



Jurisdictional Policy Advice No. 2006/14

Safety, Rehabilitation and Compensation Act 1988

Application of section 48 of the SRC Act to damages awarded under state jurisdictions

Background

1. Section 48 of the *Safety, Rehabilitation and Compensation Act 1988* (“the SRC Act”) authorises the determining authority to recover compensation paid under the SRC Act where the claimant subsequently recovers damages for the same injury. In particular, subsection 48(3) requires the claimant to repay to the determining authority either the amount of compensation paid under the SRC Act or the amount of damages, whichever is the lesser.
2. It has been brought to Comcare’s attention that the application of subsection 48(3) may cause a disadvantage to claimants who recover damages in a State or Territory where such damages are restricted.
3. As an example, under motor accident legislation in Victoria, the first 18 months of incapacity are not awarded in any damages action. The application of section 48 requires the recovery of all incapacity payments made under section 19 of the SRC Act, despite their non inclusion in the damages award. In essence, this means that the claimant receives no income for that period.

Purpose of section 48

4. The Second Reading Speech advised that the intent of section 48 is to discourage common law actions. Further, section 48 also prevents ‘double dipping’ by claimants who have both a compensation claim and a damages action for the same injury.

Discussion

5. Consultation with determining authorities has revealed that there is a varying approach to the recovery of compensation paid under the SRC Act across the jurisdiction.
6. Some determining authorities recover all the weekly compensation paid for the entire period from the date of injury regardless of whether or not the damages award

includes payment for the same period.

7. Other determining authorities do not include the amount of weekly compensation paid under the SRC Act which was not taken into account in the damages award. In other words, if damages were not awarded for a particular period of incapacity, the determining authority does not recover from the award the weekly compensation paid for that period.
8. Section 48 of the SRC Act does not distinguish between the heads or type of damages received. Section 48 requires the recovery of the compensation paid where damages are awarded for the same injury. Accordingly, determining authorities should recover all compensation paid, regardless of the type of damages awarded, where damages are awarded for the same injury.
9. The only limiting factor to this recovery is where the amount of damages awarded is less than the compensation paid under the SRC Act, in which case only the amount of damages is to be recovered. That is, where a claimant takes an action for damages in relation to an injury for which compensation has been paid under the SRC Act, and recovers less than the amount of compensation paid, the claimant will not have to repay more than the amount of damages received.
10. As soon as a determining authority is made aware that a claimant is taking action to recover damages for an injury for which compensation has been paid under the SRC Act, that determining authority should make the claimant aware, as soon as possible, that the operation of section 48 will mean the recovery of any compensation paid to the claimant. Further, the claimant should be advised that this may include monies not included in a damages settlement. The claimant can then make an informed decision about whether it would be beneficial for them to seek damages.
11. It is Comcare's intention to promulgate this policy position to plaintiff lawyers so that they can advise their clients accordingly. Determining authorities may wish to do the same.

Policy Advice

12. Where:
 - the damages recovered by the claimant are limited by other legislation (regardless of whether the amount of damages awarded is greater than the compensation paid for the same condition); and
 - the effect of applying section 48 would be that the claimant would have to repay compensation payments in respect of a period for which damages payments are not awarded; then

the amount of compensation to be recovered under section 48 is **to include** any payment made in relation to a period for which damages are not awarded.

13. Determining authorities are to take the necessary steps to advise claimants at the earliest possible opportunity that the application of section 48 may result in the recovery of compensation not covered by a matching head of damages, should they elect to sue under common law.
14. This advice is to be applied from the date of the issue of this Jurisdictional Policy Advice.
15. Any issues relevant to this policy advice may be discussed with Alex Brown on (02) 6275 0308.

Steve Kibble
General Manager
Research and Policy Branch
19 December 2006