

NHS STAFF COUNCIL/SCOTTISH TERMS AND CONDITIONS COMMITTEE

INJURY ALLOWANCE A GUIDE FOR STAFF

Introduction

1. NHS staff who are injured or become ill due to their employment may be entitled to financial assistance if their pay is reduced as a result of their health problems. Arrangements for this financial support changed in March 2013. This document provides information and guidance for staff affected by work related injury or ill health on possible entitlement to the new Injury Allowance and the transitional arrangements for the NHS Injury Benefit Scheme from 31 March 2013.

2. This guidance should be read in conjunction with your employer's managing absence or sick pay policy as well as Annex Z of the NHS terms and conditions of service handbook which describes good practice in managing sickness absence.

- Part A of this guidance describes NHS Injury Allowance.
- Part B of this guidance describes the transitional arrangements for the NHS Injury Benefit Scheme.
- Part C describes the situation for staff transferring out of NHS employment.

How will I know which payment I may be entitled to?

3. Eligibility for the different types of financial support will be dependent on the date you injure yourself or become ill as a result of your employment. It is the date injury occurred or a disease is contracted that is important here – not the date you go off sick.

4. If you injure yourself or contract a disease at work on or after 31 March 2013 you may be eligible for Injury Allowance and should read Part A.

5. If you injure yourself or contract a disease at work on or before 30 March 2013 you may be eligible for NHS Injury Benefits and should read Part B.

Part A: Injury Allowance

6. Injury Allowance is a payment made by NHS employers to eligible staff that tops up sick pay, or earnings when on a phased return to work, to 85 per cent of pay.

- For those covered by the NHS terms and conditions of service handbook, pay is as defined in paragraph 14.4.
- For those staff not covered by the handbook, it is as defined in their contractual sick pay arrangements.

Who is eligible for Injury Allowance?

7. Staff will have access to the new Injury Allowance either because they are covered by the NHS terms and conditions of service handbook where the allowance is described in Section 22, or by reference within other national or local NHS employment contracts, such as those which cover salaried doctors and dentists and some Senior Managers. GP practice staff are NOT covered by this allowance.

When is Injury Allowance payable?

8. Injury Allowance is payable when an employee is on authorised sickness absence, or on a phased return to work, with reduced pay or no pay due to an injury, disease or other health condition that is wholly or mainly attributable to their NHS employment.

What does "wholly or mainly attributable to their NHS employment" mean?

9. "Wholly" means "totally" and "mainly" means "for the most part". "Attributable" is defined in case law as *a contributory causal connection; it need not be the sole, dominant, direct or proximate cause and effect.*

10. The injury, disease or other health condition must have been sustained or contracted in the discharge of the employee's duties of employment or is an injury that is not sustained on duty but is connected with or arising from the employee's employment.

What kind of situations may lead to payment of Injury Allowance?

11. The following are some examples of situations that may lead to entitlement to Injury Allowance:

- physical or psychiatric injury sustained or disease contracted due to a specific incident or series of incidents
- injury sustained or disease contracted that does not manifest itself for several years, for example, asbestosis, Hepatitis C following a needlestick injury
- injury sustained whilst travelling on official duty, for example, road traffic accident (RTA), whilst travelling in an official car from one NHS premises to another
- injury sustained off duty, for example whilst providing professional treatment which required professional training or knowledge at the scene of a RTA
- injury inflicted off duty, the cause of which can be attributed to NHS employment (for example, being assaulted on the way home from work by ex-patient)
- injury, disease or other health condition contracted due to a series of incidents relating to NHS employment (for example, exposure to noxious substances causing injury, condition or disease over a period).

Are there any circumstances where Injury Allowance cannot be considered?

12. Injury Allowance cannot be considered if:
- you are injured whilst on a normal journey travelling to and from work, except where the journey is part of your NHS duties of employment
 - you are on sickness absence as a result of employment related matters such as an investigation, capability proceedings or disciplinary action, or as a result of a failed application for promotion, secondment or transfer
 - you sustain an injury or disease at work which is due to or aggravated by your own negligence or misconduct.

