

## THE ASSESSMENT OF COMPENSATION

by  
L.M. Graham

I think it would be fair to say that the philosophy behind the Report of the Royal Commission on personal injury by accident in N.Z. has now won fairly general support throughout the country. The concepts of community responsibility for the injured and comprehensive entitlement to care, treatment, rehabilitation and compensation are not now seriously challenged.

That philosophy had, of course, already been partially applied in the limited areas of Workers' Compensation and Motor Vehicle (Third Party) Compulsory Insurance Schemes. It also is the basis on which insurance generally rests. The Accident Compensation Act 1972 and the Accident Compensation Amendment Act (No.2) 1973, were both passed by Parliament without a division and with the support of both Parties in the House.

And so N.Z. has accomplished its quiet revolution in the field of accident compensation without a drop of blood being shed except as a result of personal injury by accident. I do not for a moment suggest that the new system is now winning unanimous support. On the contrary there are some in both the legal and medical professions who regard the scheme still as too revolutionary. And I have no doubt that there will always be those who will look back with nostalgia to the good old days when the law of Torts had a bit of body in it.

But if the scheme, which we now have, embraces the main principles of Woodhouse it departs quite radically from some of the recommendations which were made in the report of the Royal Commission. It differs in that we have three separate schemes separately funded and separately financed, it differs also in that the levies payable by employers are graded according to risk in the particular industrial activity whereas the Royal Commission proposed a flat rate of levy on employers at 1% of wages paid by them. Again, both the Earners' Scheme and the Motor Vehicle Accident Scheme are to be entirely self supporting whereas under the Royal Commission's proposals any short fall in finance was to be met by grant from the Consolidated Revenue Account.

It is in the area of the assessment of compensation that probably the greatest divergence between what was recommended by the Royal Commission and what is now contained in the legislation occurs. Although under both systems, periodic payments rather than lump sums are accepted as the main method of compensating the incapacitated earner, the way in which the amount of periodic payments is assessed differs markedly. Woodhouse recommended broadly three main ways of providing compensation:-

Firstly, a flat rate with a maximum of \$25 per week for a period of four weeks from the date of the accident;

Secondly, for temporary incapacity lasting beyond the four weeks, assessment at 80% of loss of earnings;

Thirdly, for permanent incapacity compensation based on a broad schedule of percentages for particular kinds of permanent injury.

The schedule would give greater emphasis to the more serious injuries and less emphasis to trivial injuries than the corresponding

schedule in the Workers' Compensation Act. The periodic payments for the more trivial injuries would be commuted to lump sums not exceeding \$1,200.

The main compensation provisions in the Accident Compensation Act are contained in 18 sections from Section 107 to Section 124. These sections may be grouped into the following five groups:

- (a) Five sections, namely Sections 107 to 111, deal with rights to conveyance, medical, hospital and related benefits.
- (b) A group of seven sections from Section 112 to 118 deal with earnings related compensation. In the main they concern earners but Section 118 can also provide compensation for non-earners in certain circumstances where, although not earning at the time of the accident, they become entitled to earnings related compensation in respect of loss of potential earning capacity.
- (c) Two sections, Section 119 and 120 provide compensation by way of lump sums.
- (d) Section 121 provides compensation for pecuniary losses not related to earnings.
- (e) Three sections, namely, Sections 122, 123 and 124 deal with the compensation payable in the event of death.

There are, of course, a number of other sections which go on to provide conditions, additions, limitations and refinements to the way in which compensation is assessed or payable under these sections. Section 107 and Sections 112 to 117 apply to earners only but the remaining sections apply to both earners and non-earners.

In the time available it is not possible to deal with all these sections and the way in which compensation is assessed under them in detail. I propose to confine myself, therefore, to three main areas:-

Firstly, Sections 112 to 118 dealing with earnings related compensation;  
Secondly, Sections 119 and 120 dealing with the assessment of lump sums;  
Thirdly, Sections 123 and 124 dealing with the compensation payable to dependents in the event of death.

It will be assumed that the fact of personal injury by accident having been suffered has been established and that the necessary documents including claim form, medical certificate and earnings have been properly lodged with the Commission's Agent.

