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COUPER, B. J.

LONG TERM COMPENSATION

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COUPER, B.J. LONG TERM COMPENSATION

LONG TERM COMPENSATION

The purpose of the Act is to provide for the long term compensation of persons who have rendered distinguished service to the community. The Act provides for the award of a pension to persons who have rendered distinguished service to the community. The Act provides for the award of a pension to persons who have rendered distinguished service to the community.

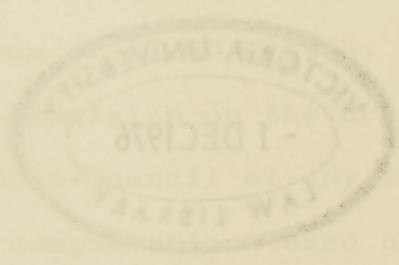
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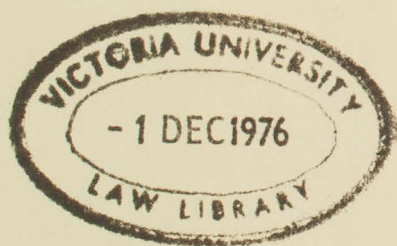
LAWS 537/538



B. J. COUPER

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LONG TERM COMPENSATION

Until the passing of the Accident Compensation Amendment Act 1975 on 18th October 1975 in which Section 114 was re-drafted all earnings related compensation was, as a general rule, based on 80% of pre-accident earnings less earnings during incapacity. The exceptions to this 80% of pre-accident earnings rule were:-

- (1) Under Section 116 the prescribed minimum of
- | | | | | | | | |
|--------------|---------|---|---|--------|---|---|---|
| | \$40.00 | (increased to \$60 by Order-in-Council 31.5.76) | | | | | |
| + for wife | \$3.00 | " | " | \$4.50 | " | " | " |
| + each child | \$1.50 | " | " | \$2.25 | " | " | " |

but not exceeding 90% of relevant earnings;

- (2) Under Section 117 where an apprentice or improver or a person under 21 years of age is entitled to have anticipated increases taken into account while he remains within this special category.

Provision was made under Section 114 (4) of the original Act for increases in rates of compensation by Order-in-Council - one such order was made in January 1975 increasing relevant earnings by 9% and a further Order made on 21 June 1976 increased relevant earnings by a further 7% but with a maximum of \$7.00 a week. Prior to the amendment Act, because there was no compulsion on the Accident Compensation Commission to seek an Order-in-Council at any specific time, a person receiving earnings related compensation based on pre-accident earnings could rapidly become disadvantaged because of inflation. The amendment Act made earnings related compensation subject to general wage orders and thus removed this disadvantage.

In addition to earnings related compensation, a person who suffers personal injury by accident in New Zealand which causes permanent loss or impairment of bodily function may receive a lump sum payment as specified in the Second Schedule of the Act (see Appendix 1). Section 120 of the Act also provides for a further payment up to \$10,000 in respect of:-

- (a) The loss suffered by the person of amenities or capacity for enjoying life, including loss from disfigurement; and
- (b) Pain and mental suffering, including nervous shock and neurosis.

Further compensation may be payable to him for pecuniary loss not related to earnings under Section 121 and medical expenses are also paid.

The Accident Compensation Commission is also charged by Section 49 (2) with:-

- (a) Ensuring the re-establishment in their previous employment where possible of incapacitated earners who have cover in respect of the personal injuries which caused their incapacity:
- (b) Ensuring the training or retraining of incapacitated earners who have such cover and who cannot be so reinstated, so that they may secure other employment suited to their maximum capacity:
- "(c) Assisting, where it considers appropriate, the development of the skills and talents of persons (other than earners) who suffer personal injury by accident in respect of which they have cover under this Act so that they may secure employment suited to their maximum capacity".

To discharge these duties the Commission is authorised to grant such financial assistance as it considers justified. In 1976 direct

expenditure on rehabilitation was \$69,556¹ and this does not include salaries of 18 Liaison Officers working full time in the rehabilitation field.

In a scheme which provides an injured person with 80% of his pre-accident earnings subject to adjustment for inflation, a lump sum, and in addition, provides extensive rehabilitation, why is compensation for permanent incapacity a problem? As the commentary on the Report of the Royal Commission observes² the great issue in compensating permanent partial disability is to decide whether the factor being compensated is loss of function, loss of wages, or loss of earning capacity. The Report of the Select Committee³ considered that because it made separate provision for non-economic losses compensation for both partial and total disablement should be based entirely on an estimate of loss of earnings. The Act as it was finally drafted and passed provided in Section 114 that the amount to be paid for permanent incapacity was 80% of permanent loss of earning capacity. Loss of earning capacity was defined in Section 113 as "a person's loss of earning capacity during any period shall be determined by deducting the amount that he is capable of earning directly from his personal exertions during the period from the amount of his relevant earnings for a like period."

Although Section 114 refers to loss of earning capacity it in fact provides only for lost earnings and all that this Section did was to provide that once an assessment had been made it could not be reduced on account of any increase in earning capacity. The assessment could be increased if the person's condition deteriorated as a result of the injury. Loss of function was provided for by the Schedule

1. 1976 Annual Report to Parliament

2. P. 91 para. 221

3. P. 38 para. 80

under Section 119 (see Appendix 1). The Select Committee contended that this method was sounder than the "broad schedule approach" of the Royal Commission because it would be quite certain that "the greater economic losses to, say, a fitter and turner who loses an arm as compared with a bank clerk who loses his non-writing arm, will be properly recognised." ⁴

It is interesting, at this stage, to recall one of the defects of the old system which the Accident Compensation Act was supposed to remove. This defect was that injured persons delayed the acceptance of rehabilitation assistance because of pending claims for damages or compensation. To meet with success rehabilitation needs to commence as soon as possible and the problem is clearly summed up by Saad Z. Nagi:-

"The process of disability assessment and determination is an extended one and frequently involves protracted hearings and litigations. Throughout this process, the claimant's primary concern is with marshalling all the evidence he can to prove that he is indeed disabled. During the time involved, his health may deteriorate further. Moreover, it is likely that by the time his condition meets the legal definition of disability, his self-definition has become more crystallized, thus limiting potential for rehabilitation. Stated differently, the disabled in such a situation is faced with conflicting demands. At the time that he needs to emphasize his limitations and inabilities in order to qualify for compensation or benefits, he is asked to consider his capacities and assets for the purposes of rehabilitation." ⁵

Section 114 of the Accident Compensation Act as it was initially

4. Select Committee Report p. 38 para. 81

5. Sociology & Rehabilitation - Editor M B Sussman p.p. 107-108

enacted required the Commission to make an assessment of

- (a) The nature and extent of his permanent incapacity, and
- (b) The amount to be paid to him thereafter

when the Commission considers that his medical condition is stabilised and all practicable steps have been taken towards his retraining and rehabilitation. To date no assessments have been made under this Section so that there are injured persons with permanent disabilities who have their earnings reduced dollar for dollar as their rehabilitation leads to increased earnings. Those persons are subject to the very conflicts referred to by Saad Z Nagi. They are better off only to the extent that the Accident Compensation Commission provides financial assistance and the opportunities for rehabilitation.

The Accident Compensation Amendment Act 1975 repealed and rewrote this Section because the existing formula was impossible to apply to an assessment for permanent incapacity. The Commission in fact recognised that it provided only for lost earnings and not lost earning capacity as was intended by the Woodhouse Report and the legislation. Two factors considered relevant, and not provided for in the original Section 114 were that at the time of making the assessment it could not be foreseen how long the person would live nor what earnings he may derive during the rest of his life. These factors are, of course, the very factors which were taken into account in calculating loss of earnings under the common law system. The re-written Section 114 reverts to the tailor-made evaluation considered in the Australian inquiry to be inappropriate because it is protracted and expensive, uncertain in its operation and productive of argument and contention, and a serious impediment to rehabilitation.⁶ Nevertheless it is more likely to produce a fairer result than the original formula and

6. Compensation & Rehabilitation in Australia Vol. 1 para. 391

individual consideration has proved to be acceptable in the Ontario scheme. It is also more likely to aid earlier rehabilitation because it takes account of more than present earning capacity.

Briefly the relevant aspects of this Section now are:-

- (1) the requirement to make an assessment only when the Commission considers that his medical condition is stabilised and all practicable steps have been taken towards his retraining and rehabilitation is retained.
- (2) An assessment in writing by the Commission of:
 - (a) The nature and extent of his permanent incapacity; and
 - (b) Whether the permanent incapacity has resulted in a permanent loss or diminution of his capacity to earn; and
 - (c) The percentage which that permanent loss or diminution (if any) bears to permanent total loss of his capacity to earn; and
 - (d) The weekly amount of his permanent loss of earning capacity (if any), which amount shall be the percentage assessed under (c) applied to his relevant earnings as determined under the various discretions given in Section 104 and Section 113 (4B)⁷; and

7. See Appendix 2.

(e) The earnings related compensation is 80% of the amount assessed under (d) or any greater amount to which he may be entitled by virtue of the prescribed minimum amounts under Section 116.

(3) In making its assessment the Commission is obliged to have regard to:-

(a) The opportunities for employment (if any) which, in the opinion of the Commission, will reasonably exist for the person.

(b) The degree to which, having regard to those opportunities, his ability to derive earnings has, in the opinion of the Commission been permanently diminished by reason of the incapacity.

(4) The Commission may in its discretion have regard (to such extent as it thinks fit) to:-

(a) the contribution of his interest in the capital assets of his business as a self-employed person to his pre-accident earnings;

(b) any dealings with his interest in those assets between the date of accident and the date when the assessment is made;

(c) the extent to which the use or acquisition of capital assets would be required in order to enable him to engage, or continue to engage in business as a self-employed person and the degree to which these assets contribute to his ability to derive earnings from that business.

(d) any other factors which the Commission considers relevant.

