rate applied. The discount rate is prescribed by the Regulations³.

² Regulation 35 of the *Workers Rehabilitation and Compensation Regulations 2010*

³ Regulation 40(1) of the *Workers Rehabilitation and Compensation Regulations 2010*

If the calculated capital payment exceeds the prescribed sum, the dependent's weekly payments cannot be commuted (refer to section 44(15)). The prescribed sum is the section 43 amount that applied at the date of the worker's death.

The commutation payment will discharge WorkCover's liability to make weekly payments to that dependent.

Decision to commute/not commute is not reviewable

If a dependent applies for a commutation, the claims agent's decision to commute or to not commute the dependent's weekly payments is not a reviewable decision. However, once a decision has been made to commute, the decision on the amount of the commutation is reviewable by the dependent (refer to section 44(16)).

Claims agent cannot revoke decision without consent of parties

Where the claims agent decides to commute a dependent's weekly payments and makes the dependent an offer, the claims agent cannot, without the agreement of all parties, revoke its decision (offer) to commute (refer to section 44(17)).

Commutation to a minor

A commutation cannot be made to a minor unless it has been approved by the Tribunal (refer to rule 28(5) of the Workers Compensation Tribunal Rules 2009).