Neither is it payable:

- if your pay has not dropped below 85 per cent
- after your employment contract has ended.

What about “wear and tear” or degenerative change?

13. It is unlikely that wear and tear or degenerative change alone would lead to payment of Injury Allowance as you must be able to prove that your condition is “wholly or mainly attributable” to your employment.

What about previous injuries?

14. If you injure yourself at work and exacerbate a previous work related injury, you should be able to prove that your current condition is wholly or mainly attributable to your employment easily even if the injuries were under two different employers. If the previous injury was NOT work related, you would need to be able to show that your sickness absence is “wholly or mainly attributable” to the recent work-related injury.

What if there is more than one cause of the injury, disease or other health condition?

15. If both NHS related and non-NHS related factors are involved, it is necessary for the employer to assess their relative importance. In such cases Injury Allowance is only payable if, on the balance of probabilities, the injury, disease or other health condition is wholly or mainly attributable to their NHS duties. Employers may also wish to seek specific advice from their occupational health department.

I have more than one NHS contract – how will Injury Allowance be determined?

16. This can be a rather complex area of employment law and when determining entitlement to Injury Allowance your employer will need to consider carefully the detail held within your contracts locally. The Employers Guidance on Injury Allowance provides some additional information on this and, additionally, reminds employers that Injury Allowance may be payable for an injury that is not sustained on duty but is connected with or arising from the employee's employment.

I have two contracts with the same employer – will I receive Injury Allowance in both if I am injured at one of them but am off sick from both?

17. Yes, if you satisfy the criteria for both. Your employer should pay Injury Allowance for both contracts if you are off sick from both. For information relating to bank workers who are employed on an “as and when required” basis please refer to your local bank policy.

I have a second non-NHS job – if I injure myself at this job will I be able to claim Injury Allowance at my NHS employment if I have to go off sick?

18. No. You can only receive Injury Allowance if you injure yourself or become ill as a result of your NHS employment.

What about agency work?

19. Injury Allowance may only be payable if you injure yourself or become ill doing NHS bank work. It would not be payable if you injured yourself doing non-NHS agency work, even if you were undertaking work in an NHS service.

20. When determining entitlement to Injury Allowance and level of payment your employer will need to consider carefully the detail held within your contracts locally.

Who makes the decision about entitlement to Injury Allowance?

21. Your employer is responsible for determining entitlement for Injury Allowance. Local policies should describe the process for claiming Injury allowance.

How do I claim Injury Allowance?

22. Firstly, you should check your local policy for details of the process within your organisation. There may be a claim form for you to complete but as a minimum you will be expected to inform your employer (preferably in writing and by way of your fit note) that your absence is work related. Your employer will then need to establish whether your absence is “wholly or mainly attributable” to your duties and if so when to start paying Injury Allowance (remember it is only payable once your pay reduces below 85 per cent so it is important that your employer can make a decision about entitlement before this happens to that timely payment of the allowance can be made).

How will the decisions be made?

23. Your employer should make the decision based on all available relevant evidence and information, using the civil burden of proof. The civil burden of proof is based on the balance of probability which is defined as “more likely than not”.

24. Your employer may also want to seek medical advice from an occupational health service but they cannot delegate the decision making to such a service.

What information may be required?

25. As well as notifying your employer that you believe your absence to be work-related at the earliest opportunity, you must provide all relevant information, including medical evidence, that is in your possession or that can be reasonably obtained, to enable the employer to determine the claim. Your employer will be able to provide a claim form for completion.

You may also be asked to give permission for your occupational health or GP records to be accessed.

26. You may also wish to provide additional supporting and corroborating evidence to help your employer determine your eligibility, for example witness statements, DWP benefit statements, copies of any relevant letters and correspondence relating to any other medical advice received. Further information on corroborating evidence can be found in the Employers Guidance on Injury Allowance which can be accessed at www.msg.scot.nhs.uk or at www.stac.scot.nhs.uk.