To claim earnings related compensation, a person who suffers personal injury by accident must establish that at the time of the accident he was an earner, that is, that he was a self-employed person or an employee as those terms are defined in the Act. Of course the person can be, and often is, both. There are however, two exceptions to this rule. Firstly, under Section 59 cover under the Earners' Scheme may be extended beyond the date when a person ceased to be either an employee or a self-employed person or both. The second exception is the case of the person who becomes entitled to compensation for loss of potential earning capacity under Section 118. I shall deal with that later.

The way in which compensation is assessed varies according to the period of incapacity. There are four different periods which require consideration:

Firstly, the first week of incapacity (that is, the day of the accident and the six days thereafter);

Secondly, the period of short term incapacity, defined in the Act as commencing with the seventh day after the accident and ending with the 28th day of the period (that is, the 34th day after the accident) or earlier recovery;

Thirdly, temporary incapacity lasting beyond the period of short term incapacity;

Fourthly, permanent incapacity.

It is necessary to look at all these different situations separately.

***The First Week.*** No compensation is payable for the first week to employers who suffer non-work accidents or to self-employed persons. The provisions for payment for the first week apply only to employees and only where the accident arises out of and in the course of employment. Sections 84 to 89 provide for certain other accidents to be deemed accidents which arise out of and in the course of employment. For example, certain accidents during meal breaks and while travelling to and from work directly by a route that is reasonable in the circumstances, are covered as work accidents.

The relevant section (112) provides that the employer in whose employment the accident occurred is liable to pay full wages, exclusive of overtime, for the time lost in the first week as a result of the accident. In certain circumstances, such as where a worker has been with his employer for less than seven days, or where secondary employment is involved, the Commission pays the first week. In this case however, payment is limited to 80% of earnings and the total amount of payment to \$160 per week. There are other details regarding the payment of compensation for the first week which are set out in the pamphlet "Guide to Employers on claims for compensation".

It has sometimes been asked why employers should be saddled with responsibility for paying compensation for the first week of their employee's incapacity resulting from work accidents. The Commission would have to pay this compensation from the Earners' Fund, a fund which is, in the main, provided by levies paid by employers on wages paid by them to their employees. If the amount of money in this fund was insufficient then the rates of levies would have to be increased so that, whether the employer pays the first week in respect of accidents arising at work, directly, or whether it is paid out of the fund which is provided by him it would still be the employer who is meeting the cost. There is the further factor that administration of the fund is greatly simplified and control over short periods of absence for minor disabilities is much more direct and practicable.

### **Earnings Related Compensation for incapacity after the first week.**

The broad basis for the assessment of all compensation after the first week of incapacity is 80% of loss of earning capacity. Loss of earning capacity is ascertained by deducting from what is known as a person's relevant earnings, the amount that he earns or is capable of earning during any period of incapacity. Relevant earnings are ascertained by applying the various formulae which are set out in detail in Section 104 of the Act. It is also necessary to look at the definitions of earnings as an employee and earnings as a self-employed person set out in Section 103 of the Act. Relevant earnings are broadly average weekly

earnings, and separate formulae are provided for calculating these, firstly in the case of employees, and secondly, in the case of self-employed persons. I do not propose to go into the detail of the various calculations in this paper. For the purpose of assessing the compensation payable to employees during the period of short term incapacity, relevant earnings are the average weekly earnings during the period of 28 days prior to the date of the accident. After the period of short term incapacity relevant earnings are assessed as the average weekly earnings during the period of 12 months prior to the date of the accident. In the case of self-employed persons relevant earnings are the average weekly earnings during the last financial year before the date of the accident. In no case however, is compensation to be assessed or paid on any average weekly earnings of a higher amount than \$200 per week. This means that the highest award of earnings related compensation for total incapacity that can be made is \$160 per week, whether as an employee or as a self-employed person, or both.

In Section 104 there are quite comprehensive provisions enabling alternative methods to be used if the basic formula does not give a fair and reasonable assessment of the person's average weekly earnings or relevant earnings at the time of the accident. The computation of relevant earnings is, therefore, reasonably straight forward.

But to arrive at the loss of earning capacity on which to base compensation, it is necessary to deduct from the relevant earnings the amount of earnings derived during the period. Again in the case of employees this amount can fairly readily be ascertained. The employee is either on pay or not on pay and there are various provisions which have now been written into Section 113 enabling an employer to pay the difference between earnings related compensation and full wages without this difference being deducted from compensation, and also providing for reimbursement of employers if they keep employees on wages and if the Commission decides that the circumstances warrant reimbursement.