(5) The non-reduction on account of increased earning capacity and re-assessment because of deterioration provisions are retained as are the provisions for increases in the amount of earnings related compensation by virtue of a general wage order or Order-in-Council.

I propose now to examine Section 114 to ascertain how it may be applied and its effect on an earner who is permanently partially incapacitated.

Before Section 114 applies the injured person must have suffered an incapacity from which he does not completely recover.

"Incapacity" is not defined but Section 114 (1) (c) and (d) makes it clear that for the purposes of that Section it means something which impairs his ability to earn. This impairment is something which is medically observable and therefore the pre-requisite is determinable by medical examination and can be factually established. Permanent impairment is defined in the American Medical Association "Guides to the Evaluation of Permanent Impairment" as follows:-

"This is a purely medical condition. Permanent impairment is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved, which abnormality or loss the physician considers stable or nonprogressive at the time evaluation is made. It is always a basic consideration in the evaluation of permanent disability."

This publication also sets out the criteria for evaluation of permanent impairment as follows:-

"This is a function that physicians alone are competent to perform. Evaluation of permanent impairment defines the scope of medical responsibility and therefore represents the physician's role in the evaluation of permanent disability. Evaluation of permanent impairment is an appraisal of the nature and extent of the patient's illness or injury as it affects his personal efficiency in one or more of the activities of daily living. These activities are self-care, communication, normal living postures, ambulation, elevation, travelling and non-specialised hand activities."

Accordingly impairment is a medical question but as that Committee observed "... .. permanent impairment is in fact the sole or real criterion of permanent disability far more often than is readily acknowledged". The report goes on to state "... .. permanent impairment is a contributory factor to, but not necessarily an indication of, the extent of a patient's permanent disability." ⁸

The emphasis on impairment occurs because it is medically identifiable and measurable whereas the psychological, social, economic, and vocational components are not so readily identifiable and measurable. S Z Nagi contends that when information is introduced on non-medical factors in the assessments of permanent disabilities there is evidence that the permanent disability assessment is changed in a significant number of cases. ⁹

The second pre-requisite to qualify for an assessment under Section 114 is

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8. The Committee on Medical Rating of Physical Impairment, "Guides to the Evaluation of Permanent Impairment" Journal of the American Medical Association, September 1958, p.3.
 9. S Z Nagi "Disability: Problems in Concept & Measurement" paper presented in a post-graduate medical education program in Occupational Medicine, Ohio State University College of Medicine, June 1965.

"... .. the Commission considers that (so far as the consequences of the injury are concerned) his medical condition is stabilised and all practicable steps have been taken towards his retraining and rehabilitation."

The proposal for determining the meeting of these criteria are:-

1. The medical condition is stabilised - This requirement should be regarded as satisfied if the medical evidence shows that all remedial, medical and surgical treatment has been provided and the physical condition has become static, so that no fundamental or marked physical change is to be expected; i.e. the medical condition is non progressive.
2. All practical steps must have been taken towards retraining and rehabilitation - These requirements would be satisfied if the person's medical or physical condition is such that a rehabilitation or retraining programme would serve no purpose. In other cases it should be a matter for evaluation by the Medical Division to satisfy the Commission that maximal medical rehabilitation has been achieved. Basically rehabilitation and retraining programmes will be supervised and implemented by the Liaison Officer service provided by the Commission.

The amendment to Section 114 contains no other provisions specifying when an assessment must be made and the generality of these make it very difficult for a claimant to enforce his rights against the Commission. He could, of course, apply for an assessment under Section 114 and any refusal would be subject to rights of Review by a Hearing Officer, appeal to the Appeal Authority and thence Supreme Court and Court of Appeal. Obviously the procedure has all the disadvantages of the

common law action which the Accident Compensation Act was intended to remove.

Having arrived at that stage where it considers the criteria are met for a permanent assessment the Commission is faced with the application of the code for determining the quantum of the assessment. This code requires the Commission to make a written assessment detailing its assessment of five factors:-

(a) The Nature and Extent of His Permanent Incapacity

This assessment, assuming acceptance of the criteria for evaluation of permanent impairment as defined in the American Medical Association's Guide previously mentioned, will be made from the medical evidence. It relates exclusively to the physical condition of the injured person.

(b) Whether the permanent incapacity has resulted in a permanent loss or diminution of his capacity to earn

It could easily be assumed that this is a simple question of fact, i.e. before the accident he earned x dollars but since the accident and after all of the rehabilitation procedures have been carried out he is earning y dollars. Such a view is far too simplistic and the Commission is still faced with the same imponderables as was the common law, i.e. what would his future earnings have been apart from the accident and to what extent are these affected by the accident. Prior to the amendment of Section 114 it was quite clear that the basis for assessment was pre-accident earnings¹⁰ but the re-written section refers to loss of or diminution of capacity to earn

10. Relevant earnings less earnings after accident = loss of earning capacity. The new S.114(1)(e) retains relevant earnings as the basis for earnings related compensation only to the extent that the percentage arrived at in 114(1)(c), after taking into account the factors in (b) and (c), is applied to this figure to calculate the weekly payments under 114.

which applies only after any possible retraining and rehabilitation. It would therefore appear that the fitter and turner who loses an arm and becomes retrained in an occupation where he earns a higher income than pre-accident may still be entitled to an assessment under Section 114 if, because of the injury, he will be unlikely to achieve the earnings of a two-armed man in his new occupation. However, such an argument becomes nonsensical in the context of the labour market because his assessment would depend on the chance that the occupation in which he can find employment virtually as an under-rate worker has a higher earning ceiling than another. For example, he may continue as a fitter and earn \$50 per week, where, say, the maximum he could ever hope to earn would be \$150 per week so he has a loss of earning capacity of 66-2/3%; alternatively he might become a painter, in which occupation he still earns only \$50 per week but a two-armed man can earn \$200 per week so he then has a loss of earning capacity of 75%. It can also be argued that had he not had the accident he would not have had the advantage of rehabilitation but who is to gainsay that he would not have changed his occupation for a higher paid one had not the accident intervened.

- (c) The percentage which the permanent loss or diminution bears to permanent total loss of his capacity to earn

The provision for assessment on a percentage basis without a guiding schedule, at least on a broad basis and related to actual physical loss or impairment is unique. It also is difficult to apply when the only directions given are those in s.s. 2 of Section 114. The effect is of course to allow the Commission a wide discretion and draw up its own administrative rules. The calculation of this percentage using earnings

as a basis is one alternative and the mere absence of a schedule for S.114 does not mean that the Commission cannot draw up its own schedule of disabilities for loss of earning capacity based on a percentage of physical impairment. A schedule of disabilities does not produce a magical answer but primarily obtains uniformity of evaluation and introduces some certainty into the result. In regard to a schedule basis the observation of the Australian Inquiry Report is pertinent where it refers to the use of formulae:-

"Each depends upon the theory that the average experience of life should be the basis for deciding the impact of various incapacities in particular cases. Once the degree of severity of the physical or mental impairment has been established, that objective fact is applied in all cases for the purpose of producing broad justice promptly and when it is needed".¹¹

This comment is contrary to the statement that disability is "not purely a medical condition" the evaluation of which "is an administrative, not medical responsibility and function"¹² but, of course, it all depends on the factors taken into account in compiling the schedule and the complexity of the particular schedule. The view of the schedule approach taken in the Woodhouse Report is:-

11. Page 182, para. 392.

12. The Committee on Medical Rating of Physical Impairment "Guides to the Evaluation of Permanent Impairment". Journal of the American Medical Association. September 1958, p.3

"There are great advantages in using some broad schedule method of assessing these cases in order to achieve a fair and reasonably predetermined level of compensation. It should be accepted that while the method will not enable absolute justice to be achieved, nevertheless the speed and certainty of assessment must far outweigh the expense and effort which would be associated with attempting to make the most meticulous adjustments in every case. In any event we think it unlikely that assessments of such delicacy are possible if broad uniformity is to be realised up and down the country. Indeed, if each case had to be separately evaluated without the advantage of clear and general guide lines then many of the advantages of a scheme of comprehensive insurance would disappear."

"The problem of assessing permanent partial disabilities and the provision of an appropriate schedule is difficult. We regard it as one of the more perplexing issues in the whole field of compensation, but we are equally satisfied that the approach must be retained in any general scheme. Having said this it must be added that there is much room for improvement in both the pattern and the detail of the schedule at present in force in New Zealand, and without doubt it should be radically amended in both respects." 13

13. Page 85, para. 201-202.

and later in the same report

"It is necessary to provide assessments that are consistent and reasonably meet the need for uniformity. Nevertheless the schedule should be used as a general guide as in Ontario rather than an inflexible measure. In addition there must be some area of discretion to deal with the unusual case."¹⁴

The last sentence is an obvious reference to the administrative function in evaluation.

Another view of "Schedules" (although this relates specifically to Section 119 the comments are of interest) is given in Appendix 3. In Australia the Senate Committee, as reported in the Australian Financial Review dated 23 July 1975, stated:-

"(9) Basis of Assessment.

That the American Medical Association "guides" be used only for statistical purposes and as some evidence of the degree of a permanent impairment."

The New Zealand Select Committee blandly stated in relation to Earnings Related Compensation for permanent partial disability that:-

"The use of a schedule of the percentages of physical disability for various injuries is not necessary for this class of compensation." A footnote indicates

14. Ibid. p. 122 para. 303 (e)

that their approach (compensation for both partial and total disablement should be based entirely on an estimate of loss of earnings) was that recommended in submissions by the New Zealand Law Society and by the Railway Unions.¹⁵

In using loss of earnings as a basis for calculating permanent partial disability for the payment of earnings related compensation there are two possibilities:-

- (1) Loss based on actual post-accident and pre-accident earnings; or
- (2) Loss of earnings based on potential earnings.

