



Jurisdictional Policy Advice No. 2005/6
Safety, Rehabilitation and Compensation Act 1988

Determinations to cease benefits – impact of “Oudyn” and other recent decisions.

Introduction

This advice has been developed by Comcare in response to Federal Court and AAT decisions relating to determinations which “cease” compensation benefits.

Purpose of the advice

The purpose of the advice is to advise the jurisdiction about issues arising from these Federal Court and AAT decisions, and to provide model drafting instructions which:

- should be included in determinations and consent orders
- meet the requirements of pertinent sections of the *Safety, Rehabilitation and Compensation Act 1988* (the Act)
- clarify that the decision/s outlined in a determination or consent order relates only to the *present* liability of the compensable condition.

Background

Australian Postal Corporation vs Oudyn [2003] FCA 318 (Oudyn)

Mr Oudyn had an accepted claim for compensation for injury to his legs. The determining authority *ceased effects* on his claim based on medical evidence that said Mr Oudyn no longer suffered from the effects of the compensable injury. In the determination letter the delegate stated that Mr Oudyn “had no further entitlement to compensation under the terms of section 14(1) of the Act”. Mr Oudyn did not request a reconsideration of the cessation.

At a later date Mr Oudyn lodged a claim for permanent impairment for his leg injury. The determining authority treated the claim as a request for reconsideration. The delegate affirmed the decision to cease benefits and referred the claim for permanent impairment

back to the primary decision maker. The primary decision maker advised Mr Oudyn that she would not make a decision on his claim because there was “no further liability”.

In this case Cooper J held that the determining authority did not have the power to exonerate itself (by the wording of a determination) from future liability and to foreclose any future claims. In his opinion, the correct determination should have been that payment ceased because the circumstance entitling payment no longer existed, or could no longer be made out by the claimant. The determination would be under a particular section of the Act and not operate as a bar to future compensation.

Cooper J also found that a claim for further benefits (in this case a claim for permanent impairment) could not be treated as a request for reconsideration for a decision to *cease benefits* where the initial determination accepting liability was correctly and effectively attached.

Rosillo v Telstra Corporation Limited [2003] FCA 1628 (Rosillo)

In this case Madgwick J cited *Oudyn* with approval and found that the determining authority could not *cease* liability under section 14 of the Act and, by doing so, bind itself to reject any future application for compensation which related to a later period of incapacity. In short, if Mr Rosillo’s situation changed he would not be disentitled from making a claim under the relevant head of liability.

Mr Rosillo did not assert any particular entitlement to compensation in terms of money. Medical evidence suggested that there was a likelihood that treatment would be required (for his compensable condition) which would be associated with a period of lost income and possibly permanent impairment. The reason for his seeking a review of the decision to *cease* liability was to protect his rights to future claims.

Rowena Liu and Comcare [No N2002/1489 and No N 2003/102, 18 June 2004] (Liu)

In *Liu*, President Justice Garry Downes stated

“A positive determination under s14 is a determination of the existence of a compensable injury. The nature and amount of the compensation is to be determined under other provisions of the Act. Compensable injuries may not always result in the payment of compensation. They may give rise to intermittent entitlements to compensation. There may be periods when there is no present entitlement to compensation under any sections of the Act relating to the nature and amount of compensation. But during such periods an injury which has been determined to be a compensable injury under s14 will not cease to be a compensable injury.”

Being mindful of the issues raised by *Oudyn*, the AAT agreed that there may be cases in which terms of settlement might lawfully and properly contain a statement that “the applicant has ceased to suffer from the effects of a condition caused by an injury and accordingly there is no present liability to pay compensation”. The AAT observed that any suggestion of finality in the words (in this case of a settlement) appeared to be sufficiently tempered by reference to “present liability”. This approach by the AAT provides useful guidance in dealing with the issues arising from these cases.

Issues

These decisions have provided firm authority to the proposition that a determining authority cannot bind itself with respect to any future claim for compensation under the same or different sections of the Act. Nor does the law allow the practice of issuing *cease benefits* determination when there is no claim before the decision maker. As Cooper J said in *Oudyn*, a determination must operate in relation to a claim in existence at the time the determination is being made.

Where a claimant submits an additional claim for compensation for a particular benefit, for example there may be a new period of incapacity for a previously accepted claim, the additional claim must be considered on its merits and a new determination must be made under the relevant section of the Act. If the claimant does not provide supporting medical evidence, or the claims manager is not satisfied with the medical evidence, the claim may be denied.

The Federal Court’s view is that it is also invalid for a determining authority to revoke an earlier determination that it is liable to pay compensation in respect of an injury under section 14 of the Act (unless it finds that liability should never have been accepted in the first instance, for example where it is later discovered that an injury never in fact occurred or that the relevant person was not an employee) with the purpose of barring later claims for benefits.

Where the AAT is asked to finalise an agreement between parties under section 42C of the AAT Act, care again should be taken to ensure that the agreement does not contain clauses which seek to limit any future application for compensation relating to a previously accepted injury. Any such clause should be deleted or amended so that it is not contrary to the propositions outlined in *Oudyn* and *Rosillo*.

The challenge is to draft relevant decisions in such a way that denying/suspending/ceasing benefits at any particular point in time does not exclude the possibility that the employee may once again qualify for benefits at some future time, and ensures that decisions, including settlement decisions issued under S42C of the AAT Act, are consistent with these cases.

In these matters *Liu* provides clarification. President Justice Garry Downes suggested that a valid determination should meet certain criteria:

- should not suggest that liability has ceased
- should not suggest that no future liability can exist
- should speak only to present liability.

The key to drafting determinations and consent orders is to use the word “presently” to make it clear that the decision or order relates to current circumstances.

Many forms of determination are possible and some suggested forms (using sections 16 and 19) are attached.

Further information

Any issues relevant to this advice may be discussed with Comcare’s Compensation and Injury Management Policy Group, telephone 6275 0663.

Compensation and Injury Management Policy Group
9 June 2005

In the second example the claimant could be advised:

“Recent medical evidence suggests there is no present liability to pay benefits under section 16 and, subject to any further information you wish to provide, I propose to make a determination to cease the payment of benefits under section 16 in the following terms.....”

Consent orders will usually take the form of the second example as, at settlement, concessions are usually made that some benefits are to be paid for a closed period. In these cases, it may be necessary to stipulate that the payment of benefits for the closed period is subject to the production of accounts/receipts or medical certificates.

The approaches outlined should not lead to materially different outcomes to those achieved under recent practices.