

NHS STAFF COUNCIL/SCOTTISH TERMS AND CONDITIONS COMMITTEE

INJURY ALLOWANCE A GUIDE FOR EMPLOYERS

Introduction

1. Section 22 of the NHS terms and conditions of service handbook contains provisions for a new allowance known as the *Injury Allowance* that is effective from 31 March 2013. This is further explained in NHS Circulars PCS(AFC)2013/1, PCS(DD)2013/3 and PCS(GPR)2015.1

2. This document provides guidance to support employers on the implementation and management of the Injury Allowance. A separate guide is available for employees.

3. This guidance should be read in conjunction with Annex Z of the NHS terms and conditions of service handbook: Managing sickness absence. The arrangements set out in Annex Z are intended to support employers and staff in the management of sickness absence and in managing the risk of premature and unnecessary ill health retirements. Employers should also refer to the Managing Health at Work PIN policy.

4. Eligible staff will have a contractual right to the new Injury Allowance where they are covered by the NHS terms and conditions of service handbook. For staff that have a contractual right to Injury Allowance but are not covered by the NHS terms and conditions of service handbook or are no longer working for an NHS employer, the provisions will apply as specified in individuals' contracts of employment and should be read alongside the relevant contractual documents. The responsibility for ensuring eligible staff, not covered by the NHS terms and conditions of service handbook, have access to the Injury Allowance provisions lies with the employer and or the recognised national collective bargaining forums.

5. Separate guidance is available on the transitional protection arrangements that have been put in place enabling eligible staff to be able to claim benefits under the National Health Service (Injury Benefit) Regulations 1995 where the work related injury sustained or disease contracted takes place prior to the implementation of the new Injury Allowance provision, that is, on or before 30 March 2013.

What is Injury Allowance?

6. Injury Allowance is a top-up payment and tops up reduced sick pay, or reduced 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 Agenda for Change pay arrangements, it is as defined in their contractual sick pay arrangements.

Who is eligible for Injury Allowance?

7. NHS employees covered by the provisions contained within the NHS terms and conditions of service handbook or by reference within other national or local NHS employment contracts. In respect of employees not covered by the NHS terms and conditions of service handbook or who are no longer working for an NHS employer, the term 'NHS employment' refers to employment with an employer that provides for Injury Allowance within their employment contracts.

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

Situations where Injury Allowance may be considered

11. This is not an exhaustive list but some examples are:

- 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 or Hepatitis C following a needlestick injury
- injury sustained while travelling on official duty, for example, road traffic accident (RTA), while travelling in an official car from one NHS premises to another
- injury sustained off duty, for example, while 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 with whom you have had contact with or provided care when a 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 where a person:

- is injured while on a normal journey travelling to and from work, except where the journey is part of their contractual NHS duties of employment
- is on sickness absence as a result of disputes relating to employment matters such as investigations or disciplinary action, or as a result of a failed application for promotion, secondment or transfer
- sustains an injury, disease or other condition which is aggravated by the claimants own negligence or misconduct.

Neither is it payable:

- where there is no reduction in pay below 85 per cent
- where the employment contract ends.

When is Injury Allowance unlikely to be payable?

13. Injury Allowance is unlikely to meet the wholly and mainly attribution test in the following circumstances:

- where the injury or disease is attributable to some other cause, for example the natural progression of a pre-existing condition, normal wear and tear or a non work related injury, condition or disease
- where a person suffers from a pre-existing or non-work related condition (injury or disease) unless there is some new work related cause and effect over and above the original problem.

Who makes the decision about entitlement to Injury Allowance?

14. The employer is responsible for determining entitlement for Injury Allowance and must decide if the injury, disease or other health condition is wholly or mainly attributable to the employee's NHS duties of employment. Decisions on payment should take into account individual's sick pay entitlements to enable the timely payment of the Injury Allowance.

How will the decisions be made?

15. Employers should seek appropriate medical advice from their occupational health service to help them to decide if the injury, disease or other health condition is wholly or mainly attributable to the person's NHS employment. The civil burden of proof is based on the balance of probability which is defined as more likely than not and should be used to decide if the injury or disease is wholly or mainly attributable to the person's NHS employment.

16. Employers will need to follow normal absence management procedures during any period of absence. Employers should monitor absences in terms of length of absence and individual pay levels to enable the timely payment of this top-up allowance to eligible staff.

How should a claim be processed?

17. Employers are encouraged to have robust processes in place for managing injuries as part of their locally agreed absence management policies. Such processes should aim to assist employers in the determining whether an absence is wholly and mainly attributable to the duties of employment and if eligible, when any payment of Injury Allowance would commence. A template claim form has been attached at the annex A below.

What information does an employee need to provide?

18. Employees should provide all relevant information in line with normal absence management procedures. This includes medical evidence, that is in their possession or that can be reasonably obtained, to enable the employer to determine the claim.