The first alternative is the option which was provided for in the original Section 114 and the results of the calculation can be seen in Appendix 4 under the section headed "Total income prior to 114 Assessment". Its effect on rehabilitation are obvious in that the lower the earnings at the time of the assessment the higher will be the compensation payable under the permanent assessment.

The use of potential earnings (the second alternative) would require a determination of:-

15. Report of Select Committee p. 38.

- (i) maximum potential earnings prior to the accident; and
- (ii) maximum potential earnings after the accident.

No doubt this would in theory in some cases produce a true reflection of the percentage of disability but there is great practical difficulty in determining these figures. Both are a matter of conjecture and (ii) could well become a serious impediment to rehabilitation. Additionally long delays will be experienced before (ii) can be determined.

Some examples of using this method are given in Appendix 4 and the question arises what happens when the potential before and after the accident are the same or nearly the same but it will be many years before that potential is reached as could well be the case in example 5 & 6. It would seem that no assessment should be made under 114 if ERC is less than would be payable under S.113.

As observed in the Australian Report¹⁶ the desirable qualities of the method of assessment are simplicity and speed; sufficient certainty in operation; reasonably non-contentious; and not inhibiting rehabilitation. The provisions in the amended Act meet none of these criteria and one is thrown back to the conclusion that a schedule is essential to meet these criteria. Such a schedule would be complicated and it would need to allow for occupation as well as physical disability but it need not be as complicated as the Californian Method

to produce certainty and broad justice. As the Act now stands it is back in the common law position where one must subjectively look at the nature and extent of the permanent incapacity and its effect on earnings and come to the conclusion that the injured person had lost earnings of \$x. In fact an additional step is introduced because one must go through the exercise of calculating a percentage which will then produce the \$x already decided on.

- (d) Determine the weekly amount of permanent loss of earning capacity by applying the percentage determined under (c) to relevant earnings

Appendix 4¹⁷ shows some hypothetical calculations of permanent loss of earning capacity. Assuming pre- and post-accident potential earnings could be determined the fair result which could be produced is defeated by the requirement that the percentage be applied to relevant earnings (these are pre-accident earnings). Examples 1 & 2 clearly indicate the devastating effect of applying the percentage to relevant earnings. Two persons with identical degrees of incapacity and the same pre-accident potential receive widely differing weekly payments. It is possible to argue that the low earnings indicate an employee who has just commenced to work and he will therefore receive compensation for a longer period and the discrepancy therefore disappears over time but this is contrary to the reality of the situation. Many employees, particularly tradesmen reach maximum earnings early in life. This method is not a fair way to endeavour

17. These examples ignore the lump sum provisions of Sections 119 and 120 because the maximum amount is only \$17,000 and in the circumstances under consideration the awards would be well below this amount and therefore not significant. In any event they compensate for losses other than loss of earning capacity.

to automatically adjust the compensation for expected length of working life. In example 1. he receives \$8 per week more than his earnings before the accident yet he had a potential to achieve an additional \$140 per week had he not been injured. In example 2. he receives \$16 per week less than he earned before the accident. It must be remembered that it is assumed that these two persons have been rehabilitated and both working a 40 hour week as they did before the accident. Prior to the Amendment Act they would have received \$64 as against \$108 and \$112 as against \$144.

The emphasis throughout the Act is on pre-accident earnings and potential earnings are provided for in Section 118 where they relate to specified classes of persons who are non-earners or beginners whose relevant earnings are less than prescribed amount for that Section - currently \$75. Section 104 (5) also permits the use of anticipated post-accident earnings for the period of short term incapacity (the period commencing on the 7th day after the date of the accident and ending with the 28th day of the period). It is interesting to note that this latter provision was included in the last amendment and also in that amendment, which was regarded as a significant policy change, the Commission was empowered by 104 (6) to fix minimum amounts in certain cases. Section 117 also provides for note to be taken of potential earnings for improvers and apprentices. Notwithstanding these variations the majority of assessments are required to be made on pre-accident earnings. The Australian Bill provided for assessment of permanent partial incapacity on the basis of a national average weekly earnings. However, the Senate Committee recommended that

benefits should be based on the actual loss of individual
18
earnings.

The reasons for using pre-accident earnings are not available so far as the New Zealand legislation is concerned but it is obviously tied up with protecting the fund and compensation being paid on the amount levy has been paid on. The "inflation proofing" of earnings related compensation is regarded as a significant movement by some and a considerable drain on the fund. Nevertheless it could well be that the new provision to use anticipated earnings for short-term incapacity in Section 104 (5) is the start of a move to potential earnings.

- (e) The weekly amount to be 80% of the amount assessed under (d)

The effect of this is included in the examples mentioned above.

There are good grounds for leaving part of the loss to be borne by the injured person but the arguments do not hold good in the case of permanent partial incapacity. The Australian inquiry advanced the following:-¹⁹

- "(1) 100% compensation would mean people are better off economically when not working. They are gaining the expense of travelling to work and other incidental expenses. In hospitalised cases there is a saving in household expenses."

The person who is permanently partially incapacitated does not have these savings, in fact he may be faced with greater expenses because of his disability.

18. Australian Financial Review 23.7.75.

19. Vol. 1 p.168.9 para. 374

"(2) The difference between the normal earnings and compensation at say 85% after income tax is often no more than the savings mentioned and rarely would the difference be so important to present any great problem to the individual concerned."

In the case of the person in example 1 of Appendix 4, 100% would give him an award of \$135 p.w. as against \$108 p.w. The person in example 2 would receive \$180 p.w. as against \$144 which would then take his income over his pre-accident earnings and allow some amount for lost potential earnings.

"(3) The fact that compensation will be paid promptly and as a matter of right."

There is no reason why ERC for temporary total incapacity cannot be paid promptly but it is obvious that an assessment for permanent partial incapacity is not so speedily available; in fact none have been made in two and a half years.

Assessments under Section 114 based on 100% of relevant earnings would produce a more fair and acceptable result and in the examples in Appendix 4 still leave some potential loss to be born by the injured person. It would also encourage rehabilitation as it would give a greater incentive to have an early assessment of permanent loss of earning capacity.

The Woodhouse Report made the point that:-

"In no case should the payment for compensation fall below the amount currently available in the circumstances as a benefit under the Social Security System."²⁰

The use of pre-accident earnings, the payment on the basis of 80%, and the subsequent deduction of PAYE, has resulted in some cases still being left with a balance to be made up by a Social Welfare Benefit. This, of course, will occur only in cases of total incapacity but if the payment of 100% disability falls below the minimum criteria then any lesser percentages based on this inadequate maximum must also fail to meet the criteria.

In an Appeal by J. H. Wall before Blair J., the Accident Compensation Appeal Authority Blair J. made the observation that "in enacting this social legislation Parliament has for obvious reasons decided to make not restitution but merely contribution towards the victim's loss". This Appeal related to a refusal by the Commission to meet the full cost of tangi expenses and although the remarks may be considered "obiter" in the context of compensation for permanent partial disability they do suggest that a person might have difficulty in contesting an award which does not fully compensate him. The extract from the Judgement of Blair J. reads:-

20. Report of the Royal Commission. P.120, para. 300 (d).

"Accepting that the Act is a distinct code, and before turning to S.122, it must be said that as regards the compensation provisions of the Act (these include Sections 114, 119 and 120)²¹ the broad scheme is to cushion the financial losses which accrue to the victims of accidents. The Act gives a much wider coverage than obtained in earlier statutes. However, it is important to note that the Act does not purport to give complete financial recompense to those who have suffered accidents.

I deliberately used the words "cushion the financial loss" above to indicate that the Act does not contemplate making full restitution to victims of accidents. Under the common law such full restitution could be obtained if the claimant could establish that his loss from the accident was the result of another's negligence. However, only a limited number of people could benefit from this and, in its wisdom, Parliament has abolished the right to claim in this way while at the same time substituting a wide and comprehensive cover for all victims of accidents which provides a substantial, but not complete, recompense for their losses.

The above oversimplifies the position, but I simply want to stress that in enacting this social legislation Parliament has for obvious reasons decided to make not restitution but merely contribution towards the victim's loss. The point I am making is that the Act does not

21. These words in brackets are mine and are not included in the judgement.

purport to be fully compensatory but does assist accident victims financially and in other ways. I think that, following the words of Lord Herschell, any interpretation²² of the Act must have regard to this factor."

The assessment in the case of self-employed persons poses special difficulties and this is the reason for S.S. (2) (6) in Section 114. There are problems associated both with determining relevant earnings and loss of earning capacity (the latter problem would be removed if a schedule based on physical impairment were used as a basis). For instance, a farmer may suffer severe injury, the nature of which is such as to render pointless any attempt at retraining. He receives such rehabilitation assistance as is practicable and after (say) 2 or 3 years, his medical condition becomes stabilised. At that point (when a permanent assessment must be made), the injured person may be able to do little more than "potter" about the farm. Ever since the accident, the farm has been conducted by a competent farm manager, and, notwithstanding the added expense involved in the manager's remuneration, the injured person's assessable income from the business since the accident has been at a level not below the rate of his relevant earnings. What should be the amount that he is estimated to be capable of earning at the time when the permanent assessment is made? It may be said that, as he has been compensated for his physical impairment, loss of amenities etc., under s.s. 119 and 120, and as s.114 is intended to compensate only for his economic loss, no compensation under s.114 should be awarded in such a case. But the maintenance

22. As reported in ACC report January 1976 pages 13 & 14.

of the farming income since the accident may have been due solely to upward movements in prices for primary produce (which may not continue), or to delayed results of a programme for improved production carried out before the accident (the effects of which may gradually disappear by reason of lack of future maintenance due to the person's incapacity) or to other reasons. If the permanent assessment is based on a comparison of "earnings", it may provide quite inadequate compensation in the long term, and, if based on the degree of physical incapacity, it may result in compensation being paid, where, even in the long term, there is no loss or little substantial loss of business income by comparison with relevant earnings. Instead of the business being still carried on at the time for permanent assessment, the farm may have been sold or leased. The income from the purchase price or the rents would not be "earnings as a self-employed person"²³ and the injured person, of totally incapacitated from doing any remunerative work, would (if compensated on loss of "earnings as a self-employed person") be entitled to 80% of his relevant earnings on a permanent assessment and at the same time would receive the income from the proceeds of sale or the rents from the lease. It could possibly be suggested that he is capable of deriving earnings as a self-employed farmer on the same basis as he would have been if he had not sold or leased the farm, but this would involve so many imponderables as to appear to be virtually

23. "Earnings as a self-employed person" are defined in Section 103 (3). This is reproduced in Appendix 5. The essential point is that not all income is earnings for the purposes of the Accident Compensation Act and cannot therefore be taken into account for determining either pre or post accident earnings. A change in the form of income after the accident could therefore be advantageous under the old Section 114.

impossible of practical application. At the root of these problems there lies the fact that, in the case of farmers and other self-employed persons whose business depends on the holding of substantial capital assets, their "earnings" are derived partly from their work and partly from the capital assets of the business. If the business is disposed of, the proceeds of the disposition of the capital assets (unless invested in another business) assume a different form for the purposes of the Act, in the sense that the income derived therefrom is no longer "earnings". Section 114 (2) (b) accordingly gives the Commission wide discretions to make what it considers to be a fair assessment for permanent partial incapacity. As can be imagined this has the potential for considerable disagreement and protracted argument associated with the common law but complicated by the statutory definition of earnings.