Before dealing with the assessment of earnings related compensation for permanent incapacity I want to touch briefly on the assessment of compensation for the self-employed. The broad basis of assessing compensation for loss of earning capacity in the case of self-employed persons is the same as it is for employees. It involves a comparison of pre-accident earnings with post-accident earnings. But the problems are much more complex and the Act, of necessity, contains somewhat wider discretions which the Commission may exercise in arriving at a fair and just assessment of loss of earning capacity in the case of the self-employed.

There are three provisions in the Act which call for mention and which are designed to assist the Commission in its task. These are:

Firstly, subsection (4B) of Section 113 dealing with the assessment of compensation for self-employed persons during the period of short term incapacity;

Secondly, subsection (5) of Section 113 dealing with the payment of interim compensation up to 50% of entitlement until an assessment has been made;

Thirdly, Section 134 giving authority to the Commission to make advances in anticipation of payment of compensation.

In some occupations such as the music teacher, the medical practitioner or the solo tradesman, the loss resulting from temporary physical incapacity may be fairly readily ascertainable. In other occupations however, the loss resulting from incapacity may be very difficult, if not impossible, to ascertain. In some cases there may even be no loss at all.

In these cases, unless it was quite certain there would be no loss, the Commission has decided to use the powers conferred on it by subsection (4B) of Section 113. If there would be undue delay in obtaining figures for pre-accident relevant earnings and/or post-accident earnings as a self-employed person, then compensation will be assessed for the period of short term incapacity under the following rules:-

- (a) If the claimant's accounts for his previous financial year are available and show that earnings as a self-employed person were earned in that year, compensation will be paid at the rate of 80% of the average weekly amount of those earnings, up to a maximum of \$60 per week. This will apply whether he was employed as a self-employed person full-time or part-time, but if, of course, he derived earnings also as an employee the rules regarding maximum compensable aggregate earnings will apply.
- (b) If those accounts show a loss, or show earnings as a self-employed person of \$1,000 or less, and he is able to show that he was employed *full-time* as a self-employed person during the financial year and at the time of the accident, compensation will be paid at the rate of \$16 per week (that is, compensation based on 80% of annual earnings of \$1,000 per annum which is the minimum sum on which levy is paid by self-employed persons).
- (c) If the claimant was not in business as a self-employed person for a sufficiently long period to be able to produce accounts for his preceding financial year, then compensation will be assessed at such amount, up to a maximum of \$60 per week, as the Commission deems appropriate having regard to:
  - (i) The estimated gross takings and expenses of the business at the time of the accident;
  - (ii) The extent to which the claimant was actively engaged in running the business at the time of the accident;
  - (iii) The estimated extent to which the claimant is continuing to receive "earnings as a self-employed person" during his incapacity.
  - (iv) The time occupied by the claimant in any other employment and the income received by him from any other employment.
- (d) If within 12 months of the accident the claimant produces accounts or evidence demonstrating the true loss of his earning capacity, and showing that the assessment made under the above rules has been too low, the decision will be revised and the arrears paid.

Compensation under these rules can be paid only during the period of short term incapacity, that is, the period commencing on the seventh day and ending with the 34th day after the accident (if incapacity lasts that long). It is estimated that nearly 90% of all accident victims will have fully recovered within this period.

If the incapacity of the self-employed person continues beyond the 34th

day after the accident and if pre-accident relevant earnings and/or post-accident earnings are still not ascertainable to enable an accurate assessment of loss of earning capacity to be made, interim payments may be continued under the provisions of either subsection (5) of Section 113 or Section 134. Subsection (5) of Section 113 authorises an interim determination to be made and compensation to be paid at 50% of the loss of earning capacity thus arrived at. Section 134 authorises payments on account of compensation before a claim or the correct amount of compensation has been established.