What information may an employer need to determine eligibility as part of the decision making process?

19. Employers will want to make robust decisions based on all available evidence and this may include:

- details of the injury sustained, disease contracted or other condition of the employee
- how it is connected to their NHS employment (that is, what caused it).

20. To support their decision making employers may find it useful to obtain copies of the following:

- accident report(s)
- occupational health department notes and records
- job description, including details of the location of work, duties of employment and training records, etc.
- sick leave record
- a full statement of events from the employee explaining what injury/disease they are claiming for and the circumstances leading to the claim
- appropriate medical advice, for example, from occupational health service and any specialist advice which is available.

21. Employers or employees may also find it helpful to obtain additional supporting and corroborating evidence, for example witness statements, DWP benefit statements, copies of any relevant letters and correspondence relating to any other medical advice received.

What about corroboration?

22. It is important to obtain appropriate and supportive corroborative evidence before making a decision about Injury Allowance.

a) What constitutes corroborative evidence?

23. Corroborative evidence can take many forms – see examples below.
Injury at work:

- An injury, physical, psychological or both, as a result of an incident at work, should be recorded in the accident book or by some method of workplace recording, and countersigned by a manager. If the incident has been deemed to be serious enough there may also be a form completed for the Health and Safety Executive (HSE) under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013 (RIDDOR) requirements which may also be available.
- Information related to DWP benefit claims.
- If there was an accident at work, but it was not entered in the accident book, but was witnessed by a colleague, a statement from that witness could be helpful by way of corroboration.
- If there is doubt about the date of an accident at work and it was not recorded or witnessed but the person attended their GP, the GP may be able to confirm that attendance and the date from the notes.
- If the person attended A&E, the GP may have been sent a discharge summary. The person may be able to get a copy, or, with consent, may be able to request the A&E records or GP records.
- If the person attended occupational health following the injury, they may be able to help with dates and details.
- If the person has sought compensation through a lawyer and has evidence, such as expert medical reports, or details of judgements and outcomes, which may be helpful relating to this, then it will be useful to have these. The person should be aware that it is not necessary to prove that the employer was negligent to get Injury Allowance; it is a no-fault scheme.
- If the person has already been awarded Injury Allowance for a previous episode of absence and has any relevant documents about it, it may be useful to submit these.

b) Diseases/other health conditions contracted through work

24. The following examples show different ways to corroborate that the person may have contracted a disease or condition through work.

- If the person has contracted a notifiable infectious disease such as hepatitis or tuberculosis, there will be documentation from GP, occupational health and/or public health departments confirming this, copies of which the employee may be able to submit, or give consent to obtain.
- If the person has contracted an occupational disease, which is on the list for reporting to the HSE under Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR), the occupational health department will be able to give documentation confirming this, or the applicant give consent for these to be accessed.

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

25. If both employment and external factors are involved it is necessary to consider 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 of employment. Employers should also seek specific advice as required from their occupational health department.

Is there any qualifying period for Injury Allowance?

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

How is Injury Allowance calculated?

27. Injury Allowance is a top-up payment. It tops up sick pay 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 i.e. as noted above, paragraph 14.4 of the NHS terms and conditions of service handbook (ie pay as if at work), or as specified in their separate contractual sick pay arrangements.

28. 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.

Any other benefits or payments received should be ignored.

Is an employee required to claim relevant contributory state benefits?

29. Yes. Employees 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 must be recovered from the employee.

What if an employer makes an overpayment?

30. Every effort will be made to avoid an overpayment, however employers will require repayment when an overpayment is made. Where an employer has made an accidental overpayment, the statutory position is that the employer 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?

31. Injury Allowance is subject to income tax and National Insurance contributions but is not subject to NHS Pension Scheme contribution deductions. Employees should be made aware of the impact that this will have in relation to their superannuation benefits.

What about people who are on a phased return to work?

32. Annex Z 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.
- These arrangements have been constructed to remove any negative incentives to remain off work.

How long is Injury Allowance payable for?

33. 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.

34. 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 half 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. Illustrative examples are set out in Annex B.

35. Where an injury, disease or other health condition is exacerbated by a further injury, disease or other health condition that is wholly or mainly attributable to their NHS employment (which may not on its own have led to a period of sickness absence) then a new episode may commence.

What about pay protection?

36. Eligible employees who have to change jobs permanently to a position on lower pay due to a work related injury, disease or other health condition, are entitled to receive a period of protected pay that is the same as any local provision for pay protection during organisational change.

What happens if a person disagrees with the decision for Injury Allowance?

37. If a person disagrees with the outcome of a decision about Injury Allowance, it should be handled under the local appeals policy.

How will the Injury Allowance apply to staff with more than one contract of employment?

38. Some staff may have more than one contract of employment and these contracts can vary from standard whole time equivalent contracts of employments to zero hours contracts covering bank workers, with differing terms and conditions of service being applied to each.