The amended Section 114 still contains the provision that there shall be no reduction of a permanent assessment by reason of any increase in earning capacity. Probably this clause is the main inhibiting factor, as far as the Commission is concerned, in making a permanent assessment. Such an inhibition is not altogether unjustified and it was one of the Woodhouse criticisms of the common law that an award was made on speculation and not subject to later adjustment. This criticism probably had in mind inadequacy rather than generosity but the argument must surely be valid for both aspects. As the Act stands an increase can be made on account of deterioration of physical condition. The reasons for no reduction advanced in the Woodhouse Report cogently sum up the arguments and are quoted below in full.

"401. But it would be irrational to permit the new system to adopt principles or methods which would permit a recurrence of the old problems. For example there is a superficial attraction in arguments that compensation should be reduced once it were found that a man had managed to return to work with less than the expected income loss.

402. These are short-sighted arguments. If it was felt that energetic personal effort would result in a reduction in assessed compensation there would be a temptation to prolong the period off work or to work at less than maximum capacity. Such a situation would be bad for production, bad for the man and it would gain nothing for the compensation fund. The country cannot afford to throw away the benefits of personal initiative for the sake of delicate readjustments of compensation.

403. The matter was discussed by Somers and Somers in their work. They said -

"If workmen's compensation is to exploit its opportunity to be something more than an income maintenance or indemnity program, however, and is to accept in practice rehabilitation as a primary objective, a strong case can be made for compensating anatomical loss as such. To stop payments to the amputee who succeeds in rehabilitating himself to his former, or

even higher, earning capacity while continuing payments to one who fails to do so would increase the existing conflicts between rehabilitation and compensation. The results of rehabilitation are never entirely certain, and fear of loss of compensation rights, added to doubts about the probable success of the rehabilitation process, could prove a formidable deterrent to a worker's receptivity to rehabilitation treatment." ¹⁵²

404. It is for reasons of this sort that we recommend ¹⁵³ that upon a review of permanent compensation there should be no downward reassessment. Adoption of this principle may enable a few injured persons to secure an over-generous level of compensation. But efficient medical administration can keep the number to a minimum and in any event it is something which is worth accepting in the general public interest and for the purpose of gaining in most cases complete co-operation for the purpose of rehabilitation."

It is submitted that some provision is required for future review and that perhaps the initial assessment should be subject to review after, say, five years. In considering the possibility it must be borne in mind that when the Woodhouse recommendation was made the permanent assessment included some content for the actual physical loss whereas this is now provided for separately under Section 119 and the other non-economic consequences under Section 120. A review has been found

¹⁵² Op. cit., p.278.

¹⁵³ See also paras. 127, 293 (e), 305 (d)

acceptable in the Ontario scheme. Another point to be also borne in mind is that a vigorous rehabilitation scheme would deter any holding back, particularly if the permanent non-reviewable assessment was dependant on adequate participation by the injured person. Certainly, after a five year trial, both parties are better able to judge whether or not the assessment is a fair one.

There still remains a further category of persons to consider and that is persons from overseas who were working in New Zealand and have suffered a permanent partial disability. Although their assessment will be based on New Zealand standards it is at least worth mentioning in passing that on return to their homeland the adequacy of their compensation will be subject to the vagaries of the international exchange rate. The obvious answer is to commute the lump sum and this also has an administrative advantage. The Ontario scheme provides for payments of pension to be made through diplomatic channels.²⁴ The difficulty arises where the worker leaves New Zealand before a permanent assessment has been made as there is then no possibility of rehabilitation under the Commission's supervision. Section 132 permits the termination of compensation on refusal to submit to medical examination or treatment and S.132 (4) provides for examination overseas. The proviso to S.113 (2) also enables the Commission to terminate compensation if he is not working to the extent that he could if the only factor affecting his ability to work was his incapacity due to the injury. Consequently, if an injured worker intends returning to his homeland before a S.114 assessment can be made he runs

24. Handbook on Permanent Disability Evaluation - August 1970 revision, p.12.

the risk of having his earnings related compensation terminated. It must be borne in mind that he may not be free to make the decision himself as in the case of a person whose work permit has expired.

Having explored the provisions of the Accident Compensation Act 1972 and its subsequent amendments as at 1 January 1976 it is interesting to see how the problem of compensation for permanent partial incapacity was handled in New Zealand before the 1st April 1974 and the approach adopted in Ontario and recommended in Australia.

The Common Law Approach

A successful common law action required the establishment of negligence or some breach of duty owed to the plaintiff. Damages were awarded under the two heads of "special damages" and "general damages". The former were reimbursement of expenses actually incurred and the latter took account of loss of future earnings, pain and suffering and loss of enjoyment of life.

The amount to be awarded for general damages was assessed by the jury after taking into account the plaintiff's work history and his future prospects. The effect of the plaintiff's injury on his ability to maintain this standard was then evaluated in the light of his ability to continue his present occupation or in another occupation if there was a suitable alternative occupation. The jury then decided, on the basis of their evaluation of these factors, the amount of his future earning capacity.

The decision by the jury was made in an adversary situation and the weighting given to each particular factor depended largely on the persuasiveness of the opposing lawyers.

These decisions took no account of inflation and of course the award was a lump sum not subject to future amendment once the available rights of appeal to higher courts had been exhausted. The devastating effect of inflation, if any example is needed, can be seen by reading the letter which appears as Appendix 6 of the Australian Report.

The non-availability of future amendment also presents an obvious impairment to rehabilitation as the plaintiff in most cases will not wish to play-down his disability. Rehabilitation had no place in the common law other than as part of the lump sum award. No service or advice was provided and no encouragement given for the plaintiff to seek help on his own initiative.

The Workers' Compensation Act

The Workers' Compensation Act 1956 provided that a person by virtue of his status as an employee had a right to compensation for personal injury by accident arising out of and in the course of his employment.

Permanent partial disability was provided for by the schedule below:

Nature of Injury	Ratio of Compensation to Maximum Comp- pensation for Total Incapacity
	Per Cent
Loss of both eyes) 100
Loss of both hands	

Loss of both feet)	
Loss of a hand and a foot		
Total and incurable loss of mental powers involving inability to work)	100
Total and incurable paralysis of the limbs or of mental powers		
Total loss of an arm or of the greater part of an arm		80
Total loss of a hand, or of five fingers of a hand, or of the lower part of an arm		70
Total loss of a leg		75
Total loss of a foot, or of the lower part of a leg		60
Total loss of the sight of one eye, together with serious diminution of the sight of the other eye		75
Total deafness		50
Total loss of the sight of one eye		50
Total loss of the lens of an eye		30
Total loss of a thumb		30
Total loss of a forefinger		20
Total loss of a joint of a thumb		15
Total loss of a little finger		12
Total loss of a middle finger or of a ring finger		8
Total loss of a big toe		10
Total loss of a toe other than a big toe, or of a joint of a finger		5
Total deafness of one ear		10
Total loss of two joints of a finger -		
If a forefinger		12½
If a little finger		8½
If a middle finger or a ring finger		6½

For the purposes of this Schedule the expression "loss of" includes "permanent loss of the use of".

Disabilities not listed are related to the schedule on the basis of a medical report - or, being an adversary situation, medical reports. The percentage specified is applied to the aggregate of the maximum rate of weekly compensation which is payable over a six year period, i.e. the maximum weekly rate multiplied by 313. As at 4.5.73 this maximum was \$42 per week which gives a maximum of \$13,146 for 100% incapacity.

A worker could not obtain both common law damages and a Workers' Compensation Award.

The Workers' Compensation Act made no provision for rehabilitation.

The Australian Approach ²⁵

The Australian approach compensates under two heads:-

- (a) Disfigurement (under Clause 51) up to \$10,000;
- (b) Incapacity, being impairment of ability to work or of well-being (see Part V Division 3 and definition of "incapacity" in clause 4 (1)).

Compensation is payable only while the incapacity continues.

But the injured person may apply to the Secretary for a determination that the incapacity (whether total or partial) is permanent, and, if the Secretary determines that it is, the benefit is not to be cancelled on the ground that the incapacity has come to an end or reduced by reason only that the percentage of incapacity has decreased (Clause 104 (2)).