Is there any qualifying period for Injury Allowance?

27. No. Payment of Injury Allowance is not dependent on length of service. This means that all staff are covered from their first day of employment.

How is Injury Allowance calculated?

28. Injury Allowance is a top-up payment. It tops up sick pay and/or earnings when on a phased return to work, and certain other income (as specified below) to 85 per cent of pay as defined in appropriate contractual documentation, that is, as noted above in section 14 of the NHS terms and conditions handbook, or as specified in their separate contractual sick pay arrangements.

29. The following payments will be included when calculating 85 per cent:

- contributory state benefits received for loss of earnings, for example, Job Seekers Allowance, Employment and Support Allowance, at the rate they are actually received by the employee
- sick pay (including Statutory Sick Pay (SSP))
- any earnings when on a phased return to work on reduced pay.

30. Any other benefits or payments received should be ignored.

Do I have to claim DWP benefits if this Injury Allowance will top up my pay anyway?

31. Yes. Staff are required to claim any contributory state benefits they may be entitled to and must inform employers immediately on receipt of such benefits. Where timely notification is not provided any overpayment of Injury Allowance that arises as a result will be recoverable.

What if an employer makes an over-payment?

32. Employers will require repayment when an overpayment is made. Where an employer has made an accidental overpayment the statutory position is that they can recover this by deducting the overpayment from future wages or salary. This is covered by s.14 of the Employment Rights Act 1996, which provides that protection from deductions from wages does not apply to an overpayment of wages or employment-related expenses. Employers should take into account the period of time the over payment was made when agreeing the programme of repayments.

What about tax and National Insurance contributions?

33. Injury Allowance is subject to income tax and National Insurance contributions but is not subject to NHS Pension Scheme contribution deductions.

What about staff on a phased return to work?

34. Annex Z of the NHS terms and conditions of service handbook describes phased return as a mechanism for *“enabling staff to work towards fulfilling all their duties and responsibilities within a defined and appropriate time period, through interim flexible working arrangements.”*

Eligible employees who agree a phased return to work programme with their employer may receive the Injury Allowance as a pay top-up if their pay is reduced during this employer approved period of rehabilitation.

Payment of Injury Allowance during phased return to work should remove any negative incentives to remain off work.

How long is Injury Allowance payable for?

35. Injury Allowance is payable for a period of up to 12 months per episode, subject to local absence management, return to work and rehabilitation policies.

36. The intention is for the Injury Allowance to be a flexible payment that supports staff when they are off sick and on return to work. As such it can be paid for a maximum of 12 months per episode, for example, during sickness absence on reduced or no pay and during any agreed phased return to work after pay has been reduced, with an episode remaining linked to the original injury.

37. Where an injury is exacerbated by a further injury or incident at work (which may not on its own have led to a period of sickness absence) then a new episode may commence.

What about pay protection?

38. If you have to change jobs permanently to a position on lower pay, or have to reduce your hours due to a work-related injury, disease or other health condition, you are entitled to receive a period of protected pay that is the same as any local provision for pay protection during organisational change.

I disagree with the decision my employer has made about Injury Allowance – what can I do?

39. Disputes relating to eligibility or payment of Injury Allowance should be handled under the local appeals process.

Part B: Continuing access to NHS Injury Benefit Scheme

40. Access to the NHS Injury Benefit Scheme will continue to be available under transitional arrangements until 30 March 2038 for people who suffer a relevant work related injury or disease on or before 30 March 2013. NHS Injury Benefits can provide three forms of financial support for NHS staff affected by injury or disease that is wholly or mainly attributable to their NHS employment:

- Temporary Injury Allowance
- Permanent Injury Benefit
- death benefits.

41 All NHS Injury Benefit matters, including applications and decision on Temporary Injury Allowance, are administered by the Scottish Public Pensions Agency (SPPA). Full details of the scheme and supporting guidance is available at: www.sppa.gov.uk.