If a person suffers permanent incapacity, then an assessment is made in accordance with the provisions of Section 114. The assessment is not made on a schedule or quasi schedule basis such as Woodhouse contemplated, instead, as with temporary incapacity, it is based on a comparison of pre-accident earnings with post-accident capacity to earn. Assessments of these amounts must be made in each individual case but they cannot be made until the medical condition of the claimant is stabilised and until all practical measures have been taken towards his retraining and rehabilitation. If he is then found to be totally incapacitated earnings related compensation assessed at 80% of his relevant earnings will be paid for the remainder of his working life. In cases of partial incapacity the measure of the percentage of loss of earning capacity will be established from medical and other evidence. In most cases the injured person will, it is hoped, have been found some employment and this will be a guide towards the degree of incapacity suffered. There is a great deal more that could be said on the subject of earnings related compensation that time does not permit me to deal with but there are three further sections to which, before leaving the subject, I would like to make reference. These are Sections 116, 117 and 118. Section 116 provides for increasing to a minimum amount, the earnings related compensation payable to a full time earner, but within prescribed limits. The present prescribed limits are \$40 per week compensation plus \$3 per week for a dependent spouse and \$1.50 per week for each dependent child. If earnings related compensation for the full-time earner who is totally incapacitated does not reach these figures it may be increased to 90% of his relevant earnings provided the total payable does not exceed the total of the prescribed amounts. The amount is apportionable for partial incapacity.

The next section, 117, authorises increased rates of compensation to employees who are under the age of 21 years at the date of the accident or who are apprentices or are employed under a contract or service requiring them to undergo training, instruction or examination for the purpose of qualifying for that occupation. In these cases, the earnings related compensation may be re-assessed step by step as the incapacitated employee would have progressed up the scale until he reached adult status or until he qualified for the occupation for which he was training as an employee. The prescribed maximum amount of relevant earnings on which compensation may ultimately be assessed under this provision is \$100 per week.

The last section to which reference should be made under this heading, is Section 118. Section 118 is quite a complex section and its main purpose is to provide earnings related compensation to certain classes of persons who, but for the accident, would have become earners and would have qualified for earnings related compensation. The maximum prescribed amount on which compensation

may be assessed in these cases is \$50 per week but this may be increased by 50% to \$75 per week if the Commission is satisfied that, but for the accident, the injured person would have reached a salary or wage level warranting the higher amount because of the kind of career or profession he was studying for.

Let us now look briefly at the two Sections, 119 and 120, which deal with the payment of lump sums of compensation. They apply to persons who are covered under all three compensation schemes provided for in the Act. The main concern about these two sections at present is whether the sums provided in them are adequate. Under Section 119 the maximum sum which may be paid out for permanent loss or impairment of bodily function (including the loss of any part of the body) is \$5,000. Under Section 120 which deals with lump sum payments of compensation for loss of amenities or capacity for enjoying life, including loss from disfigurement, and pain and mental suffering, the maximum sum that may be paid out is \$7,500, subject, however, to this sum being increased in appropriate cases provided the total amount paid under both Section 119 and 120 does not exceed \$12,500.

As with the assessment of earnings related compensation for permanent incapacity, the Commission has not delegated to its agent authority to assess and make decisions on compensation for lump sum payments under these two sections. The Commission will make assessments under both sections having regard to the medical and other evidence that is available to it in much the same way as general damages were assessed under common law claims, but of course, in Section 119 cases, the amount of compensation will be determined having regard to the percentage of \$5,000 fixed for the injuries listed in the Second Schedule.

The maximum amounts payable under both sections will be subject to annual review to keep them in line with current money values but whether there should be any increase in the amounts beyond this is a matter on which there are differences of opinion. It is my personal view, and I emphasise that it is a personal view, that we require more experience of the operation of the scheme before any dramatic increase in the lump sums, over and above the increase required by the escalation of money values, could be recommended to Government.

Before concluding, let me discuss briefly Sections 123 and 124 dealing with compensation for the dependants of persons who die as the result of personal injury by accident. Section 123 gives entitlement to periodic payments of earnings related compensation to the dependants of deceased earners. Section 124 gives entitlement to lump sum payments to certain dependants of anyone who dies as a result of personal injury by accident whether at the time of death or at the time of the accident they were earners or not. In both cases the test of entitlement is dependency.