39. It is recognised that an employee who suffers a work related injury under one contract of employment may result in a period of absence in another. Employers will therefore need to consider the interaction between the various contracts where a member of staff meets the eligibility criteria for Injury Allowance, seeking legal advice as necessary. It would seem reasonable to apply a similar approach as is adopted locally in respect of payment of sick pay entitlements.

40. Employers will also need to be aware 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 (see paragraph 11 above).

Annex A. Template claim form.

This is attached separately.

Annex B. Illustrative examples

Policy intention

1. 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.

2. 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.

Annex Z: Managing Sickness Absence

3. Annex Z sets out a framework to support employers and staff in the management of sickness absence. It encourages employers to put in place a structured review process with regular reviews being carried out to assess and monitor staff when they are off sick, and determine what action is needed at each stage. Review and decision dates should be determined taking account of the individual's sick pay entitlements and there should be a review before their sick pay ends. Employers should also refer to the Managing Health at Work PIN policy.

4. Where a member of staff is unlikely to return to work this would culminate in a final review where a decision on the appropriate way forward is made; that is, return to substantive employment or redeployment or termination of contract. It is assumed that as part of this process, that reasonable adjustments have been considered. Medical evidence should be made available to support the review process.

Examples

5. Each example below assumes the employee has met the eligibility criteria and the application has been approved. There is no right to exhaust the full 12 month allowance. It is there to provide support to staff alongside an employer's structured absence management policies and procedures.

a) Paul has full sick pay entitlements, with six months full pay and six months half pay. The Injury Allowance is payable when he moves from full to half pay. Pay is then topped up to 85% of earnings.

b) Peta has recently had a period of long term absence which has reduced her sick pay entitlement to zero. Given the immediate move into a no pay situation the employer will need to determine eligibility for Injury Allowance promptly. On confirmation of Peta's eligibility then her income is topped up to 85 per cent as defined, from the first day of absence (applied retrospectively as necessary).

c) Toni's sick pay entitlement provides for 4 months full pay and four months half pay. On confirmation of Toni's eligibility her income is topped up to 85 per cent as defined, at the end of the 4 month period of full pay. This continues for a period of three months at which point her employer, further to discussion with occupational health services, places her on a period of phased return to work on full pay as per local agreed absence management policies. In this scenario Toni's manager, in discussion with occupational health services, agree to a longer period of phased return and if her pay drops below 85 per cent at any point during this time then the Injury Allowance will provide a top-up to that level.

Application of allowance

6. In all the scenarios the employer will need to review the situation regularly and a decision on entitlement to the Injury Allowance will be made as part of their local absence management policies and procedures.

7. According to local policy and Annex Z, a final review of absence needs to be held. Injury Allowance may stop depending on the decisions made at this final review; that is, return to substantive employment or redeployment or termination of contract.

8. The Allowance ceases to be paid when one of the following conditions is satisfied:

- 12 month maximum payment period is reached
- pay is no longer reduced below 85 per cent
- employee returns to substantive employment
- employee is redeployed. Where they have to change jobs permanently to a position on lower pay due to a work related injury, disease and/or other health condition, they will receive a period of protected pay that is the same as any local provision for pay protection during organisational change
- contract of employment is terminated, possibly resulting in access to ill health retirement benefits if they are a member of the NHS Pension Scheme.

Recurring absences

9. Should Peta, Paul or Toni suffer recurring absences following a return to work, which remains "wholly and attributable" to the original injury, any remaining/unused allowance (to a total of 12 months) may be used to top their pay up to 85 per cent.

10. If Paul were to return to work after 8 months absence but subsequently had a recurrence of symptoms of the original injury resulting in a period of absence then sick pay entitlement would be determined in light of 14.6 of the terms and conditions of service handbook. This states that no account will be taken of Injuries, diseases or other health conditions sustained or contracted in the discharge of the employee's duties of employment, as defined in Section 22.

11. In this scenario Paul would be entitled to return to full sick pay entitlement and further payment of IA would only occur when sick pay reduced below 85 per cent.

12. If Peta were to return to work after eight months absence but subsequently had a recurrence of symptoms of the original injury resulting in a period of absence, then sick pay entitlement would be determined in light of 14.6 as above. As Peta has already had a period of long term absence prior to the injury at work this is likely to impact on her level of entitlement as this is calculated, by deducting from the employee's entitlement on the first day of sickness, the aggregate periods of paid sickness absence during the 12 months immediately preceding that day (section 14.6).

13. In this scenario Peta is likely to have a shorter period of full sick pay thereby triggering access to the remaining Injury Allowance of four months (12 minus the eight months allowance already accessed, which leaves a remaining four months maximum allowance).

14. As above, the employer will need to review the situation regularly and a decision on ongoing entitlement to the Injury Allowance will be made as part of their local absence management policies and procedures.