Under the N.Z. Legislation, everyone who has cover under the Act and who suffers the requisite impairment or loss of

25. This synopsis is based on the National Compensation Bill 1974 and there is a variation between this Bill and that proposed in Volume 1 of the Report of the National Committee of Inquiry.

amenities etc., qualifies for the lump sum payments irrespective of age. Under the Australian scheme, a benefit in respect of personal injury is not payable until a person has attained the qualifying age (as defined in clause 4) or in respect of any period before he attains that age (clause 18 (1)); and is not payable to a person who has attained or after he attains 65 years, unless the incapacity commenced after he attained 61 years, in which case it is not payable for a longer period than 4 years after the incapacity commenced (clause 18(2)). In this respect the N.Z. scheme is more generous to children and old persons, who qualify for lump sum payments under s.s. 119 and 120 irrespective of age.

Under the Australian scheme periodical benefits and maximum and minimum amounts for weekly income are increased from time to time in accordance with Clauses 94 and 95.

The Secretary is required to determine whether the incapacity is partial incapacity that is or is likely to be permanent. If he so determines, (either at the outset, or, pursuant to clause 39 (4) or 53 (2), subsequently) the percentage of incapacity is to be medically certified on the basis of the "Guides to the Evaluation of Permanent Impairment" prepared by the American Medical Association (Clause 35). Compensation is assessed (subject to clauses 35 (2), 35 (3) and 37 (2)) for the overall loss (apart from disfigurement) at 85% of the loss as ascertained by reference to the medically certified degree of incapacity and the last published median weekly earnings, but

not initially in excess of 85% of the person's "weekly income"²⁶
(Clause 33).

If the person has not derived earnings during the last 12 months the assessment is based on 60%.

If the percentage of incapacity is later medically certified as having increased, a fresh determination may be made (Clause 34).

If the Secretary considers the rate of benefit is less than it should be he may increase it (Clause 37 (1)). If the net income that the person is considered capable of earning, plus the rate of the benefit, is less than 85% of his "weekly income" the Secretary may determine the rate at 85% of the person's "weekly income" (Clause 37 (3) and (4)). The rate for permanent partial incapacity of any person is, however, not to be increased by the Secretary in excess of the rate that would be payable for total incapacity (Clause 37 (6)).

The unique feature of the Australian Act is the use of the last published median earnings as the basis of calculation which has the effect of providing higher compensation for the lower paid worker and lower for the higher. The former are usually engaged in manual occupations and therefore suffer a greater loss from physical impairment than those engaged in clerical or professional occupations. However, the provision that compensation shall not

26. "Weekly income" in relation to the Australian scheme is the weekly income as determined under the appropriate provisions of Clauses 26 - 31. In broad terms the expression corresponds to "relevant earnings" under the N.Z. Act, but under the Australian scheme every person who has attained "the qualifying age" has attributed to him a minimum weekly income of \$50; and an upper limit of \$500 is imposed (clause 31). The "qualifying age" means the age of - (a) of 18 years; (b) at which he first engages in full time employment (c) at which he first engages in employment at a remuneration of not less than \$50 per week; or (d) at which he first derives earnings as a self-employed person at a rate of not less than \$50 per week, whichever of those ages he first attains.

exceed 85% of the weekly income of the person can have a compressing effect on the higher percentage disabilities for the lower paid worker. It may mean that because of this maximum a person with a 70% disability gets paid the same as a person with an 80% disability because the latter's maximum earnings are below the median earnings.

The Ontario Approach

Section 42 of the Ontario Workmen's Compensation Act provides that:-

"(1) Where permanent disability results from the injury, the impairment of earning capacity of the workman shall be estimated from the nature and degree of the injury, and the compensation shall be a weekly or other periodic payment"

The Act provides for compensation on the basis of 75% of average weekly earnings during the previous 12 months.

The Workmen's Compensation Board is empowered under Section 42 (2) to compile a rating schedule of percentages of impairment of earning capacity for specified injuries or mutilations and it has in fact done this. According to the Handbook ²⁷ the Schedule applies exactly in only 20% of cases but it is used as a guide in over 80% of cases.

Awards may be permanent or provisional, schedule and non-schedule, lump sum or pension and in some circumstances supplementary awards are made.

27. Handbook on Permanent Disability Evaluation, Workmen's Compensation Board, Ontario 15.8.70. p.11.

If the worker's condition is stabilised an award is made on a lifetime basis as a pension and in some instances as a lump sum. If it appears that, although the impairment is permanent, the worker's condition will improve over a period of years a provisional award only may be made. A provisional award is usually in pension form for a period up to five years at which time it is reviewed.

Where the disability fits the schedule an award is made of the specified percentage of 75% of the average weekly earnings (up to a limit of \$7,000) during the previous 12 months. Non-schedule awards are based on a medical judgement of the degree of impairment.

Lump sum awards are merely a commutation of the pension and are granted when the impairment does not exceed 10% or the Board considers commutation is in the best interests of the worker. Requests for commutation are evaluated by a Vocational Rehabilitation Officer and have been granted to enable the purchase of a home or business where this may give the worker a reasonable chance of improving his economic circumstances. Occasionally commutations are granted to pay off debts or to enable the worker to purchase a vehicle which will assist him in his employment.

While all awards are subject to review if the degree of impairment changes, pensions for permanent impairment are not reduced by later earnings or income.

Special supplements, subject to modification as circumstances change, may be given where the injury has had a severely adverse socio-economic effect beyond that which it would have on the

average workmen.²⁸

Permanent pensions are payable during the Worker's lifetime but the special supplement (because it relates to earning capacity) is payable only during his working life and subject to need and co-operation with the Rehabilitation Officers.

Assessments are made by rating teams which include a medical officer of the Board and it must be remembered that the Ontario Workmen's Compensation Board has extensive medical and rehabilitation facilities at its disposal and under its exclusive control. With these resources it is in an extremely advantageous position in evaluating permanent partial incapacity.

The Ontario scheme meets full medical and rehabilitation costs and provides for expenses in much the same way as does the New Zealand and the proposed Australian scheme.

Conclusion

All of the schemes face considerable difficulty in assessing compensation for permanent partial incapacity because of:-

- (1) The difficulty in determining when the person is fully rehabilitated.
- (2) The difficulties in measuring the loss of earning capacity.

28. Section 42 (4) "where the Board deems it more equitable, the Board may award compensation for permanent disability having regard to the difference between the average weekly earnings of the workman before the accident and the average amount that he is earning or is able to earn in some suitable occupation after the accident".

- (3) If compensation is to be "real compensation" the calculations must include some component for potential loss.

The Ontario scheme because of its medical and rehabilitation network is in the best position to deal with the first problem and it also has the ability to make provisional awards and to augment those with supplementary payments. This capability also helps to solve the second problem of measuring loss of earning capacity because of the possibility of subsequent review. The permanent pension, based on a schedule, produces certainty and security for the injured person and the supplementary award provides the bridge between partial and total rehabilitation.

The use of the American Medical Association "Guides" as suggested in the Australian Inquiry Report provides certainty but tied to either median or pre-accident earnings it takes no account of potential loss. A schedule seems to be inevitable both in the interests of uniformity, certainty and administrative efficiency.

Strangely enough, the only system which purported to consider potential loss was the Common Law²⁹ (although Fleming appears to disagree with this view³⁰) which has been abolished. Possibly, the amendment to S.114 of the Accident Compensation Act will cause a move in this direction as the method of assessing the percentage

29. Winfield & Jolowicz on Tort - 9th edition, p.582 - "The court must estimate the period of future disability and the plaintiff's future rate of earning"

30. The Law of Torts - John G. Fleming, 4th edition, p.204" ... the now favoured view is that the loss for which the plaintiff is entitled to compensation is not a future loss of earnings but the present impairment of a capacity to earn".

of loss of earning capacity is unspecified and gives a wide discretion. This coupled with an extensive and dynamic rehabilitation system could achieve the principles envisaged in the Woodhouse Report.

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COUPER, B. J.

LONG TERM COMPENSATION

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COUPER, B. J.

LONG TERM COMPENSATION

function of hand.

COMPENSATION FOR PERMANENT LOSS OR IMPAIRMENT OF BODILY FUNCTION

Nature of Permanent Loss or Impairment of Bodily Function	Percentage of \$5,000 Payable
<i>Loss of Part of Body</i>	
1. Total loss of an arm or the greater part of an arm	80
2. Total loss of a hand or of the lower part of an arm	70
3. Total loss of a thumb	28
Total loss of one segment of a thumb	14
Loss of the pulp of a thumb	8
4. Total loss of an index finger	14
Total loss of two segments of an index finger	12
Total loss of one segment of an index finger	8
Loss of the pulp of an index finger	4
5. Total loss of the middle finger	12
Total loss of two segments of a middle finger	10
Total loss of one segment of a middle finger	8
Loss of the pulp of a middle finger	3
6. Total loss of a ring or small finger	8
Total loss of two segments of a ring or small finger	6
Total loss of one segment of a ring or small finger	4
Loss of the pulp of a ring or small finger	2
7. Total loss of all fingers, thumb intact (Treat as 90 percent of loss of a hand)	63
8. Total loss of a leg	75
Total loss of a foot or of the lower part of a leg	60
9. Total loss of a great toe	10
Loss of one segment of a great toe	5
10. Total loss of a lesser toe	2½
11. Total loss of both legs by above-knee or below-knee amputation	100
12. Loss of both arms, above-elbow or below-elbow amputation	100

NOTE: For the purposes of section 119 of this Act, when applying the foregoing provisions of this Schedule for the purpose of assessing permanent loss or impairment of bodily function affecting the hand and its digits, if multiple digits are involved assessment shall be made both by summing the individual losses specified in the foregoing provisions of this Schedule, and on the basis specified in subsection (3) of that section in relation to the permanent loss or impairment of bodily function affecting the hand or lower arm as a whole as a gripping organ.

In relation to the last-mentioned method of assessment, complete loss of finger/palm grip in all its components shall be treated as constituting 60% loss of function of the hand, and complete loss of opposition or pincers grip shall be treated as constituting 40% loss of function of the hand, these figures to be apportioned into four equal parts for the individual digits.