The aggregate of periodic payment to dependants under Section 123 is limited to the amount of earnings related compensation which the deceased earner would have been entitled to had he suffered total incapacity. In general, payments continue until the dependant spouse dies, remarries or attains the age of 65, though some flexibility is introduced in the age at which payments finally cease. The lump sum payments under Section 124 are limited to a total of \$2,500. The sum of \$500 is provided for each dependent child or other

dependant regarded as a child, provided the total payment under this head does not exceed \$1,500. The amount payable to a totally dependent spouse or de facto spouse is \$1,000. There is provision under both sections for the Commission to apportion compensation between conflicting claimants.

It has sometimes been suggested that to limit the widow's entitlement to half the earnings related compensation that her husband would have received had he been totally incapacitated is unfair on her. It has been suggested that this might be raised to say 60%. At the suggestion of the Select Committee of the House which sat to study submissions on the Woodhouse Report, this question was carefully studied. It was found in practice that to increase the widow's entitlement beyond 50% would, except for the higher income bracket not provide her with relief if she were bringing up a young family. This position arises by reason of her entitlement to supplement her earnings related compensation with a widow's benefit. To increase earnings related compensation would merely result in a reduction of the amount payable under the widow's benefit.

And now, although I feel like Marco Polo that more than half the story has been left unsaid, I must conclude. I have no doubt that as our experience of the new system builds up, new methods of assessing compensation and new legislative authorities will suggest themselves. But although we have had thus far only seven weeks experience, we have already received a wide variety of claims, and we have no reason to doubt but that the basic principles on which the new system of compensation is founded, are sound.



## PANEL DISCUSSION

**Panel members** : Mr L.M. Graham  
Mr W.R. Caldwell  
Dr M.D. Matich  
Mr R.B. Guise  
Mr C.L. Purdue

### *Question:*

**Mr Philson:**

1. If a member of a partnership (doctors, solicitors, accountants etc.) is injured at work or elsewhere, can he claim for an income related benefit when although he has been away from work his income at the end of the year may not show any reduction because of extra work and effort put in by his partner or partners during his absence and by himself when he returns to work?
2. If such a person has a personal accident policy and he receives a weekly benefit from his insurance company, whilst off work as a result of an accident, how does such payment affect any income related benefit due to him under the Accident Compensation Act during the period of his incapacity?

In both 1 and 2 above it is assumed that no income is known until the end of the financial year although drawings may be made as required and charged against the salary declared at the end of the financial year.

### *Reply:*

**Mr Caldwell:**

This is one question, which is regularly raised to me and to members of the Commission. Paraphrased it is this:

"If a working proprietor of a limited liability company, managing director, general manager, or someone such as that, has a Personal Accident policy with an Insurance Company

and has an accident and wants to claim Accident Compensation from the Commission, can he claim under his personal accident policy as well?"

*The answer to that question is:*

Depending upon whom the insured person is, the personal accident policy may have no effect. Let me clarify that point:-

1. If the limited liability company takes out a policy in its name – Jas. Smith Ltd – and pays the proceeds of that policy to the employee, then those are earnings and are taxable and therefore the loss of earning capacity under our Act would be reduced and less compensation would be paid.
2. But if the same company, Jas Smith Ltd, takes out a personal accident policy with an insurance company and names the beneficiaries and names these persons as beneficiaries, meaning that the company has no right to the benefits of the policy and the insurance company pays directly to that person, then the money paid out, the benefits, are not earnings and there would be no reduction in compensation.
3. If the working proprietor himself, or any employee for that matter, takes out a personal accident policy personally, not with the blessing of his firm – his firm may never know of it-and the benefits are paid to him by the insurance company, then it has no effect on earning related compensation.

I think Mr Graham did in fact answer the first part of your question. This was a problem the Commission recognised and grappled with and bearing in mind that most accidents are over and finished with within the first four weeks (i.e. the 35 days referred to), the formula which the Commission has produced will take care of this in 90% of cases.

