



NO PRESENT LIABILITY DETERMINATIONS

PURPOSE

To provide scheme guidance on determining of 'no present liability' where an employee no longer suffers the effects of their compensable condition under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

BACKGROUND

Court decisions have found that, where liability has been accepted under section 14 of the SRC Act for an injury, liability for compensation for that injury under section 14 cannot be ceased, unless it can be shown that liability for the injury should never have existed.

Where an employee no longer suffers the effects of their accepted compensable condition, a determining authority¹ can issue a determination of no present liability in relation to compensation types being claimed. A determining authority cannot:

- > bind itself to reject any future application for compensation under the SRC Act;²
- > issue determinations denying future compensation payments, or discontinuing compensation payments, when there is no existing or current claim for compensation before the decision maker;³ or
- > cease liability to pay compensation in respect of an injury under section 14 of the SRC Act (except as a result of a formal review process where it is found that liability should not have been accepted in the first place).

GUIDANCE

Once liability for injury has been determined in favour of the employee under section 14 of the SRC Act, any subsequent decision to deny or discontinue compensation payments must have regard to the following principles to be a valid 'no present liability' determination under the applicable section of the SRC Act. The no present liability determination should:

- > not suggest that liability for the compensable injury has ceased;
- > not suggest that future liability for the compensable injury cannot exist; and
- > speak only about present claims for compensation that are before the decision maker.

A 'no present liability determination' under the SRC Act does not exclude the possibility that the employee may claim and qualify for compensation payments in future.

¹ Determining authority, in relation to a determination, means the person who made the determination [subsection 60(1) of the SRC Act]. For the purposes of this guidance, the determining authority will be referred to as the 'decision maker'.

² *Australian Postal Corporation v Oudyn* [2003] FCA 318; 73 ALD 659.

³ *Lock and Comcare (Compensation)* [2018] AATA 2386 (23 July 2018).

When to determine no present liability

A decision maker may determine there is no present liability for compensation payments under the SRC Act where:

- > the employee no longer suffers from the effects of their compensable injury, for which liability was accepted under section 14; and
- > a specific claim for compensation (incapacity, medical treatment or another head of compensation) is no longer payable because the employee is no longer suffering from the effects of their compensable injury.

In the case of disease claims, a no present liability determination may also be made when the employment factors have ceased to significantly contribute to the employee's current condition.⁴ When considering if an employee's employment still significantly contributes to the current condition, decision makers should have regard to whether:

- > the original employment factors are still contributing to the injury to a significant degree
- > any non-employment factors or new issues are contributing to the condition more than the original employment factors
- > different employment issues are now contributing to the employee's condition.

The decision maker will need to establish the facts, consider the information and decide whether it is the original employment factor or some other factor(s) that now significantly contribute to the condition.

It is important to note:

- > if the date of injury is on or after 1 December 1988 but prior to 13 April 2007 – then consider whether the employment has ceased to contribute to a 'material' degree.⁵
- > if the date of injury is prior to 1 December 1988 – employment merely has to be 'a contributing factor' without any need to meet a material or significant degree test.⁶

Decision makers should not determine that there is no present liability for a compensation claim under the SRC Act if an employee is not currently claiming compensation for that cost or benefit. The decision maker needs to identify a claim (based on the submission of a claim form, medical certificate, invoice, receipt, etc.) before proceeding with a determination of no present liability. If such a claim has been made, then a decision maker should only consider the current compensation claim(s) before them and cannot extend the determination to capture heads of compensation that have not been claimed.

Aggravations

Where an employee has an accepted claim for an aggravation, they do not need to be symptom free in order for no present liability to be determined. Decision makers should compare the employee's current level of impairment/symptomatology with the levels that existed prior to their work-related aggravation. Once the employee returns to their former level of impairment/symptomatology, the employee may no longer be entitled to any further compensation and a determination of no present liability can be considered.

⁴ *Prain v Comcare* [2017] FCAFC 143; *Woodhouse v Comcare* [2021] FCAFC 95.

⁵ *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007* – This Act amended the SRC Act by replacing the material contribution test in the definition of "disease" with a test of contribution "to a significant degree" [ss 5B(1)].

⁶ *The Compensation (Commonwealth Government Employees) Act 1971*, [refer ss 29(1)] – prior to 1 December 1988, employment merely had to be a contributing factor to the contraction of the disease.

Liability cannot be ceased

Once an initial claim for compensation has been accepted, subsequent determinations cannot purport to cease all liability under section 14 of the SRC Act.⁷ If liability under section 14 should not have been accepted in the first place, then the determination to accept the claim should be reviewed in accordance with the reconsideration provisions of the SRC Act⁸ (refer to the Scheme Guidance – [Considerations in the reconsideration process](#)).

A determination of no present liability does not prevent the employee from making future claims under the SRC Act. Where the employee makes a further claim(s) for compensation that has already been subject of a no present liability determination, the decision maker may have regard to the evidence relied on earlier, as well as considering any new evidence in making a determination to accept or reject that claim.

When a claim is inactive

When a claim is inactive or 'closed', it does not necessarily mean there is no present liability. The decision maker should not determine that there is no present liability on an inactive claim when the employee has not claimed compensation for a cost or benefit under the SRC Act.

An inactive or closed claim does not prevent an employee from claiming compensation in relation to their compensable condition in the future.

If an employee lodges a claim for a compensation cost or payment against an inactive or closed claim, the decision maker can re-open the claim, undertake the usual assessments and issue a determination based on the available evidence.

What should the determination state?

The 'no present liability' determinations must speak only in the present tense and specify the section(s) of the SRC Act for which no present liability is being found. For example, "I determine no present liability for medical and incapacity compensation under section 16 and section 19 of the SRC Act." The no present liability determination cannot purport to prevent the employee from making future claims.

Wording such as 'not presently entitled' or 'not presently suffering from your compensable condition' would be suitable for no present liability determinations.

FURTHER INFORMATION

For further information, please contact Comcare's Scheme Policy and Design team on 1300 366 979 or email: SchemePolicyandDesign@comcare.gov.au.

⁷ *Carson and Telstra Corporation Limited* [2001] AATA 648; 33 AAR 351.

⁸ *Telstra Corporation Limited v Hannaford* [2006] FCAFC 06/87.