Example: Finger/Palm Grip—

Index	Middle	Ring	Little finger
15%	15%	15%	15% loss of function of hand, equalling altogether 60% of loss of function of hand.

Nature of Permanent Loss or Impairment of Bodily Function	Percentage of \$5,000 Payable
<i>Opposition or Pincers Grip—</i>	
Index	10%
Middle	10%
Ring	10%
Little finger	10%
10% loss of function of hand equalling altogether 40% of loss of function of hand.	

The higher figure arrived at after assessment by both these methods shall be the figure awarded.

If in the case of injury to a limb or part of a limb it is considered desirable in order to obtain the best functional result that the limb or portion of the limb be amputated at a more proximal level than the part injured, the disability shall be assessed as if the injury itself had necessitated the amputation at the more proximal level.

Assessment of Arthrodeses

The following figures are to be used for a sound arthrodesis in the position of optimum function, partial joint stiffnesses to be proportionally assessed under section 119 (3) of this Act.

Shoulder	—	Treat as 35% loss of function of the arm	28
Elbow	—	Treat as 40% loss of function of the arm	32
Wrist	—	Treat as 30% loss of function of the lower arm	21
Hip	—	Treat as 50% loss of function of the leg	37.5
Knee	—	Treat as 40% loss of function of the leg	50
Ankle	—	Treat as 35% loss of function of the lower leg	21
Triple (foot arthrodesis)	—	Treat as 30% loss of function of the lower leg	18

Assessment of Shortening

0—½ in. inclusive	—	Treat as 5% loss of function of the leg	3.75
½—1 in.	—	Treat as 10% loss of function of the leg	7.5
1—1½ in.	—	Treat as 15% loss of function of the leg	11.25
1½—2 in.	—	Treat as 20% loss of function of the leg	15

Patellectomy

Where there is full extension of the knee and full flexion in the knee with minimal quadriceps thigh muscle wasting, treat as 15% loss of function of the leg, this figure to be varied in less successful results related to residual joint stiffness

Excision of Head of Radius

Where full elbow extension and flexion movement is regained with full forearm rotation movement in either direction, treat as 15% loss of function of the arm, this basic figure to be varied in less successful cases related to residual joint stiffness

APPENDIX 1 (Page 1)

SECOND SCHEDULE—continued

Nature of Permanent Loss or Impairment of Bodily Function	Percentage of \$7,000 Payable
Excision of Lower End of Ulna Forearm Bone Where full forearm rotation movements are preserved and the wrist is normal, treat as 10% loss of function of the lower arm, this figure to be varied in less successful cases related to residual joint stiffness	7
Ligamentous Injuries of the Knee Joint with Residual Instability and Including Quadriceps Insufficiency with Comparable Instability Moderate laxity	Treat as 15% loss of function of the leg 11.25
Multiple Disabilities If the disability affects more than one limb the assessment shall be made by summing the figures, but if the disabilities involve the one limb the method of progressive extraction of losses, i.e., regarding the limb as a whole shall be used.	
[Spinal Disability and Other Disabilities]	
1. Cervical Spine	
(a) Persistent muscle spasm, rigidity, and pain substantiated by loss of anterior curve revealed by X-ray, although no demonstrable structural pathology, moderate referred shoulder/arm pain	10
(b) In cases similar to those mentioned in the immediately preceding paragraph, but with gross degenerative changes consisting of narrowing of intervertebral spaces and osteoarthritic lipping of vertebral margins	20
2. Thoracic Spine	
(a) Spinal strain related to trauma with persistent discomfort, moderate degenerative changes with osteoarthritic lipping, no X-ray evidence of structural trauma	10
(b) Fracture:	
(i) Compression 25% involving one or two vertebral bodies, no fragmentation, healed, no neurologic manifestations	10
(ii) Compression 50% with involvement posterior elements, healed, no neurologic manifestations, persistent pain	20
3. Lumbar Spine	
(a) Mild to moderate persistent muscle spasm with pain, with moderate degenerative lipping revealed by X-ray	10
(b) Fracture:	
(i) Vertebral compression 25%, one or two adjacent vertebral bodies, little or no fragmentation, no definite pattern or neurologic change	15

SECOND SCHEDULE—continued

Nature of Permanent Loss or Impairment of Bodily Function	Percentage of \$7,000 Payable
(ii) Vertebral compression 50%, one or two adjacent vertebral bodies, little or no fragmentation, no definite pattern or neurologic changes	20
(iii) In cases similar to those mentioned in the immediately preceding subparagraph, but with successful fusion, mild pain	25
4. Neurogenic Low Back Pain—Disc Injury	
(a) Surgical excision of disc, no fusion, good result, no persistent sciatic pain	10
(b) Surgical excision of disc, no fusion, moderate persistent pain and stiffness aggravated by heavy lifting with necessary modification of activities	20
(c) Surgical excision of disc with fusion, activities of lifting moderately modified	15
(d) Surgical excision of disc with fusion, persistent pain and stiffness aggravated by heavy lifting necessitating modification of all activities requiring heavy lifting	25
5. Tetraplegia and Paraplegia	100
6. Blindness	
(a) Total blindness	100
(b) Total loss of vision in one eye (normal vision in the other eye)	30
7. Deafness	
(a) Total deafness	75
(b) Total deafness in one ear (normal hearing in other ear)	17
NOTE: Where there are subjective symptoms of pain without demonstrable clinical findings of abnormality or demonstrable structural pathology, no assessment should be made under section 119 of this Act.	
[8. Total Loss of Natural Permanent Teeth	
1. Anterior Teeth	
Loss of 1, 2, or 3 teeth	4
Loss of 4, 5, or 6 teeth	5
Loss of 7 to 12 teeth	6
2. Posterior Teeth	
Loss of 1 tooth	1
Loss of 2 to 5 teeth	2
Loss of 6 to 16 teeth	4

In this Schedule the words "Spinal Disability and other Disabilities" were substituted for the words "Spinal Disability" by s. 60 (1) of the Accident Compensation Amendment Act (No. 2) 1973, and item 8 in square brackets was added by s. 60 (2) of that Act. See s. 1 (3) of that Act.

APPENDIX X 1 (Page 2)

1104. Relevant earnings—(1) Subject to sections 117 and 118 of this Act and to the provisions of this section, for the purpose of determining the amount of any earnings related compensation payable during or after the period of short term incapacity (as defined in section 2 (1) of this Act) to an earner who suffers personal injury by accident in respect of which he has cover under this Act, or payable at any time to any dependant of such an earner, the amount of his relevant earnings shall be such amount as, in the opinion of the Commission, would, at the time of the accident, fairly and reasonably represent his normal average weekly earnings, having regard to such information as the Commission may obtain regarding his earnings before the time of the accident and his earnings at the time of the accident, and to his work history and the period of his residence in New Zealand before the time of the accident.

(2) If the earner was an employee at the date of the accident and was not then also a self-employed person and had not been a self-employed person at any time during the period of 12 months immediately preceding the date of the accident, in fixing his relevant earnings under subsection (1) of this section,—

- (a) The Commission may have regard, in the first place, to the amount of his weekly earnings as an employee at or about the time of the accident, or (if the Commission in its discretion so decides) the amount of his earnings as an employee at or about the time of the accident when converted in such manner as the Commission considers appropriate to a weekly basis; but
- (b) If, in the opinion of the Commission, the amount ascertained under paragraph (a) of this subsection would not, at the time of the accident, properly represent his normal average weekly earnings, the Commission may then have regard to the amount of his average weekly earnings during the period of 28 days immediately preceding the date of the accident; but
- (c) If, in the opinion of the Commission, the amount ascertained under paragraph (b) of this subsection also would not, at the time of the accident, properly represent his normal average weekly earnings, the Commission may then have regard to his average weekly earnings during the period

of 12 months immediately preceding the date of the accident or such part or parts of that period as the Commission may select as appropriate for the purpose:

Provided that nothing in this subsection shall preclude the Commission from having regard also to such other factors as it may consider relevant for the purpose of subsection (1) of this section.

(3) If the earner was a self-employed person at the date of the accident (whether or not he was also an employee at the date of the accident) or if the earner had been a self-employed person at any time during the period of 12 months immediately preceding the date of the accident, the Commission, in fixing his relevant earnings under subsection (1) of this section, may have regard to all or any of the following factors, as it thinks appropriate for the purpose:

- (a) His earnings as a self-employed person during his financial year last ended before the day immediately following the date of the accident, or, if the amount of those earnings is not for the time being readily determinable, such sum as may be estimated by the Commission as fairly and reasonably representing those earnings:
- (b) His earnings as an employee (if any) during that financial year and his earnings as a self-employed person during that financial year, or, if the amount of those earnings is not for the time being readily determinable, such sum as may be estimated by the Commission as fairly and reasonably representing those earnings:
- (c) The average amount of his earnings as a self-employed person during any of the periods of 2 or 3 or 4 consecutive financial years last ended before the day immediately following the date of the accident, or, if the Commission, in the exercise of its discretion, so decides, during any one or more of those financial years which it may select as appropriate for the purpose:
- (d) His earnings as an employee (if any) at or about the time of the accident, or during the period of 12 months immediately preceding the date of the accident, or during such part or parts of that period as the Commission may select as appropriate for the purpose:

APPENDIX 2 (page 1)

(e) His earnings as a self-employed person (as determined or estimated by the Commission) during the period of 12 months immediately preceding the date of the accident, or during such part or parts of that period as the Commission may select as appropriate for the purpose, if sufficient information, including accounts, is furnished to the Commission to enable it to determine or estimate the amount of his earnings as a self-employed person during that period or the said part or parts of that period, as the case may be:

Provided that nothing in this subsection shall preclude the Commission from having regard also to such other factors as it may consider relevant for the purpose of subsection (1) of this section.