We recognised that in a partnership where there are 8-9 lawyers or 4-5 doctors the remaining partners may work a wee bit harder or put in extra effort to catch up with their incapacitated partner's briefs, or see his patients. There is a presumption here that probably, and only probably, his absence would cause a loss to himself or his partnership. There is nothing tangible, and probably even at the end of the year when the partnership accounts are drawn up there could be no proof that a loss had been suffered, so for that reason the Commission formulated the administrative rules that if the claimant has accounts for the previous financial year and is able to show earnings as a self-employed person then compensation will be paid – 80% of the average weekly earnings up to a maximum of \$60 per week for the first four weeks. Now that is only for the first four weeks. If the incapacity continues beyond four weeks then there is a pretty strong assumption that a loss will in fact be suffered, and at that time, to pay continuing compensation, the other provisions of the Act can be used – Sections 113(5) and 134, as Mr Graham

mentioned — to make interim determinations or to make advance payments. The amounts paid under those sections are very high by professional standards. The Commission has recognised this. You can come back at the end of the year and, if by your books of account, (it is an accountancy exercise not a legal one) you can demonstrate that you had a loss and show what your loss of earnings has been, we will readjust not only the period of short term, but also the period of continuing incapacity, because the period of continuing incapacity allows for payments on an interim basis. So the answer is :- Yes. The claim can be made although there is no direct indication that earnings can be lost.

The second part of the question-

Can the person receive benefits from his insurance company whilst he is off work?

The answer I think would be the same as the answer to the point I dealt with at the outset. Yes. If he has a policy with an insurance company, providing him with \$100 per week, or any figure he can claim that and it will not alter his earnings under the related compensation in any way at all.

**Question:**

**Mr Dickie:** My question follows on from the answer you have just given. I can contemplate partnerships where they are going to decide now they will assess what the sick or incapacitated partner is prepared to deduct for his incapacity for his working brethren while he is off work. I am contemplating changing my Partnership Agreement. I am prepared to accept a reduction of salary if I am sick which is set at a reduction of salary per week of \$160, to assess contemplated loss of earnings; loss of profits would be paid directly from my insurance policy to my other partners for their doing my work while I am sick.

**Reply:**

**Mr Caldwell:**

In the first place I must speak with tongue in cheek because I have not investigated this thoroughly. This proposition was put to me by a firm of chartered accountants in New Zealand. On looking into it we discovered that we *think* it would be a breach of the Partnership Act if you were to alter your Partnership Deed or Partnership Agreement to provide for this.

**Mr Dickie:**

What happens to that \$160 at the end of the year? Is it simply a postponement of the \$160 which is paid back out of general dividend at the end of the year when the profits are tallied up?

*Reply:*

**Mr Caldwell:**

No, you pay it to your partners and you lose it entirely. What you are talking about here is not in fact salary. What you are talking about here are drawings.

**Mr Dickie:**

No Sir. I am talking about salary. I will never receive that \$160. It is compensation I am prepared to pay my partners for carrying the can for me while I am off work.

*Reply:*

**Mr Caldwell:**

You are not getting salary. You are drawing against earnings. You are a self-employed person. What you are saying – you will be living on capital. You won't be drawing anything from the partnership.

**Mr Dickie:**

No. You are drawing your normal percentage of your partnership earnings less \$160 and that would show at the end of the year's accounts that you have earned X% less \$160 for those weeks. You would in fact have earned less, and the other partners would have earned that much more because they worked hard.

*Reply:*

**Mr Caldwell:**

I am not embarrassed when I say I cannot immediately answer your question. We have had eleven different propositions from chartered accountants all with schemes whereby an incapacitated partner will get compensation from the Accident Compensation Act. We are looking into this whole matter across the board at this very moment and I cannot answer your question specifically here today, but this will be published in the near future – what we are going to do about this sort of thing. If you would like a specific answer I will be delighted to take your name and address after the meeting and write to you specifically after this afternoon.

I am sorry I cannot give you a definitive answer to that question but this is a pretty complex one because we have suddenly within the last few weeks been besieged by accountants round the country finding ways and means to ensure, probably correctly, that their partners do not ostensibly suffer a loss. But the question will be answered.

*Question:*

**Mr Marshall:**

At a recent meeting of the Insurance Association, we had the Council president, Mr Olsen, as well as some of the Executive, there and the question of this Act came up, especially Personal Accident policies, Mr Olsen told us that the Personal Accident Policy taken by

an injured person does in no way affect his rights under the Act. In Wellington there has now been some re-thought on this and there have been some claims which had been temporarily declined because the insured worker had a personal accident policy before. Is Mr Caldwell aware of this and is his decision as given before?