Making a claim – from 31 March 2013 to 30 March 2018

42. During this period, eligible employees or ex-employees will be able to apply for Temporary Injury Allowance and/or Permanent Injury Benefit for injuries or diseases occurring on or before 30 March 2013. The application and decision making processes for Temporary Injury Allowance and Permanent Injury Benefit remain unchanged.

43. NHS employers are responsible for considering claims for Temporary Injury Allowance and for the calculation and payment of the allowance where appropriate.

44. Pension administrators will continue to consider disputes about entitlement to Temporary Injury Allowance under their internal dispute resolution procedures.

45. Applications for Permanent Injury Benefit will still be dealt with by the relevant Scheme administrators who will continue to consider disputes about entitlement to Permanent Injury Benefits under their internal dispute resolution procedures.

Making a claim – from 31 March 2018 to 30 March 2038

46. During this period, access to scheme benefits will only be available to those who can prove that there has been a **delayed onset** of their symptoms such that a benefit claim was not previously necessary. In the main, the application and decision-making processes for such claims will remain as described above. However, you must be able to provide robust evidence to confirm that your injury/disease was caused by an event or incident that occurred on or before 30 March 2013 and that your symptoms had not developed to a degree that you considered it necessary to make an application before 30 March 2018.

If you are in receipt of NHS Injury Benefits on or before 30 March 2013

47. If you are already in receipt of Temporary Injury Allowance or Permanent Injury Benefits on or before 30 March 2013 you will not be affected by the changes from 31 March 2013.

48. You will still be able to ask for a review of your benefit if your income changes or your condition deteriorates (and that deterioration is wholly or mainly attributable to your NHS employment). You will still also be expected to provide information about any compensation payments you may receive as a result of your injury/ill health and your award may be recalculated as a consequence.

If you have applied for NHS Injury Benefits on or before 30 March 2013

49. If you have applied for Temporary Injury Allowance or Permanent Injury Benefits in respect of an injury sustained or a disease contracted on or before 30 March 2013 but where the outcome has not been determined at that date you will not be affected by the changes from 31 March 2013 and you will receive a decision on your application in due course.

If you have had an application for NHS Injury Benefits rejected on or before 30 March 2013

50. If you have an application for Temporary Injury Allowance or Permanent Injury Benefits that has been rejected on or before 30 March 2013 in respect of an injury sustained or disease contracted on or before that date will not be affected by the changes from 2013. The two-stage internal dispute resolution procedures operated by scheme administrators remains available to applicants who wish to challenge (appeal) the outcome of their claim for Temporary Injury Allowance or Permanent Injury Benefit.

What about death/dependent benefits?

51. Death benefits remain available for people who die as a result of a work-related injury or disease that occurred on or before 30 March 2013.

Part C: Transferring staff

I'm transferring to a non-NHS employer under TUPE arrangements on 1 April 2013 – what am I entitled to?

52. As Injury Allowance becomes a contractual entitlement on 31 March 2013, you will transfer to your new employer with an equivalent contractual right. This will entitle you to payment of Injury Allowance if you injure yourself or become ill due to your work on or after the date of transfer. Your new employer will determine entitlement and make payments accordingly.

I injured myself in my NHS employment before I transferred to a non-NHS employer. What will I get if I later go off sick?

53. If your work related injury or ill health pre-dates 31 March 2013, you will need to check your contract of employment to see what provision was made for work injury at the time of your transfer. You should request that they pay you the equivalent of NHS TIA whilst you are off sick but you may have to negotiate payment with your new Non-NHS employer if it is not covered by a contractual provision. If you have to leave employment or move to a lower paid job at a later date, you may be able to claim PIB in the usual way and liability for this would fall back to the NHS organisation at which you injured yourself or became ill.

54. If your injury/disease occurred on or after 31 March 2013, you will be covered by the new Injury Allowance or an equivalent contractual provision if your transfer also happened after 31 March 2013, but it will be payable by your new employer.