(4) Where for any period an earner has derived earnings as an employee from commission or has otherwise derived earnings as an earner who is deemed to be an employee under any of the provisions of subsections (2), (3), (4), and (5) of section 2 of this Act, if those earnings are not readily determinable, the Commission may, for the purposes of the foregoing provisions of this section, assess his earnings as an employee during that period at such amount as it thinks fit, having regard to such information as it may obtain on his earnings before and at the date of the accident, and to such other factors as it may consider relevant for the purpose, and to the provisions of subsection (2) of section 103 of this Act.

(5) If the relevant earnings of an employee as determined in accordance with the foregoing provisions of this section would be significantly more or significantly less than the average weekly amount of the earnings as an employee that he would, in the opinion of the Commission, have derived during the period of short term incapacity if he had not suffered the injury, then, notwithstanding anything to the contrary in the foregoing provisions of this section, the Commission may, if it thinks fit, assess his relevant earnings at that amount. Any assessment made under this subsection shall be for the purpose of determining the amount of any earnings related compensation payable in respect of the period of short term incapacity, and shall be of no effect for the purpose of determining the amount of any earnings related compensation payable in respect of any period after the period of short term incapacity.

(6) Notwithstanding anything to the contrary in the foregoing provisions of this section, the Commission may, from time to time, insofar as it thinks fit so to do,—

(a) Fix a minimum amount of relevant earnings for any employee who, having engaged to work under a contract of service, has not commenced to work under that contract:

(b) Having regard to the liability imposed on self-employed persons for payment of levy under Part III of this Act, fix a minimum amount of relevant earnings for self-employed persons:

(c) Having regard to that liability, and to such other considerations as the Commission may think relevant, fix a minimum amount of relevant earnings for any class or group of self-employed persons, whether those persons are classified or described by reference to the nature of their employment, or to the hours in which they have normally engaged in that employment before the accident, or to the period of time for which they have been engaged in that employment, or to the amount or rate of levy imposed on them, or by reference to any combination of those factors, or are classified or described in any other manner whatsoever that the Commission thinks fit;

and may from time to time vary, amend, or revoke, in whole or in part, any determination made under this subsection.

(7) Subject to subsection (13) of this section, where the relevant earnings of an earner (whether he is an employee or a self-employed person) are required to be ascertained under the foregoing provisions of this section, and a relevant general wage order (as defined in section 2 (1) of this Act, as amended by section 2 (4) of the Accident Compensation Amendment Act 1975) increasing rates of remuneration comes into effect after the commencement of this subsection and at a date after the date of the accident, his relevant earnings as so ascertained (or those relevant earnings as so ascertained and for the time being increased in accordance with this subsection and subsection (8) of this section or either of those subsections) shall, on and after the date on which the order comes into effect, be increased to the same extent as they would be increased if they were a weekly rate of remuneration subject to that order:

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(4A) Notwithstanding the foregoing provisions of this section, it is the intent and purpose of this section that, where earnings related compensation is payable under this section for any period, the commencement of the payment thereof and the ascertainment of the amount thereof should not be unduly delayed on account of difficulties or uncertainties which may arise in ascertaining the amount of the relevant earnings of the incapacitated person or his earnings as an employee or as a self-employed person during that period, and to the end that the said intent and purpose may be effected, the Commission shall, subject to any regulations made under this Act, have unrestricted authority to exercise, as and when it thinks fit, the powers conferred on it by subsections (4B), (5), and (8) of this section:

Provided that **[[for the purposes of paragraph (a) of subsection (1) of this section]]** in the exercise of those powers, the Commission shall, so far as is for the time being practicable, be guided by the principles set out in the foregoing provisions of this section.

(4B) Subject to the provisions of subsection (4A) of this section, and of any regulations made under this Act, where, in the determination of the Commission, a person is entitled to earnings related compensation under this section, the Commission may, having regard to the evidence which is presently available, determine his loss of earning capacity **[[for any period of his incapacity]]** **[[whether that period is before or after the time at which an assessment is made under section 114 of this Act]]** at such amount as it considers will provide fair and just compensation without being required to make assessments of relevant earnings and actual earnings, if (in its opinion) undue delay would be involved in making such assessments:

Provided that any determination made under this subsection shall not bind or prejudice the Commission or limit or restrict its powers with regard to any determination of that person's loss of earning capacity during any part of the period **[[of his incapacity to which the determination does not relate]]**

APPENDIX 2 (Page 3)

APPENDIX 3

Gentlemen - it might be useful if initially at this session I make some comments in relation to Schedule 2 of the Accident Compensation Act 1972 and on matters pertaining to Schedules in general in the evaluation of disability. Later we could get down to the minutiae of the interpretation of the present Schedule.

Before the first meeting of the Medico-legal committee set up by the previous National Government to help in the formulation of certain parts of the Act, I was asked by Mr. H.G. Duncan, the Assistant Secretary of Labour who chaired the committee to write to him giving my thoughts on these matters for consideration in due course by the whole committee. This I duly did and I will just quote to you some of that letter which gives the background ^{of} thought of myself, and the body I represented, the New Zealand Orthopaedic Association, in respect of the preparation of Schedule 2.

"The majority of disabilities covered by a Schedule are orthopaedic ones and any comments I have to make pertain purely to orthopaedic matters. It would be my very firm opinion that any new Schedule should not be complicated and ultra-sophisticated. In relation to orthopaedic disability the Schedule should merely be a guide to the Orthopaedic surgeons in New Zealand to ensure uniformity in the assessment and evaluation of disability. It would be quite impossible and in fact inadvisable to devise a Schedule of such complexity which would allow just any medical practitioner or a layman to evaluate orthopaedic disability by just referring to such a schedule and it is the very firm opinion of myself and my association that the assessment of orthopaedic disability should remain in the hands of Orthopaedic surgeons actively engaged in the practice of their specialty. In the evaluation of orthopaedic disability it is quite inevitable that even with an adequate

schedule the majority of assessments will still have to be made quasi schedule. The schedule itself just being used then as a guide to ensure that a method is followed that will lead to uniformity of assessment. Orthopaedic assessments for conditions, apart from amputations and excluding spinal disabilities are largely made on losses of power, partial losses of movement in joints or complete loss of movement, alterations in sensation or loss of sensation ^{ligaments & capsules} and shortening of limbs. Depletion or losses of power can never be adequately written into a schedule, neither can the vast varieties of alteration and losses in sensation, and it is also quite impossible to cover all degrees of partial losses of movement in joints and of course with the complexity of modern injuries which are so often multiple in nature, all these things that I have mentioned can be present in a limb, not just one of them, and it is impossible frankly to devise a schedule which will cover multiple different types of loss in a limb of the sorts I have just mentioned. The disability which exists might appear at first sight to be one covered by a schedule for example a partial loss of a finger by amputation but it is not just the level of the amputation that constitutes the disability, one has to take into account whether a full range of movements has been regained at the remaining joints of the remnant and whether the stump is a durable satisfactory one, or whether it is a poorly cushioned stump by soft tissue with resulting tenderness and discomfort or whether it has a neuroma in it and whether in fact of course the length loss of a segment from an anatomical point of view is so great that although anatomically they

is a small remnant present distal to any joint, is it of any use to the man from the point of view of function?

If it is not, then one cannot just assess the anatomical loss from a line across a hand chart, ^{the} a loss in such cases of short stump from the point of view of function even though ^{not} anatomically is the loss of the whole segment.

So that even when evaluating what would appear to be a simple matter of partial loss by amputation all these things have to be taken into account and often the

evaluation of a disability will end up by being a quasi schedule one, not strictly the scheduled loss. ^{on an anatomical basis} All that

is required in a written schedule to ensure uniformity among Orthopaedic assessors when faced with losses of joint movements are standard figures for complete

stiffness of various joints, such as one sees after arthrodesis or surgical stiffening operations. By

relating the partial losses of movement in any case of joint stiffness all that one does then is to compare these

with the position pertaining to a person with complete and utter stiffness of that joint for which there is a

recognised schedule figure."

*Quite a
many similar
cases.*

Now those are some of the points that I made in my letter to Mr. Duncan and all those points were agreed to by the Medico-legal committee subsequently and it was within that general guideline that Schedule 2 was devised. What we did in Schedule 2 was to prepare a per centage disability list for amputations, complete or partial of the limbs and their digits and this involved revising the figures of the old Schedule of the Workers Compensation Act 1956 to get rid of anomalies in that previous schedule. Such things as the ridiculous discrepancy in the old schedule between losses by

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amputation partial or complete of the index finger in relation to the other digits of the hand.—The fact that the previous schedule made no allowance for anything under the loss of one joint or segment and that the loss of a segment of a great toe was not compensatable at all under the old Act, and to cover the facet of multiple digit involvement we described a method of assessing disability in such cases which allowed for an enhancement factor instead of just having the one method of assessment present in the old Act of summing the individual losses in multiple digit amputations.

Now ignoring the matter of amputation we then proceeded to give figures for complete stiffness or loss of movement in the various major joints. Figures that the Orthopaedic surgeons in this country have been using for quasi schedule evaluation under the old Act for people who had had surgical arthrodesis or surgical stiffening of these joints. There was no such material of course in the 1956 Act schedule and the idea of that was that then for partial losses or partial stiffness in any case, the Orthopaedic assessor could relate those partial losses to what pertained to complete loss and give an appropriate quasi schedule figure on a per centage basis.

We then added a section on varying degrees of shortening of the limbs with the appropriate figures and then we gave a list of per centage figures of disability that pertain to what an Orthopaedic surgeon would regard as the perfect result from certain operations patellectomy, excision of the head of the radius and so on, knowing full well however that none of these operations give normal function and therefore some disability figure on a per centage basis is required to express the physical loss.

You must realise however that the figures given are for the so called perfect result and that many results are not as

good as that and in the ones that are not, higher figures of disability on a per centage basis would pertain, but by using the figures for the so called perfect result as a guide an Orthopaedic assessor can easily with uniformity give a per centage figure for the not so good result.