*Reply:*

**Mr Caldwell:**

That is an easy one which I can answer. In the Commission we are aware there was confused thinking over this and in fact Mr Sandford was telephoned by an executive member of the N.Z. Council from Christchurch most concerned that there may be claims by employed people, workers, who had Personal Accident policies and who may have their earnings related compensation reduced. The chairman thought this had been cleared up with the whole of the insurance industry. I do not know of any specific case of a claim being delayed or suspended, but there certainly has not been one declined on these grounds. There has not been any refusal of full earnings compensation because there has been a Personal Accident policy, and what I said in response to the question before still stands.

If a worker has a Personal Accident policy, or an employee, then he can receive the full benefit of that and still get his related compensation under the Accident Compensation Act. I am sorry if there has been the confusion that there has been in the insurance industry. I don't know why the confusion arose but it was cleared up by the Chairman of the Commission more than a month ago and we thought that was the end of the matter.

*Question:*

In Section 113(2) the words used are:

"A person's loss of earning capacity during any period shall be determined by deducting the amount he is capable of earning directly from his personal earnings during the period involved."

Does that by implication mean that it is accepted that a person who say breaks his leg, which affects only his mobility but not his ability to carry on his employment, is in fact expected to carry on his employment to mitigate his loss?

*Reply:*

**Mr Graham:**

The remarks that I made previously were prefaced by the words "unless it was certain that no loss would occur". It is not for the Commission to start to say how a man should occupy himself if he is on the flat of his back incapacitated, and as long as it is not quite certain that no loss will occur then these rules, or these administrative arrangements, which I have mentioned are the arrangements that will be followed during the term of the short term incapacity. So if

while he is lying with his leg trussed to the ceiling the man can still give directions on the running of his business which will reduce the inconvenience or the problems that may arise in his business during his accident, good luck to him. We will not stop payments if during this period he does give directions as to how his business is carried on. I would like to emphasise this point regarding the self-employed. We have not got a great backlog or great reserve of money we can pay out willy nilly unless losses occur and the only money we have is the money that self-employed persons provide. It is their levy of 1% on their earnings which provides the pool of funds from which we pay compensation.

We do not want to get into the position of having amendments to the Act every year to plug loopholes such as we see happening in the case of the Income Tax Act, where voluminous amendments occur every year. We don't want to get into that position but we must see as far as possible that the compensation that is paid is fair and just compensation and that it is not a scheme where some persons who do not really suffer any loss whatever are going to find a means of obtaining benefits. And if at the end of the year the accounts show a substantial improvement in the returns of a firm have occurred by reason of the fact that perhaps some method has been devised whereby more than the entitlement was attained from the compensation, the Commission can employ powers in the Act as it is, to make adjustments. It does not intend to make adjustments for short term incapacity that may result in collecting refunds. It considers this is a fair and reasonable way of meeting people during this period.

In the cases that are being discussed, after all, it is not the Commission's money that is going to suffer. It is the money you people pay. If 1% is not sufficient to meet the claims of the self-employed persons the only alternative is that the 1% will have to be reconsidered and arrangements made for some increase in this 1% levy to be made. We do not in our present estimates of our responsibility for the compensation claims that are likely to be received under the Act contemplate any change in this 1% levy on the self-employed. Please don't misunderstand me in this respect. But if this is going to be the means of over-compensation being paid in some cases, difficulties could arise.

**Question:**

**Mr Rogers:**

What discrimination can a medical practitioner exercise when he is looking at a patient who has reported some injury or disability which can be attributed back beyond 1st April or can also be attributed to his doing his ordinary work in the course of a work accident? Can he say, "this is a recurrence of an old injury" or can he say "I don't know, this may be a recurrence, or it may be the result of an accident yesterday"?

*Reply:*

**Dr Matich:**

I think we would probably use the same yardstick as is used in regard to War Pensions. The words used there are:

“aggravated by or attributable to”.

If for example you have arthritis, what will the result be if you fall over and you end up with a very painful hip as the result of your fall? This is directly an accident under the terms of Accident Compensation.

*Question:*

**Mr Fowler:**

How would you qualify a person employed on labour only — as an employee or employer under Accident Compensation?

*Reply:*

**Mr Graham:**

The definition of who is an employee under the Accident Compensation Act differs slightly from the corresponding definition under the Workers' Compensation Act. A labour-only building contractor under the Accident Compensation Act is deemed to be an employee. There is a provision that only a percentage of his earnings are treated as his wages both for the purpose of payment of levy and also for the purpose of compensation, but the labour only building contractor is the only kind of contractor who is deemed to be an employee under the Accident Compensation legislation.

*Question:*

**Mr McFarlane:**

Can we have the direct sentiments of the Commission to make it absolutely clear. If you cannot in a partnership account prove an accountancy loss, then as far as I can see there is no compensation because it seems to me you are just never going to be able to get such proof. In other words, all your real losses are always going to be concealed. It seems as it stands at the moment simply no compensation. Is that correct?

*Reply:*

**Mr Graham:**

This is a difficult area. No-one will deny that it is a difficult complex area. What I said earlier was — unless it is clearly demonstrable that there would be no loss whatever this administrative arrangement would be followed. Now the member of a partnership who is lying flat on his back for a month is going to lose contact with a lot of clients. It is quite clear that if he is not doing any work for a whole month in an accountancy practice that accountancy practice cannot help but suffer some inconvenience and some loss because of this. I can only speak for myself. I would suggest that where it was quite

clear that the partnership could not operate without suffering some inconvenience and loss, which would be inevitable in my view, if one of the partners was to lose contact with all his clients in the operation of a partnership for a month, then the payments would be made.

The position might be a little different if a man was running a business where he had a very competent manager running the business and he spent six months of the year up in Hawaii or Fiji. That was his normal pattern of living, and there are cases of this kind of self-employed persons who do this. It may be that he is living in the Bay of Islands or somewhere like that but has a business somewhere else in New Zealand where he has a manager or share milker running that business. Where it is quite clear that he will suffer no loss whatever if he is incapacitated for a month, and during that month he was not going to take any part in supervising that business operation, I think the other self-employed persons who are providing the money for the self-employed fund would be the very first to criticise the Commission for paying out something for a loss that was non-existent. In the case of the practising accountant or practising lawyer, in my view no partnership of this kind could continue to operate without inconvenience or loss if one of the active partners in the partnership was flat on his back for a month.

**Question:**

- (1) Section 5 of the Act obviates an individual's right to press for a common law redress in the case of injury. The Act lays down certain limits of compensation payable by the Commission. Does the Commission propose to revise these limits periodically?
- (2) The work accident portion of the scheme. We have an earners scheme and this relates to individuals who have lived or resided in New Zealand for twelve months. Under that scheme they are completely covered whether the accident occurs in work or out of work. But you have the other person who is coming to this country, perhaps within the last 12 months, and he is covered but in a limited form. Is this correct?

**Reply:**

**Mr Caldwell:**

I am not quite sure what your second question was going to be but perhaps we can short-cut it a little because what you are referring to there was the old Section 57 of the Act which had continuing cover and work cover. That has been repealed entirely.

Mr Graham reminds me here that there has just been produced a reprint of the Act. These are available from the Government Printer. They contain the No.1 and No.2 Amendment Acts.



Dealing with your first question, we are obliged under the Act to recommend to Parliament that compensation limits, etc. be increased. By way of example. Under Section 114, the permanent disability section, if an injured claimant is awarded \$100 week today and he is so badly incapacitated that he will never work again, that \$100 is increased perhaps yearly certainly yearly, perhaps more often, because compensation under the Act keeps pace with inflation. It doesn't lag behind it like the Workers' Compensation payments and the Social Security payments are said to do. All benefits under the Act are subject to review and subject to recommendation to Parliament by the Commission themselves.

*Question:*

I would like to ask Mr Graham how much compensation a self-employed man would receive earning an income in excess of \$6,000 and also in receipt of an investment income of \$6,000. If I understand correctly one would cancel the other out and he would receive precisely nothing.

*Reply:*

**Mr Graham:**

I am sorry if I did not make myself clear on this point. The Accident Compensation Act is based on the definition of "earnings as a self-employed person" or "earnings as an employee" and these are set out in Section 103 of the Act. Investment income is disregarded entirely for the purpose of compensation. So if a man received \$100,000 per year but only has \$6,000 self-employed, he would still be entitled to earnings related compensation if he lost that \$6,000 per year self-employed income.