We also introduced the method of the progressive extraction of losses to be employed when evaluating disability involving multiple levels of the one limb. I can explain that in more detail to you later, but this method gives a better reflection on multiple disability in one limb, than does just summing the losses that pertain to various joints of that limb.

When it came to spinal disability we were of course faced with the most difficult task of all, because there is such a large subjective element in spinal disability. What we tried to do there was this. As a basis we tried to get rid of as much of the subjective side as we could and stick to objective measurable disability and that is why there is the footnote under the spinal disability sector which states - "note - where there are subjective symptoms of pain without demonstrable clinical findings of abnormality or demonstrable structural pathology, no assessment should be under Section 119 of this Act". Initially that was to go in under the spinal disability sector, ultimately it was put at the end of the second schedule to apply to all sections of the schedule not just to spinal disability and in my opinion quite rightly so. The reasoning for that is this, that if there are only subjective symptoms described by a patient to an assessor with no measurable objective findings of abnormality then either these are claimants on the make or else their symptoms are due to psychological disorder, functional overlay, *or are to do with or take measure relief of.* that is not something that can be measured on a per centage basis, it has to be covered under Section 120 of the Act.

You will realise however that as far as the spinal

disability section is concerned it covers only certain commonly encountered spinal disabilities which have measurable objective clinical findings and x-ray changes to go with those and that there will be many many cases of spinal disability which do not fall accurately into the figures given in the schedule, so that there will still be many cases of spinal disability which can only be assessed on a quasi schedule basis.

Now I hope it has become apparent by now that a schedule, like schedule 2 can only be used by expert Orthopaedic assessors and that therefore every case which has a permanent orthopaedic residuum will have to be examined by an Orthopaedic surgeon for the specific purpose. One cannot just by looking at the schedule and hospital records sitting back in ones armchair accurately assess the disability. One has to hear the claimant's account of his subjective symptoms, then examine the man, carefully record the objective findings of physical loss and see whether the subjective story ties up with the objective losses found on examination and then relate those objective losses to the schedule to arrive at a percentage figure of disability and of course quite ignoring section 119 we can help the Commission in their workings out of what the man might be entitled to in the Commission's opinion under section 120 and also give them some help in their deliberations on whether a man has to change his type of work with subsequent permanent economic loss which would be compensated under the pensions part of the scheme.

	<u>Example 1</u>	<u>Example 2</u>	<u>Example 3</u>	<u>Example 4</u>	<u>Example 5</u>	<u>Example 6</u>	<u>Example 7</u>
Maximum <u>Potential</u> pre-accident earnings	\$320	\$320	\$250	\$200	\$200	\$200	\$300
" " post- " "	<u>80</u>	<u>80</u>	<u>100</u>	<u>160</u>	<u>180</u>	<u>200</u>	<u>Nil</u>
Difference = Loss of Potential earnings	\$240	\$240	\$150	\$ 40	\$ 20	Nil	Nil
Difference as % pre-accident potential	75%	75%	60%	20%	10%	Nil	100%
Relevant (pre-accident) earnings	<u>\$180</u>	<u>\$240</u>	<u>\$180</u>	<u>\$180</u>	<u>\$180</u>	<u>\$180</u>	<u>\$180</u>
% applied to relevant earnings	135	180	108	36	18	Nil	180
80% = Permanent assessment	108	144	86.40	28.80	14.40	Nil	144
<u>Total Income After 114 Assessment</u>							
Actual post-accident earnings	80	80	80	80	80	80	Nil
ERC permanent assessment	<u>108</u>	<u>144</u>	<u>86.40</u>	<u>28.80</u>	<u>14.40</u>	<u>Nil</u>	<u>144</u>
Total Income (before tax)	<u>188</u>	<u>224</u>	<u>166.40</u>	<u>108.80</u>	<u>94.40</u>	<u>80</u>	<u>144</u>
<u>Total Income Prior to 114 Assessment</u>							
ERC under S.113 = 80% of Relevant Earnings	144	192	144	144	144	144	144
Less earnings during incapacity	<u>80</u>	<u>80</u>	<u>80</u>	<u>80</u>	<u>80</u>	<u>80</u>	<u>-</u>
= ERC before 114 assessment	64	112	64	64	64	64	144
+ Actual earnings	<u>80</u>	<u>80</u>	<u>80</u>	<u>80</u>	<u>80</u>	<u>80</u>	<u>-</u>
Total Income (before tax)	<u>144</u>	<u>192</u>	<u>144</u>	<u>144</u>	<u>144</u>	<u>144</u>	<u>144</u>
<u>Difference After Permanent Assessment</u>	+44	+32	+22.40	-35.20	-49.60	-64	Nil
<u>Future Maximum Potential Income</u>	188	224	186.40	188.80	194.40	200	144
<u>Potential Before Accident</u>	<u>320</u>	<u>320</u>	<u>250.00</u>	<u>200.00</u>	<u>200.00</u>	<u>200</u>	<u>300</u>
Lost Potential	<u>132</u>	<u>96</u>	<u>64.60</u>	<u>11.20</u>	<u>6.60</u>	<u>Nil</u>	<u>156</u>

APPENDIX 4.

5.103, I(3) For the purposes of this Act, the expression "earnings as a self-employed person", in relation to a self-employed person, means so much of the assessable income (as determined under and for the purposes of the Land and Income Tax Act 1954) of that person as is beneficially derived by him from the carrying on by him of a business; but does not include income so derived to the extent to which that income consists of—

- (a) Income from dividends (as defined in section 4 of the Land and Income Tax Act 1954), not being income derived by that person from the carrying on by him of the business of dealing in shares; or
- (b) Income from interest or from any premium or like revenue arising from a debt, not being income derived by that person from the carrying on by him of the business of lending money or of a business in the course of the conduct of which financial accommodation is regularly given to customers; or
- (c) Income from rents, fines, premiums, or other revenues (including payment for or in respect of the goodwill of any business, or the benefit of any statutory licence or privilege) derived by that person as the owner of land from any lease of, or licence relating

to, the land (including any chattels included in the lease or licence), not being income derived by that person from the carrying on by him of the business of—

- (i) Operating an hotel, motel, motor camp, hostel, convalescent home, private hospital, or boarding house; or
- (ii) Hiring premises in conjunction with the provision of goods and services thereon where the hiring of the premises is for the sole or principal purpose of enabling the provision of those goods and services; or
- (d) Income from the lease or bailment of livestock; or
- (e) Income from the grant or renewal, or from the sale or other disposition, of any right relating to—
 - (i) The operation of any mine or quarry; or
 - (ii) The extraction, removal, or other exploitation of any standing timber or of any natural resource; or
 - (iii) The taking in any other manner of profits or produce from land; or
- (f) Income from any easement affecting land; or
- (g) Income from payments of any kind made as consideration for—
 - (i) The sale or other disposition of, or the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trade mark, or other like property or right; or
 - (ii) The supply of scientific, technical, industrial, or commercial knowledge or information (but not including any services which are rendered as a means of enabling the application or enjoyment of such knowledge or information); or
- (h) Income derived by that person from a partnership or joint undertaking where that person does not render personal services to a substantial degree in the carrying on of the business of the partnership or joint undertaking; or
- (i) Any share or interest in income derived by that person as a beneficiary under any will, trust, or settlement, not being a share or interest referred to in subsection (4) of this section; or

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- (j) Income which is neither derived from New Zealand (as defined in section 2 of the Land and Income Tax Act 1954) nor deemed for the purposes of the Land and Income Tax Act 1954 to be derived from New Zealand (as so defined); or
- (k) Any compensation as defined in section 2 (1) of this Act; or
- (l) Any earnings referred to in paragraph (1) of subsection (2) of this section:

Provided that, for the purpose of assessing earnings for the payment of compensation, any income of a person allowed by any provision of the Land and Income Tax Act 1954 to be spread back or apportioned to a financial year earlier than that in which the income was derived shall not be included in the earnings of that person for any financial year other than that in which it was derived, if the application to the Commissioner of Inland Revenue for the spread-back or apportionment was made subsequent to the time of the accident in respect of which earnings related compensation is or is to be claimed.

(4) For the purposes of subsection (3) of this section, in the case of a person to whom paragraph (b) of the definition of the expression "self-employed person" in section 2 (1) of this Act applies, any income referred to in that paragraph shall, to the extent of that person's vested beneficial share or interest in that income, be deemed to have been derived by him from the carrying on by him of a business.

(5) Every reference in this section to the carrying on of a business by a person shall be read as a reference to the carrying on of that business by that person either alone or together with another person or other persons.

(6) Nothing in this section shall restrict subsection (8) of section 60 of this Act.]

This section was brought into force on 1 April 1974; see S.R. 1973/290/2.

In subs. (2), para. (dd) was inserted by s. 39 (1) of the Accident Compensation Amendment Act (No. 2) 1973. See s. 1 (3) of that Act.

In subs. (2) (g) the word "person" was substituted for the words "director of a company" by s. 39 (2) (a) of that Act.

In subs. (2) (k) the words in square brackets were substituted for the words "Act; or" by s. 39 (2) (b) of that Act.

In subs. (2) (l) the word "or" has been added consequent on the addition of para. (m) to subs. (2) by s. 4 of the Accident Compensation Amendment Act 1974.

In subs. (2), para. (m) was added by s. 4 of the Accident Compensation Amendment Act 1974 from 1 April 1974; see s. 1 (3) of that Act.

Subss. (3) to (6) were substituted for the original subs. (3) to (5) by s. 39 (3) of the Accident Compensation Amendment Act (No. 2) 1973. See s. 1 (3) of that Act.

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(1) The Board shall have the power to make regulations for the better management of the affairs of the University, and to do all such things as may be necessary for the carrying out of its functions.

(2) The Board shall have the power to make regulations for the better management of the affairs of the University, and to do all such things as may be necessary for the carrying out of its functions.

(3) The Board shall have the power to make regulations for the better management of the affairs of the University, and to do all such things as may be necessary for the carrying out of its functions.

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